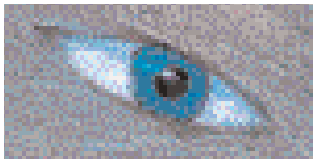
Gazette LawSociety

Regulars

COVER: roslyn@indigo.ie
Some of Roslyn's work is on exhibition at South Dublin County Offices, Tallaght, from 26 August to 6 September 2002

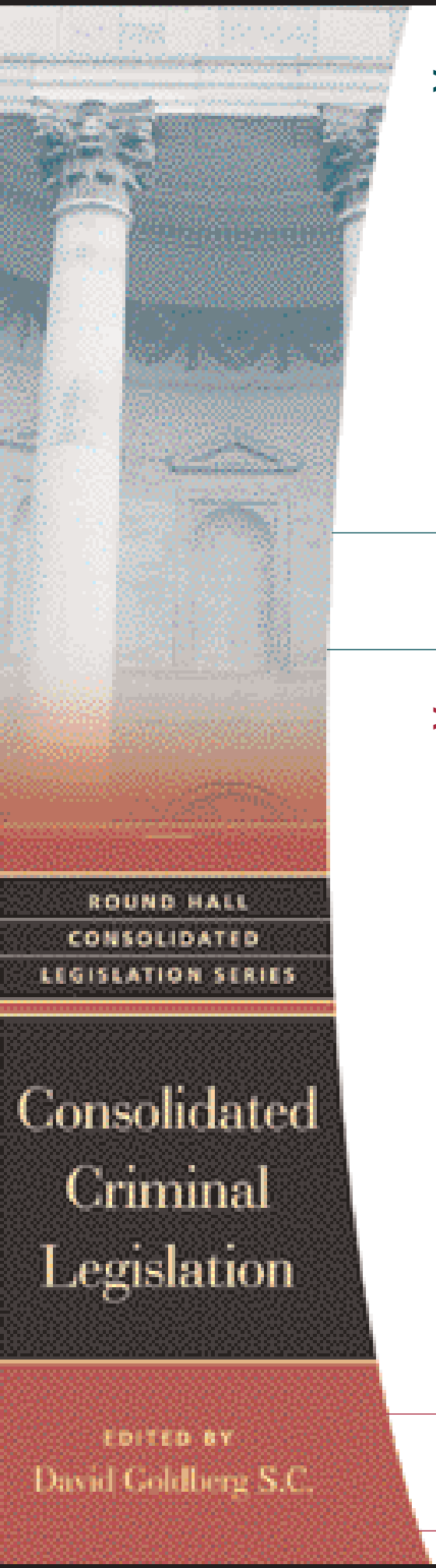
Cover Story



Editor: Conal O'Boyle MA. **Assistant editor:** Garrett O'Boyle. **Designer:** Nuala Redmond. **Editorial secretaries:** Catherine Kearney, Nicola Crampton. **Advertising:** Seán Ó hOisín, 10 Arran Road, Dublin 9, tel: 837 5018, fax: 884 4626, mobile: 086 8117116, e-mail: seanos@iol.ie. **Printing:** Turners Printing Company Ltd, Longford. **Editorial Board:** Pat Igoe (Chairman), Conal O'Boyle (Secretary), Eamonn Hall, Mary Keane, Ken Murphy, Michael V O'Mahony, Michael Peart, Keith Walsh

Published at Blackhall Place, Dublin 7, tel: 01 672 4800, fax: 01 672 4877.
E-mail: c.oboyle@lawsociety.ie Law Society website: www.lawsociety.ie

Volume 96, number 6
Subscriptions: €57.15



> CONSOLIDATED SUPERIOR COURT RULES

In recent years there appears to be an increasing emphasis on procedural issues in Ireland's Superior Courts. And with so many amendments made during this time it is often time consuming and laborious to establish the Rules as they currently stand.

Consolidated Superior Court Rules is the only reference source that brings together all rules and amendments in a single volume.

Consolidated Superior Court Rules
- Is unique - it is the only reference source that brings together the original rules with all amendments, current to 2002
- Includes hundreds of amendments made by the Rules of the Superior Courts (No 4) (Euro Changeover), 2001
- Is up to date - in looseleaf format, updates will consolidate any new amendment into the Rules

Format	Price
Looseleaf and CD-Rom	b265 + VAT @ 21%
Looseleaf Only	b165
CD-Rom Only	b165 + VAT @ 21%

> CONSOLIDATED CRIMINAL LEGISLATION

Consolidated Criminal Legislation contains the criminal law statutes which are used on a daily basis before the criminal court. It allows all practitioners to have instant access to Acts amended, ensuring that they have the most up-to-date legislation available. Consolidation will enable the legislation to be read as intended by the Oireachtas.

Consolidated Criminal Legislation is essential reading for:
- Barristers
- Solicitors
- Judges
- Gardaí
- All those involved in prosecution and defence

In traditional looseleaf format and to facilitate ease of reference, *Consolidated Criminal Legislation* includes the following sections:
- Sexual Offences
- Offences Against the Person
- Drugs and Customs
- Offences Against the State
- Firearms Offences
- Procedure/Administration
- Evidence
- Juries & Verdicts
- Criminal Assets
- Offences + Punishment Tables

Format	Price
Looseleaf and CD Rom	b385 + VAT @ 21%
Looseleaf Only	b285
CD Rom Only	b285 + VAT @ 21%

Call Pauline Ward now on 01-6024812 to order your copy of *Consolidated Superior Court Rules* and *Consolidated Criminal Legislation*.

Pride and prejudice

This is indeed an historic year. As we celebrate the 150th anniversary of the granting of the Law Society's charter, we have now been given another reason to celebrate. The appointment of The Hon Mr Justice Michael Peart as the first solicitor to sit on the High Court bench is truly a momentous occasion and should rightly be a source of immense pride for our profession.

As you will know, the Law Society fought long and hard for 'parity of esteem' with our colleagues at the bar in the matter of judicial appointments to the superior courts, arguing that judges should be drawn from the widest pool of available legal talent. That argument was won with the passing of the *Courts and Court Officers Act, 2002*, and the appointment of the Hon Mr Justice Michael Peart is the first of many we hope to see in years to come.

A fine representative of the profession

He is an outstanding solicitor and has been an outstanding colleague on the Law Society Council. He was full of wisdom and common sense at Council meetings and a Trojan worker on our committees, particularly the Education Committee, where his vision helped to ensure that we have a world-class legal education system. I'm sure I speak for the entire profession when I say that we could imagine no finer representative on the High Court bench and that we wish him all the best in his new position.

We also, of course, warmly welcome the appointments of The Hon Mr Justice Eamon de Valera, The Hon Mrs Justice Mary Finlay and The Hon Mr Justice Barry White.

Yes, as a profession, we have many things of which we can be proud. Yet we would be foolish to turn a blind eye to the criticisms that are sometimes directed against us, because there can often be a grain of truth in them – no matter how unpalatable that might seem. We have enough detractors without giving them even more grounds for prejudice through the ill-conceived actions and indefensible behaviour of a tiny minority in the profession.

We have worked hard to overcome the prejudice that sprang from the introduction of solicitor advertising and gave rise to cheap remarks about 'ambulance-chasing' solicitors. And although the *Solicitors (Amendment) Act* has tried to shut that door, the damage to our reputation is a matter of on-going concern.

There is still another issue that is serving to tarnish the good name of our profession, and that is the practice, by a very small number of solicitors, of deducting a flat-rate 'solicitor-and-client' fee from settlement awards by the courts, or settlements negotiated on their behalf. Elsewhere in the *Gazette*, James Flynn, a taxing master of the High Court, describes it as 'outrageous'. It should go without saying that this is grossly unacceptable, unless it can be shown what the charge was for, is justified, and was authorised by the client in advance. It should go without saying, but unfortunately it can't.

That is why the chairman of the Disciplinary Tribunal, Tom Shaw, felt that he had to issue an unprecedented statement on the subject at a recent tribunal hearing. You can read the text of that statement on page 4, but suffice it to say that the tribunal and the Law Society take a very serious view of this invidious practice.

The society's regulatory committees have also issued a practice note on this subject (see page 46), in which they state that they are referring solicitors to the Disciplinary Tribunal for breaches of section 68, particularly section 68(2) (percentage charging in litigation cases) and the disclosure requirements of section 68(6). If you don't know what these sections refer to, then I strongly urge you to go back and read them.

Privilege of self-regulation

It would be a tremendous shame if the great and admirable work done by the solicitors' profession was to be tarnished in any way by the maverick behaviour of a very few. And the consequences for the profession as a whole could be enormously damaging. We are granted the privilege of self-regulation on trust, but that trust can disappear – and so too can that privilege. Like Caesar's wife, we must be above suspicion.

We have enough reasons to take pride in our profession; let's not give our critics grounds for fostering their prejudices.

Elma Lynch,
President.

'We are granted the privilege of self-regulation on trust, but that trust can disappear – and so too can that privilege'

Disciplinary Tribunal lays down the law

In an unprecedented move, the chairman of the Disciplinary Tribunal, solicitor Tom Shaw, at a recent tribunal hearing made the following statement about solicitors who deduct percentage payments from their clients, even though their fees have already been paid by the insurance company.

The chairman's statement reads in full:

'The tribunal is concerned that it should go out from here that if there is any practice in relation to settlements in road traffic accidents as between

solicitors and their clients relating to fees, in so far as the tribunal is concerned they wish it to be stated very clearly that the provisions of section 68 of the *Solicitors (Amendment) Act, 1994* is the law which is applicable to this area of practice. As far as this tribunal is concerned, that is the law that will be applied and no other practice will in any sense be deemed to take over that law'. *[Mr Shaw then read into the record the provisions of section 68:* ***see panel below****.]*

'The tribunal wishes it to be known that a solicitor who has been paid in full by the insurance company for the work done is not entitled to any extra fee from his client for that same work.

'We feel that it is very important for the future of the profession and the future of the clients of the profession that everybody knows what the law is and the fullest possible promulgation to the terms of section 68 should be made available to the profession, as has happened, but also to the general public'.

Section 68 of the *Solicitors (Amendment) Act, 1994*

'The provisions of 68 are as follows:

"On the taking of instructions to provide legal services to a client or as soon as practicable thereafter, the solicitor will provide the client with particulars in writing of (a) the actual charges or (b) where the provision of particulars of the actual charges is not in the circumstances possible or practicable, an estimate as near as may be of the charges or (c) where the provision of particulars of actual charges or an estimate of such charges is not in the circumstances possible or practical, the basis on which the charges are to be made by that solicitor or his firm for the provision of such legal services, and, where those legal services involve a contentious business, with particulars in writing of the circumstances in which the client may be required to pay costs to any other party or parties and the circumstances of any in which the client's liability to meet the charges which will be made by the solicitor of that client for those services will not be fully discharged by the amount if any of the costs recovered in the contentious business from any other party or parties or any insurers of such party or parties.

"A solicitor shall not act for a client in connection with any contentious business not being in connection with proceedings seeking only to recover a debt or liquidated demand on the basis that all or any part of the charges to the client are to be calculated as a specified percentage or proportion of any damages or other monies which may be or may become payable to the client. Any charges made in contravention of that sub-section will be unenforceable in any action taken against that client to recover such charges.

"(3) A solicitor shall not deduct or appropriate any amount in respect of all or any part of his charges for the amount of any damages or other monies that become payable to a client of that solicitor arising out of any contentious business carried out on behalf of that client by that solicitor.

"Sub-section 3 of this section shall not operate to prevent a solicitor from agreeing with a client at any time that an amount or an account of charges will be paid to him out of any damages or other monies which may be or may become payable to that client arising out of any contentious business carried out on behalf of that client by that solicitor or firm.

"Any agreement under sub-section 4 of this section will not be enforceable against a client of a solicitor unless such an agreement is in writing and includes an estimate as near as may be of what the solicitor reasonably believes may be recoverable from any such party or parties or any insurers of such party or parties in respect of that solicitor's charges in the event of that client recovering any damages or other monies arising out of such contentious business, notwithstanding any other legal provision of that effect, a solicitor shall show on a bill of costs to be furnished to the client as soon as practicable after the conclusion of any contentious business carried out by him on behalf of that client a summary of the legal services provided to the client in connection with such contentious business.

"(b) The total number of damages or other monies recovered by the client arising out of such contentious business and (c) details of all or any part of the charges which have been recovered by that solicitor on behalf of that client from any other party or parties or any insurers of such party or parties. That bill of costs shall show separately the amounts in respect of fees outlay, disbursements and expenses incurred or arising in connection with the provision of such legal services.

"Nothing in this section shall prevent any person from exercising any existing right in law to require a solicitor to submit a bill for taxation whether on a party-and-party basis or on a solicitor-and-own-client basis or to limit the rights of any person or the society under section (9) of this act.

"Where a solicitor has issued a bill of costs to a client in respect of the provision of legal services and the client disputes the amounts or any part thereof of that bill of costs, the solicitor shall (a) take all appropriate steps to resolve the matter by agreement with the client and (b) inform the client in writing of (1) the client's right to require the solicitor to submit the bill of costs or any part thereof to a taxing matter of the High Court for taxation on a solicitor-and-own-client basis. Sub-section 2, a client's right to make a complaint to the society under section 9 of this act that he has been issued with the bill of costs which he claims to be excessive. In this section, charges include fees, outlays, disbursements and expenses. The provisions of this section shall apply notwithstanding the provisions of the *Attorney and Solicitors Act 1849* and the *Attorney and Solicitors Act 1870*.'

Radical overhaul of charity law needed, says society

The traditional legal definition of charity should be rewritten to reflect the changes in society, a system of registration and reporting should be put in place to ensure accountability, and charities and fundraising should be regulated by a properly resourced Charities Office. In return, the Charities Office should provide support and services to the charity sector.

These are among the main recommendations of a new report from the Law Society's Law Reform Committee, which also calls for a complete overhaul of the law of charities. The report, *Charity law: the case for reform*, was launched at a press conference in Blackhall Place last month.

At the moment, charitable status is based on principles developed in the 19th century. The report argues for a fresh perspective to more closely reflect people's expectations of what should be included in the term 'charity' today and suggests that notions such as 'relief of poverty' should be replaced by concepts of social deprivation, social inclusion and community welfare.

Oonagh Breen, one of the authors of the report, interviewed at last month's press conference

As well as proposing new statutory guidelines, the report suggests that a new regulatory body known as the Charities Office should be established to decide on charitable status. This would replace the present position, where virtually no development of the law takes place because charities can rarely afford to go to court to challenge Revenue Commissioner decisions. The integrity of charitable status would be protected by ensuring that it is granted fairly, consistently and transparently.

The report proposes that all charities (other than the very smallest) should be required to register with the proposed Charities Office and to make annual returns including accounts. It also recommends tightening up controls on charity fundraising and says that the new Charities Office, rather than garda superintendents, as is the case now, should issue fundraising permits.

In relation to regulation, the report recommends that the Charities Office would have effective investigative powers to deal with suspected malpractice or fraud and to protect charity property. And it suggests that a new legal structure specifically designed for charities would help the sector, which at present has to use informal associations, trusts or companies limited by guarantee to conduct their business. None of these meets all the requirements of charities, and the burden of administration could be significantly reduced by introducing a CIO (charitable incorporated organisation) structure currently under discussion in the UK.

The report also makes recommendations about the duty of care of trustees. In relation to investment of charitable funds, the report says that lay trustees should be protected from personal liability for unfortunate investment decisions made in good faith.

Solicitor help panel a success

Results of a recent questionnaire reveal that the first year of the panel scheme to help solicitors in difficulty with the Law Society has been a success (see *Gazette*, March 2001, page 5). Approximately 50 solicitors contacted panel members in relation to a regulatory matter. Typically, they would just have been informed by the Law Society of a complaint against them or would have been asked to account to the Law Society in respect of some matter relating to their practice.

All panel members confirmed that they were happy to continue with their involvement for another year, and most indicated that they could cope with more contacts. Panel members have attended seminars to familiarise themselves with the workings of the regulatory committees of the Law Society and with the Disciplinary Tribunal.

Information in relation to the panel is available from Therese Clarke at the Law Society, tel: 01 868 1220 or e-mail t.clarke@lawsociety.ie.

LRC LOOKS FOR SUBMISSIONS

The Law Reform Commission is inviting conveyancing practitioners to make submissions about the problems encountered in relation to multi-unit developments, both residential and commercial. The LRC is considering proposing legislation to provide a mechanism to deal with problems that can arise in multi-unit developments, particularly in the areas of 'administrative breakdown' and 'conveyancing defects'. Submissions should be received by 31 August.

COMPENSATION FUND PAYOUTS

The following claim amounts were admitted by the Compensation Fund Committee and approved for payment by the Law Society Council at its meeting in July 2002: Michael P McMahon, 5/6 Upper O'Connell Street, Dublin 1 – €12,139.96; Dermot Kavanagh, 2 Mary Street, New Ross, Co Wexford – €4,444.08.

SOUTHERN COMFORT

Dublin solicitor Michael Twomey was recently invited to appear before the Northern Ireland Assembly's enterprise, trade and investment committee to give evidence on a proposal to introduce limited liability partnership status in Northern Ireland. Twomey is a member of the Law Society's Business Law Committee and author of a book on partnership law.

YOUNG LAWYERS' CONFERENCE

The International Association of Young Lawyers (AIJA) will be holding its annual conference from 26-31 August in Lisbon, Portugal. Further information about the conference can be found on the AIJA website at *www.aija.org*.

Data protection pressure growing

The legal profession is likely to find itself under increasing pressure to register with the data protection commissioner, following comments contained in his annual report 2001. The commissioner, Joe Meade, said that he found it 'difficult to understand' why registration levels in the profession were so low.

'I think it is to be expected, in the modern legal environment, that many legal professionals will have extensive day-to-day involvement with matters of a sensitive nature relating to the health, criminal convictions and ethnic background of their clients; and, indeed, that such matters will be recorded and processed on computer to some degree', said Meade.

He said that he had raised the matter with the Law Society and the Bar Council and indicated that he would be 'taking more proactive steps in the year ahead to ensure that legal professionals are complying with their legal obligations'.

For its part, the Law Society has long been of the view that solicitors were exempted from registration under the *Data Protection Act, 1988*, a view eventually accepted by the previous data protection commissioner. However, the society now says that with changes in technology over the last decade and with the new expanded definitions included in the *Data Protection (Amendment) Bill, 2001* (see also *One to watch*, page 8), solicitors will probably be obliged to register.

Elma Lynch: the right to confidentiality is a fundamental principle

According to Law Society President Elma Lynch: 'The basic purpose of the data protection legislation is to protect the individual and his or her privacy. It is beyond question that the solicitors' profession regards the right to confidentiality as a fundamental principle. It has done so for centuries – and to a far greater extent than is required by the *Data Protection Act* of 1988. Nothing in the commissioner's comments suggests that he believes that lawyers are violating individuals' rights by unfair processing or disclosure of information'.

And she added: 'In any event, the entire debate will shortly be resolved by the *Data Protection (Amendment) Bill, 2001*, which removes any ambiguity by virtue of a broader definition of the term "processing" and by the introduction of additional requirements. It is difficult to conceive of a situation where a solicitor will not be obliged to register under the terms of the bill. Mr Meade is aware of this and will undoubtedly be greatly cheered by the rush of applications from solicitors that will follow its enactment'.

• The data protection commissioner has issued a warning to companies receiving mailings from a UK company calling itself the Data Protection Act Registration Service. The mailings urge companies to visit a bogus website and to register under the *Data Protection Act*. The bogus website, which is similar to the commissioner's official website address, provides inaccurate and unreliable information about registration requirements and charges exorbitant fees. The commissioner has referred the activities of the UK firm to the Garda Bureau of Fraud Investigation.

POSTCARD FROM THE PAST

At its meeting held on Wednesday 7 October 1896, on the motion of Mr Findlater, seconded by Mr Reeves, the Council resolved to send the following address to Her Majesty The Queen:

'To Her Most Gracious Majesty Victoria of the United Kingdom of Great Britain and Ireland, and of the Colonies and Dependencies thereof in Europe, Asia, Africa and Australia, Queen Defender of the Faith,

May it please Your Majesty,

We, the President and Council of the Incorporated Law Society of Ireland, desire to offer to Your Majesty our loyal and sincere congratulations upon the enjoyment by Your Majesty of a longer and more prosperous reign than any of your Royal predecessors.

We desire respectfully to express our unswerving devotion and attachment to your Majesty and to that Throne which you have so gracefully adorned.

Signed
Wm Fry (jnr), President
WG Wakely, Secretary'

Extracted from the *Minute Book of The Incorporated Law Society of Ireland* – 1895-1900

Central Office gets a makeover

During the long vacation, work will begin on refurbishing the Central Office and the offices of the High Court registrars. For the duration of the work, the entire west wing of the four Courts, including the Judges' Yard, will be closed to court staff and members of the public. The public counters of the Central Office will operate temporarily from court 6 on the ground floor. The List Room and the public search terminals will be moved to the antechamber of court 6, with access via the Morgan Place entrance. The High Court registrars will be moved to Áras Uí Dhálaigh. The Central Office should reopen in the Michaelmas term.

Northern exposure

The increasing complexity of the challenges facing national law societies and bar associations in Europe was the theme of the keynote address at the annual meeting of the Swedish Bar Association, which was given by director general Ken Murphy recently.

It was the first time that the honour of being guest speaker at this event, held this year in Lund in southern Sweden, had been given to a speaker from outside Scandinavia. The Swedes were interested in the Irish experience and Murphy's perspective on the regulation, education and representation of the legal profession. Last year Murphy was elected chairman of ESSEBA (English Speaking Secretaries of European Bar Associations), an organisation which has existed for more than 40 years and which comprises the chief executives of some 15 national law societies and bar associations in Europe.

Establishment of PIAB now 'inevitable'

The establishment of a Personal Injuries Assessment Board was a manifesto promise of all major parties in the recent general election and, as expected, features in the programme for government published as the new government took office.

Tánaiste Mary Harney has now taken direct political control of this issue in the context of a government response to the enormous public and media pressure in relation to escalating insurance premiums. It is expected that the government will unveil its blueprint for the operation of the PIAB in September, with the necessary draft legislation following swiftly thereafter. It is also expected that the PIAB will apply initially to employers' liability claims before being extended to motor and public liability cases.

Although there has been no consultation with the legal profession at any stage in the several years in which ideas for reform of the personal injury compensation system in Ireland have been under review, the society has sought to make its concerns known to the tánaiste. First, that the PIAB should be fair in its composition and method of operation and, second, that it should not simply represent an additional layer of cost and delay in the system.

'The society now accepts that the establishment of PIAB is inevitable, given the government's need to appear responsive to public anger about the level of insurance premiums', said director general Ken Murphy. 'However, the government should not proceed with PIAB unless it receives an unambiguous guarantee from the insurance industry that this will lead to a significant reduction in premiums. We have doubts that any reduction in the so-called "delivery cost" of the system will result but, if it does, it should not be used simply to boost the profits of insurance companies'.

Ken Murphy: unambiguous guarantee needed on reduction in premiums

Although the society's information in relation to PIAB is limited, it has been sharing this with the profession through detailed briefings at two meetings of the presidents and secretaries of all bar associations and also at a recent very well-attended meeting of the Dublin Solicitors' Bar Association.

Your views on advertising regulations needed

The Law Society is required to make new regulations in relation to solicitor advertising in accordance with the provisions of the *Solicitors (Amendment) Act, 2002*, which became law last April. A working group chaired by the chairman of the Registrar's Committee, James McCourt, has produced a draft of these regulations and is anxious to receive the views of practitioners on them as soon as possible.

The draft regulations have been sent to all bar associations, and McCourt briefed the presidents and secretaries of the bar associations on them at a meeting in Blackhall Place last month. The draft regulations are available in the members' area of the society's website, or a hard copy may be obtained by writing to Linda Kirwan at the Law Society.

All submissions must be received at the society by 16 September 2002, at the latest. This is to allow all comments and proposed amendments to be fully considered by the working group so that a final draft can go before the Council for adoption at its meeting on 4 October 2002. This is necessary as the minister for justice, equality and law reform, who must concur in the making of the regulations, requires that his commencement order for the relevant sections of the act takes effect on 1 November 2002.

ONE TO WATCH: NEW LEGISLATION

***Data Protection (Amendment) Bill, 2002*: a summary**

The *Data Protection (Amendment) Bill, 2002,* when enacted, will amend the existing *Data Protection Act, 1988* in a number of significant ways. The main changes can be grouped into five categories: new definitions, new rights for data subjects, new responsibilities for data controllers, new rules governing the registration process, and new powers and functions for the data protection commissioner.

These new rules are in addition to the provisions of the *European Communities (Data Protection) Regulations 2001*, introduced by the minister for justice, equality and law reform in December 2001, which took effect from 1 April 2002. Detailed guidance to these regulations has already been published.

1) New definitions

Data now includes both 'automated data' and 'manual data'. (However, the application of certain parts of the act to *existing* manual data is deferred until October 2007.)

Automated data means, broadly speaking, any information on computer, or information recorded with the intention of putting it on computer. *Manual data* means information kept as part of a 'relevant filing system', or kept with the intention that it should form part of such a system. A *relevant filing system* means any set of information that, while not computerised, is structured by reference to individuals, or by reference to criteria relating to individuals, so that particular information relating to a particular individual is readily accessible.

Personal data means data relating to a living individual who is or can be identified either from the data or from the data in conjunction with other information that is in, or is likely to come into, the possession of the data controller.

Blocking, in relation to data, means marking the data to prevent it from being processed for a particular purpose or purposes. *Processing* is re-defined in a much broader way. It now means performing any operation or set of operations on information or data, whether or not by automatic means, and includes:

a) Obtaining, recording or keeping the information
b) Collecting, recording, organising, storing, altering or adapting the information or data
c) Retrieving, consulting or using the information or data
d) Disclosing the information or data by transmitting, disseminating or otherwise making it available, or
e) Aligning, combining, blocking, erasing or destroying the information or data.

Sensitive personal data is now specifically defined, and means personal data relating to:

a) The racial or ethnic origin, the political opinions or the religious or philosophical beliefs of the data subject
b) Whether the data subject is a member of a trade union
c) The physical or mental health or condition or sexual life of the data subject
d) The commission or alleged commission of any offence by the data subject, or
e) Any proceedings for an offence committed or alleged to have been committed by the data subject, the disposal of such proceedings or the sentence of any court in such proceedings.

2) New rights for individuals

***Right to be informed*.** Organisations that obtain your personal information must inform you of (i) their identity, (ii) their purpose for keeping your data, and (iii) any other information which they ought to provide so that their handling of your data is 'fair' – for example, the identity of anyone to whom they will disclose your personal data and whether or not you are legally obliged to answer any of their questions. Organisations that have obtained your personal data from someone else (in other words, not from you) must, in addition, contact you to inform you of the types of data they hold, and its source.

***Improved right of access*.** An individual continues to have the right to get a copy of all personal data relating to him or her by making a written 'access request'. The right of access now extends to both 'manual data' and 'automated data'. In addition, a data controller must now also describe:

i) The types of personal data which it processes
ii) The purposes of processing
iii) The persons (or categories of person) to whom the data will be disclosed
iv) The source of the data, and
v) The logic involved in processing data (in cases where the data are used for automated decision-making), to the extent that providing this information does not infringe trade secrets or intellectual property.

In addition, where personal data consists of an opinion about an individual, these data may now be provided in response to an access request, without having to seek permission from the person who expressed the opinion. (An exception is made in the case of data kept by prisons, places of detention and so on about detained persons.)

***Employment rights*.** No-one can force you to make an access request, or reveal the results of an access request, as a condition of recruitment, employment or provision of a service.

***Right to object*.** As an individual, you may request a data controller to stop using your personal data, or not to start using the data, if you feel that the use of your data involves substantial and unwarranted damage or distress to you. This 'right to object' only applies in cases where the data controller needs to process the data for the exercise of official authority, for the public interest, or for its 'legitimate interests'. The right does not apply if you have already given your clear consent to the use of your data, if the use is necessary for a contractual obligation to which you have agreed, if the use is for electoral purposes by election candidates or political parties, or if the use is required by law. The data controller must write back to you within 20 days confirming compliance with your request, or stating its reasons for non-compliance. If you are unhappy with the data controller's response, you can complain to the data protection commissioner, who can use his enforcement powers if necessary.

***Right to block certain uses of data*.** The existing right to correct or erase data is expanded so that you may now request an organisation to 'block' your data, that is, prevent it from being used for certain purposes.

***Freedom from automated decision-making*.** Important decisions about you – such as rating your work performance, your creditworthiness, or your reliability – may not be made solely by automatic means (such as by computer), unless you consent to this. Generally speaking, there has to be a human input into such decisions.

3) New responsibilities

Some of the existing responsibilities of organisations in handling personal data are clarified or made firmer in the new law, there are some new responsibilities, and there are special exemptions for journalistic, artistic and literary processing.

***Application to manual records*.** As outlined above, the act will now apply to manual data as well as automated data. However, the full application of the act to *existing* manual data – manual data held in filing systems at the date of passing of the act – will be delayed until 24 October 2007. This delay only affects certain provisions of the *Data Protection Act*, namely:

- Section 2 of the act, as amended, which deals with the basic data protection principles
- Section 2A of the act, which lays down additional conditions for 'legitimate processing' of personal data, and
- Section 2B of the act, which lays down further conditions for the processing of sensitive data.

Other provisions of the *Data Protection Act*, including the right of access and the right to have personal data corrected or deleted

NEW DATA PROTECTION BILL

as appropriate, will apply to manual data from the outset.

Relevant filing system. The *Data Protection Act* will not apply to all manual files – only to files which come within the definition of 'manual data'. This definition covers files which are part of a 'relevant filing system', that is, a structured, organised system which enables a data controller to locate specific types of information about particular individuals.

Fair obtaining and fair processing. There is clarification of the existing requirement to obtain and process personal data 'fairly'. Data shall not be treated as fairly processed unless a data controller provides individuals with full information about (i) the data controller's identity, (ii) the purpose or purposes for processing the personal data, (iii) any other information that is appropriate to the specific circumstances and that is required in the interests of fairness, such as information about disclosures to other persons and the individual's right to access their data.

Obtaining personal data indirectly. Where a data controller has obtained the personal data indirectly – in other words, not from the individual himself or herself – then it must provide the above information, and also inform the individuals of what types of personal data it processes and the original source of these data. There are limited exceptions to this requirement, for example, to facilitate statistical and research work.

Processing of publicly-available information. When an organisation is required by law to make a database – such as the electoral register – available to the public, such a database has, up to now, been exempt from data protection rules. The bill restricts the exemption, so that if such a database is used for a purpose other than the purpose for which it was intended, the data protection rules apply as normal.

Legitimate processing. It is now a condition of handling personal data that a data controller comply with at least one of the following conditions. These conditions apply **in addition to** the existing 'data protection rules', although responsible data controllers should already be able to rely upon one or other of these conditions:

- *Explicit consent* of the data subject is obtained (if the data subject is under 18 years or is mentally or physically incapacitated, the explicit consent of a parent, guardian or close relative will be required)
- Processing is *legally necessary* (that is, necessary to comply with a legal obligation)
- Processing is *contractually necessary* (that is, necessary for performance of a contract to which the data subject is a party, or to take steps at the request of the data subject prior to entering into a contract)
- Processing is *necessary to protect vital interests* of the individual (including preventing injury or damage to his/her health and preventing serious loss or damage to his/her property), in cases where it is not possible to obtain consent in advance
- Processing is *necessary for a public purpose,* namely: for the administration of justice, for the performance of a statutory function, for the performance of a function of the government or of a government minister, and for the performance of a function of a public nature carried out in the public interest
- Processing is *necessary for a private purpose* – in other words, for the legitimate interests of a data controller or third party, except where the processing is unwarranted having regard to the fundamental rights of the data subject. The minister for justice, equality and law reform can regulate what is and isn't covered by this provision.

Processing sensitive data. The bill provides that, in the case of sensitive personal data, one of a number of *extra conditions* must be met before the data can be processed, in addition to all of the conditions set out above. This is to ensure that sensitive data are properly protected. Some of the extra conditions are as follows:

- The individual has given *explicit consent*
- The processing is necessary for a right or obligation under *employment law* – this may be subject to further ministerial regulations
- The processing is carried out by *a non-profit organisation* – political, religious or trade union – for its own internal purposes involving its members, or involving other individuals with whom the organisation has regular contact
- The processing is necessary for *medical purposes* carried out by a doctor or other health professional
- The processing is carried out by political parties or candidates for canvassing and related *electoral purposes*
- The processing is authorised by regulations made by the minister for justice, equality and law reform for reasons of *'substantial public interest'.*

Journalistic, artistic and literary privilege. The bill includes special exemptions for processing of personal data for journalistic, artistic or literary purposes. The exemptions are designed to balance the public interest in freedom of expression with data protection rights.

4) New registration rules

Up to now, Ireland has had a selective system of registration – data controllers have not been required to register unless specifically covered under section 16 of the *Data Protection Act, 1988*. The bill will reverse matters – *every data controller* will be required to register, *unless exempted* from this requirement under regulations made by the data protection commissioner.

In practice, the commissioner will draft regulations which will attempt to exclude as many 'low risk' data controllers as possible – such as small corner shops, small businesses that keep only payroll data about their staff – while ensuring that all significant data controllers remain subject to the new registration requirement.

Another change is that data controllers who hold personal data for two or more *unrelated purposes* will have to make separate applications for registration for each such purpose.

Up to now, data controllers have had the option of listing many purposes on a single registration application.

5) New powers and functions

Privacy audits. The data protection commissioner's powers to enforce the *Data Protection Act* are strengthened and clarified. In particular, the commissioner now has the power to carry out investigations as he sees fit, in order to ensure compliance with the act and to identify possible breaches.

The commissioner has indicated that he intends to use this power to conduct 'privacy audits' upon data controllers at random and on a targeted, sectoral basis.

Prior checking. The data protection commissioner must consider each application for registration to see whether especially risky or dangerous types of processing (as prescribed in regulations) are involved. If so, the commissioner must establish whether the processing is likely to comply with the act. Any negative findings by the commissioner may be appealed to court. Data controllers can also request that such 'prior checking' be carried out by the data protection commissioner.

Codes of good practice. The data protection commissioner will have a new power to prepare and publish 'codes of practice' for guidance in applying data protection law to particular areas. This supplements the commissioner's existing power to approve codes of practice drawn up by trade associations. Both types of code – whether drawn up by the commissioner or by trade associations – may be put before the Oireachtas to have statutory effect. G

This information was reproduced from the data protection commissioner's website at www.dataprivacy.ie.

Selling the family silver is not

The Law Society of England and Wales is proposing to amend its rules to allow solicitors employed in commercial organisations to act for clients of their employer. The presidents of the law societies of Ireland, Northern Ireland and Scotland discuss the controversial proposals

Over recent months, we have followed with interest the debate on the future regulation of legal services provision by solicitors in England and Wales, the main focus of which has been the prospect of such services being provided to third parties on a commercial basis by supermarkets and others. We have done so with rising concern and astonishment, because what seems to be for sale is the independence of the solicitors' profession – together with the fundamental rights of every citizen that this independence protects.

What is at stake are the core values that define the identity of lawyers in independent practice (that is, guaranteed independence, avoidance of conflicts of interest, and client confidentiality). Failure to understand and protect these values will result in irreversible damage to the interests of consumers of solicitors' services and the public interest.

We take it as given that this debate should not be feared. It will always be incumbent on the profession to make sure that its regulatory systems and content are fit for purpose and adapted to take account of changing social and economic conditions. Where any practice or regulation, properly understood, is restrictive of competition and not otherwise justified we would not seek to defend it. But the core values are not negotiable. We need to assert this without equivocation, no matter how inconvenient it may be, or out of line with policies of the moment or commercial expediency.

The *NOVA* case

We are concerned first about a Nelsonian eye being turned to recent developments, particularly the European

Elma Lynch, President of the Law Society of Ireland

Court of Justice decision with regard to the bar of the Netherlands. In this case, the court upheld the ban on multi-disciplinary practices between accountants and lawyers in Holland.

This dealt directly with the interface between competition and the core values. It cannot be dismissed as dealing only with different circumstances peculiar to the Netherlands, or exclusively with competition issues, or with the particular structure of a multi-disciplinary partnership between lawyers and accountants. The court validated an absolute regulatory prohibition on any form of mixed-control partnership, which was implemented by the Dutch bar in substitution for a more limited prohibition precisely because the absolute ban was considered to be the minimum necessary to protect the core values.

Fundamental principles

Therefore, the true implications of the Dutch decision are that the court regarded issues of structure and control as of importance, recognised that effective regulation was necessary to guarantee and protect consumer interests by securing core values, and confirmed

You'll never beat the Irish – ev

The appointment of Michael Peart as the first solicitor in the history of the state to go from private practice directly to the High Court bench has significance beyond our shores, writes Pat Igoe

The common-law world, stretching from Australia, New Zealand, parts of Africa and, of course, India, to the United States (except former French colony Louisiana) and Canada (except Québec for the same reason) retain, in varying degrees, habits and practices of the *ancien régime*.

The direct appointment to the High Court of a solicitor without previously taking silk appears to be a worldwide first. The nearest that comes to it in terms of precedent would appear to be in England, with the appointment two years ago, also directly from private practice, of solicitor Lawrence Collins QC to the High Court.

Mr Justice Collins, a partner in the City firm of Herbert Smith immediately prior to his appointment, had made 'a little bit of history', the Lord Chancellor had noted. He was, however, one of a minority of solicitors in England and Wales with the required right of audience in the higher courts. He was also one of a handful of solicitors to seek and be appointed as Queen's Counsel.

He joined Sir Michael Sachs, a former partner with the Manchester firm of Slater, Heelis & Co, who was appointed a recorder and then a Circuit Court judge prior to appointment to the Queen's Bench Division of the High Court in July 1993. His was the first appointment of a former practising solicitor to the High Court, his route being by promotion from the lower courts.

Devil's advocate

As in Ireland, the focus in England has been to move away from the almost exclusivity of advocacy skills as a condition of appointment to the superior courts' bench towards appreciation of the importance of case management by judges. Judge Martin McKenna, a former litigation partner at

an option for the profession

scepticism as to the efficacy of cosmetic processes such as 'Chinese walls'.

The case could not be more apposite. It is of significance because the ultimate judicial authority on EC competition law and principles has made it clear that the legal profession's core values must not and should not be sacrificed to the god of competition.

Everything about our understanding of the real world tells us that unbridled commercialism will not work in the public interest and that there has never been a greater need than now for genuine and guaranteed independence of solicitors' services. No solicitor can serve two masters, and he who pays the piper will ultimately call the tune. It is naïve and against all the evidence to think that the core values can be preserved effectively without regulating and controlling the structure within which the services are delivered.

This point is made in the current American Bar Association resolution, which states: 'The sharing of legal fees with non-lawyers and the ownership and control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession'.

The media coverage appears to have been dominated by briefings from the proponents of the proposals, with no serious attention being given to the core values and the real world implications of the planned deregulation. Every impression is given of unquestioning acceptance of the premise that the present evolved regulatory framework is an elaborate conspiracy by lawyers against an unsuspecting public. That premise is wholly wrong. The tools of regulation of the legal profession have been based on the public interest, designed to preserve the core values effectively, and forged on the anvil of experience. That is why they deal both with the regulation of individual practitioners and the context in which they practise. The lack of recognition of this creates a self-fulfilling caricature of the solicitors' profession as reactionary, protectionist and out-of-date.

Scottish law society president, David Preston

Alan Hewitt, president of the Northern Ireland law society

Not for sale

These views are offered as a contribution from a different and perhaps detached perspective, which we hope will help to ensure that all relevant arguments are addressed and debated openly. It is understood that the deregulation proposals as initially advanced will proceed only if some way can be found of ensuring that third-party clients of an employed solicitor can be guaranteed the same effective levels of protection as under the present structure.

For the reasons we have set out, most lawyers might well believe that this will prove to be an impossible task. For all lawyers, there is a common position which should unite us – the core values are not for sale. G

Elma Lynch is president of the Law Society of Ireland, Alan Hewitt is president of the Law Society of Northern Ireland, and David Preston is president of the Law Society of Scotland. This article first appeared in the English Law Society's Gazette.

en in judicial appointments

Eversheds Solicitors in Birmingham, was appointed directly to the Circuit Court from private practice. He felt qualified for the job because of the greater emphasis on judges 'running' cases under the new civil procedure rules, and not just being 'reactive'.

'I don't think that I would have been particularly interested if I had to sit there listening to barristers droning on', he said after his appointment. Little emphasis had been placed on advocacy during his interview prior to appointment.

Judge Harvey Crush, a senior litigation partner at Norton Rose Solicitors for 21 years before appointment to the Circuit Court in 1995, believes that discrimination against solicitors in appointments is clear, but it is also indirect and unintentional. Advocacy skills are not as important as other skills that can be learnt in the commercial world. 'The skills required to preside over and manage cases are those which come easily to those judges who have presided over large meetings and a large business', he said.

Indeed, the arguments made by the English Law Society in respect of the appointment of solicitors to the bench of the superior courts have been similar to those raised here. Happily, the dismantling of discriminatory barriers appears to have been quicker here. At the time of the passing of the *Court and Legal Services Act 1990* in England, which gave solicitors the right to seek audience in the higher courts and a clear career path to the higher bench, the Fair Trade Commission here was just recommending the eligibility of solicitors for appointment as judges of the higher courts.

Since then, we have had the *Courts and Court Officers Act, 1995*. Section 30 of this act amended the *Courts (Supplemental Provisions) Act, 1961*, providing for the then landmark change that a practising solicitor of ten years' standing would henceforth be eligible for appointment to the Circuit Court. Also, s28 of the act provided that a Circuit Court judge of four years' standing would be eligible for appointment to the bench of the High Court or the Supreme

Court. Thus, at least an indirect path was opened to the appointment of solicitors to the highest courts in the land.

In 1999, the *Report of the working group on qualifications for appointment as judges of the High and Supreme Courts* was published by the then minister for justice, John O'Donoghue. The report, which was unanimous among its 17 members – including representatives of the bar, the Law Society, the Competition Authority and the director of consumer affairs – recommended eligibility for appointment of solicitors in private practice of not less than 12 years' standing and with a minimum of ten years' regular High Court or Supreme Court litigation experience.

The *Courts and Court Officers Act, 2001* was finally enacted, and enabled barristers and solicitors of at least 12 years' standing to be appointed to the High Court or Supreme Court.

Got to get up to get down under

In Australia, two members of the High Court are former solicitors. In both cases, Justice Callinan and Justice Gummow were called to the Queensland and New South Wales bar before appointment to the bench. Their route to the bench was thus similar to that of Mr Justice Finnegan, president of the High Court, who practised as a solicitor before being called to the bar.

As here, the arguments about opening up the selection processes have been raging in the Antipodes. The *Journal of the Law Society of New South Wales* has provided a forum for the arguments in respect of judicial appointments. One advocate of a wider pool for appointments to the higher bench has been the attorney general of Victoria, Jan Wade. She has argued that 'there is considerable legal expertise from solicitors, legal academics and government and corporate lawyers – expertise that, were it to be drawn on, would raise the standard of judicial excellence'.

Australia has also had judges in the higher courts appointed from academia, including Justice Bruce McPherson of the Queensland Court of Appeal and Professors Sackville, Lingren and Finn appointed to the Australian Federal Court. Singapore, another former British outpost, appears to be the only common-law jurisdiction to have appointed a

Letters

Insurance firms: authors of their own misfortune?

From: Declan J McEvoy, William Early Solicitors, Co Carlow

In light of the current debate regarding increasing insurance premiums, your readers may be interested in the following example of an insurance company dealing with a claim in a manner which resulted in large additional costs being incurred by them for no good reason.

I acted for a plaintiff who sustained serious injuries in an industrial accident. Given the circumstances of the accident, it appeared clear to me that liability should not be at issue. Also, the nature of the injury sustained meant that a final medical report was available relatively quickly. Following receipt of this report, I arranged a without-prejudice settlement meeting with the representatives of the defendant's insurance company. It should be noted that this meeting took place before any proceedings had been issued.

I briefed senior counsel to conduct the settlement negotiations and a settlement was reached at the meeting. However, this was subject to the approval of the principal of the defendant company and, it appears, by a London-based insurance company. For some unknown reason, this approval was not forthcoming and the settlement offer was withdrawn.

As a result, I was obliged to issue High Court proceedings and to push the case on to hearing. This involved the employment of junior counsel, senior counsel, an occupational therapist and an actuary, further medical reports, and retaining the services of an engineer. From the defendants' point of view, they similarly had to instruct solicitors, senior counsel, engineers and so on. A defence was filed, denying liability.

The case was listed for hearing at the High Court recently, when liability continued to be at issue. Just prior to the hearing, the case was settled for a sum higher than the original settlement figure offered and accepted some two years previously. Therefore, due entirely to the attitude of the defendant company and its insurers, they not only had to pay an increased settlement, but also had to pay the costs of instructing their own solicitors and counsel and all of our costs.

As this example shows, the length (and therefore the cost) of cases is more often than not due to the attitude of defendants and their insurers rather than the attitude of plaintiffs, who would, of course, in almost all cases wish to have their case concluded sooner rather than later and without the necessity of going to court. If insurance companies dealt more fairly with plaintiffs at an early stage, then this would have benefits for all concerned.

Correspondence course

From: Richard E McDonnell, Richard H McDonnell, Solicitors, Co Louth

I am not sure whether it is discourtesy, laziness or thoughtlessness, but a large proportion of the correspondence we receive nowadays does not quote our reference, which causes considerable inconvenience. I cannot imagine how post ever gets distributed within some of the larger Dublin firms. Perhaps the *Practice notes* section could issue a recommendation that all correspondence issued should bear the intended recipient's reference. This would ultimately save both the sender and recipient time wasted in trying to identify for whom a letter is intended.

judge directly from the corporate sector.

In New Zealand, every legal practitioner is enrolled as a solicitor and barrister. Most take out practising certificates as both solicitors and barristers. A minority take out practising certificates as barristers only, and are known as 'barristers sole'. While many senior judicial appointments are from the ranks of the barristers sole, a number of High Court judges have been appointed directly from law firms where the practitioners have enrolled as both solicitors and barristers.

Justice Judith Potter is a former president of the New Zealand Law Society and was a commercial lawyer with the firm of Kensington Swan until her appointment to the High Court in the mid 1990s. She continues to hear a full range of cases, including criminal law cases.

Mr Justice Michael Peart: appears to be a worldwide first

In North America, except Louisiana and Québec, which have gone their civil law ways, the legal profession has, of course, been fused. The institutionalised distinction between office-based and court-based lawyers does not apply. In the United States and Canada, lawyers are lawyers and solicitors are people trying to sell you life assurance.

The appointment of solicitor and colleague Michael Peart, henceforth Mr Justice Michael Peart, to the bench of the High Court of Ireland has not just been warmly welcomed in itself. It is also seen as a significant boost to the elementary and worldwide argument that courts need to benefit from the widest pool of expertise and experience available. G

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

Only our rivers run free

From: RW Nairn, legal executive, McTernan MacGowan, Solicitors, Sligo

I write about what has always struck me as a strange aspect of fiscal legislation, namely capital gains tax chargeable upon a gift. The crux of the problem lies in the fact that the tax is chargeable against the donor, not the donee who acquires the beneficial interest. It has to be admitted, however, that the donee has a secondary liability, but the donor in a CAT case has also a secondary liability – although this provision may well only have been inserted in aid of the state.

I wonder whether any lawyer competent in the appropriate fields would be interested in pursuing the question of the validity of this charge, having regard to constitutional law, when the donor receives no beneficial interest. On the face of the question, it seems strange that a citizen should have to contribute tax to the state out of an asset in which he is not acquiring a beneficial interest and which in fact he has disposed of without consideration. Does this type of notional charge not remind one of the just old maxim in another field: 'no taxation without representation'?

Tax laws enjoy the benefit of a very strong presumption of constitutionality: see *The Irish constitution*, JM Kelly, 3rd edition, p1083 and *Madigan v Attorney General* ([1986] ILRM 136). It would appear, however, that such rights could fall foul of the constitutional guarantee of property rights if they are discriminatory or arbitrary in their operation (see above). See also *Blake & Ors v Attorney General* ([1982] IR 117) and *Attorney General v Southern Industrial Trust Ltd* ([1960] 94 ILTR 161).

Does any competent person wish to put the point further?

Missing you already

From: Fiona Hurley, O'Donovan Murphy & Partners, Bantry, Co Cork

We refer to the June issue of the *Gazette*, and in particular to an article carried on page 2 thereof entitled *Fewer solicitors in new Dáil*. We would like to point out that Denis O'Donovan TD, who has been a qualified solicitor for over 20 years, was also elected to the Dáil for the first time, and indeed topped the poll in the Cork South West constituency. It was incorrectly stated that the only solicitor in addition to Olwyn Enright elected to the Dáil for the first time was Peter Power in Limerick East. Strange, is it not, that the only other solicitor who was not mentioned in the said article is also in the same Cork South West constituency. It may be the constituency nearest to the United States of America, but it does still form part of the Republic!

History was made last month when solicitor Michael Peart sat for the first time as a judge of the High Court. Here, he talks to Conal O'Boyle about the challenges he faces in his new appointment and his love/hate relationship with postage stamps

Michael Peart was licking stamps in his firm's post room when he took the call from justice minister Michael McDowell telling him that he had just been appointed a High Court judge. Not, perhaps, the ideal location in which to hear life-changing news, but his law firm was short staffed that day and Peart was leading from the front.

'My reaction was to sit down on a very dirty chair outside the post-room door and to take a deep breath and think "What have I done?"', he recalls. 'Then I rang Jacinta, and after I spoke to her we realised that it was actually good news'.

Such initial reticence is understandable when you consider the enormity of the appointment, both for Peart personally and for the solicitors' profession as a whole. As the first-ever solicitor appointed to the High Court bench in this jurisdiction – and, indeed, in any of our neighbouring jurisdictions – there are a lot of expectations riding on Michael Peart.

'At first it was terrifying', he admits, 'but I'm adjusting to it. I suppose I have a mixture of pride and regret. I'm proud because I'm the first, but on a personal level there is also regret because I'm going to lose the life I had before, which involved

High

30 em[illegible]dearly. I miss everything that goes with practice life, but I took this on voluntarily and it's going to ch[illegible] my life in a way that I think I want.

'It is a great honour to be the first solicitor appointed to the High Court bench. That carries huge responsibilities and I'm conscious of those, but I regard myself as the standard-bearer or the carrier of the torch, and I look forward to the challenge'.

The challenge wasn't made any easier by the fact that he had just eight working days to divest himself of his practice before hearing his first case. McDowell's call came on Tuesday 25 June, Peart received his seal of office from President McAleese on Wednesday 3 July at a ceremony in Áras an Uachtaráin, and by Monday 8 July he was sitting on the High Court bench.

Peart was lucky. His sister, Valerie, is also a solicitor and she has been able to take over the reins at short notice. But other potential appointees from the solicitors' profession may not find the path so smooth, particularly if they are sole practitioners.

'U[illegible]barris[illegible]we can't just h[illegible]back t[illegible] brief[illegible]ays. 'We have to divest ourselves of all fina[illegible]nterest in the firm – and of necessity that [illegible]ore than eight or ten days. I think somebody [illegible]going to have to take a look at that, because sole practitioners or solicitors in small firms can't simply leave the firm, and at the moment that's what you have to do'.

Independence day

'In my particular case, it would have helped if I hadn't been appointed at the very beginning of July or if I hadn't had to sit perhaps until the Michaelmas term in October. It would have given me that couple of months to go through the accounts and take legal advice in order to depart from the firm in an orderly way. I'm fortunate that Valerie is taking over the family firm and we have entered into an informal arrangement of a temporary nature that has enabled me to go. But obviously there is a great degree of trust involved which wouldn't necessarily exist in an arm's length transaction.

'This has been the aspect of my appointment that has been the most uncomfortable. It's not the fear of the job or the fear of solitude and loneliness on the bench; it's just the logistics of unravelling a practice at very short notice'.

Another obvious drawback is the complete lack of

training given to newly-appointed judges, but Peart says that this came as no surprise to him. 'I knew that there was no training at all in advance', he laughs. 'None whatsoever. I was just hoping that on my first day I wouldn't get the type of case that I knew absolutely nothing about. But fortunately that didn't happen. I think the president of the High Court was quite considerate about it!'

Although his first cases were all Circuit Court appeals, he expects that in the weeks and months ahead he will be moved from job to job so that he gets a reasonable spread of experience, eventually ending up in an area that appeals to him or that he has a particular flair for.

'I think that if you are an experienced litigation solicitor, which I consider myself to be, your experience in court is probably the best experience you can have to sit on the bench', he explains. 'You don't need specific training to judge a case. You may need training in specific areas of law that you mightn't have dealt with before or perhaps in new legislation. For example, not everyone would have experience of refugee cases, so if I was suddenly to hear a lot of refugee cases I wouldn't mind having some training – or at least a long conversation with the judge who has been dealing with them.

'It's been made completely clear to me from any judges I've spoken to that they would welcome a phone call whenever I want advice on any subject. There is a collegiality among judges, and even though I'm a solicitor I am part of that collegiality. That is a great comfort'.

But after 32 years in practice, don't expect Michael Peart to have to pick up the phone too quickly. And his background as a solicitor should help him to bring some unique qualities to the High Court bench.

'I think solicitors, unlike barristers, are used to dealing directly with members of the public', he says, 'and that direct contact will be an important factor for me. You get to know people who are litigating and you get to know their concerns as human beings. Not all litigators are big corporations; some are small individuals with few resources behind them. I think barristers sometimes aren't as aware of that in the advice they give. As a solicitor, I would be extremely conscious of the expense of litigation and as a judge I will try to expedite hearings to ensure that they don't take any longer than they should. I would certainly hope to confine litigation to the bare essentials, because of the enormous costs and the risks to individual litigants'.

Barristers, he adds, may have greater experience of advocacy and pure law, but solicitors bring their knowledge of humanity and perhaps the common touch to the bench. 'I certainly think that neither is more advantageous than the other', he says. 'We are just slightly different in our backgrounds and experiences. Hopefully I will bring something new and fresh to the bench. And that's not in any way being critical of what is there already. It's just a different experience, and I think the greater the mix the better'.

Men in black

Although he is conscious of the groundbreaking nature of his new job, Peart does not see himself as a trailblazing reformer who wants to shake up the system. 'I'm not on a crusade', he says. For example, he has no great problems with the archaic nature of judicial dress, but would not object if wearing the traditional horsehair wig was made optional. He feels some sort of gown is probably necessary ('I wouldn't be in favour of judges sitting on the bench in lounge suits'), but suggests that a lighter robe might be more desirable in summertime, given the stifling heat in many courtrooms.

There is also the thorny issue of precedence in the courtroom. As a senior solicitor, he always felt somewhat annoyed that he had to wait until even the most lowly barrister had finished making applications in court before the sitting judge would hear motions from solicitors, irrespective of the length and depth of their experience. He admits that this seems wrong to him.

'I think something should be done to ease that', he suggests, 'because solicitors, if they are to have complete parity of esteem, must appear in court on a level playing field and not be second-class citizens.

Perhaps some new system could be designed to decide who should make their application first, maybe on a first-come, first-served basis. Perhaps you could indicate to the registrar that you want to make an application and applications would then be called in the order that they are notified. That seems to me to be fair'.

Bench marks

Yet despite being a reluctant revolutionary, his very appointment means that there are bound to be issues that have never been considered before and which could well act as catalysts for change. For example, he has been informed that he has now become, *ex officio*, an honorary bencher of the King's Inns, in common with every other High Court judge. However, he does not yet know what is involved in such a position.

A similar situation arises in relation to his continued membership of the Law Society Council, to which he was first elected seven years ago. Since it has never cropped up before, there appear to be no rules governing the issue. He concedes that it would probably be inappropriate for a sitting judge to have to seek re-election to the Council every two years, but he would like to retain his links to the society's Education Committee, with which he has been associated for the last six years. He was chairman of that committee when the society opened its new Education Centre two years ago.

'I feel that I could still continue to make some contribution to the committee if I was asked to do so by the president of the Law Society', he says. 'I don't think there's any reason why I shouldn't be able to. After all, a sitting High Court judge is currently chairman of the King's Inns education committee – but their rules are probably different to ours'.

The fresh prince

Although he is the new boy on the block, Peart, like most other court users, knows the problems facing the courts system – delays, backlogs and the speedier resolution of disputes – but perhaps his solicitor's background allows him to suggest potential solutions to some of these old perennials. He identifies changes to court rules and procedures as a means of unjamming the system.

'Some of the rules under which we operate are extremely old, and they could do with being updated', he says. 'Some of them actually facilitate delays. I think case management, which is the buzz word of the moment, should probably come to the fore so that judges have a much more hands-on approach to controlling the time it takes to carry out the different procedures involved between commencement of an action and its hearing.

'The chief justice recently appointed Mr Justice Nial Fennelly to review criminal procedures with a view to streamlining and expediting hearings. I know he is embarking on that area before looking at civil litigation procedures, but I am quite sure that when Mr Justice Fennelly has finished looking at how the criminal law operates then attention will be turned to civil litigation. I think that it is also mooted that there might be a separate and distinct commercial court to take commercial cases out of the ordinary flow of cases going through the court.

'In my opinion we have operated under the present system for a very long time and the system is buckling under the sheer weight of cases waiting to be heard. I think any change would be welcome – even if it has to be changed again in the light of experience gained'.

'Hopefully I will bring something new and fresh to the bench. And that's not in any way being critical of what is there already. It's just a different experience, and I think the greater the mix the better'

Lost and found

As an experienced lawyer, Michael Peart may able to spot the flaws in the system, but on his first day in the job he had a harder time spotting his own chambers.

'On my first morning I was told that my chambers were in a certain location, so I went up there and I was half-undressed when I was told that my chambers were, in fact, somewhere else', he recalls. 'I had to dress again and move down the corridor to another room which, I believe, was the chambers of Mr Justice Moriarty before be got seconded to Dublin Castle. I'm a bit of an itinerant at the moment and I have those chambers on loan until October because they are in the course of preparing chambers for me in Áras Uí Dhálaigh'.

Still, on the plus side, he won't have to lick his own stamps in the post room, will he? 'I'm not even sure I can guarantee that, because one of the things that has hit me in the face is that I have no secretary as a judge. Obviously, coming from an office environment, I'm used to having staff around who I can ask to do these things for me. At the moment, I have no staff and don't even know where the post room is. I have a horrible feeling that I might end up licking my own stamps after all!'. G

FACT FILE

THE HON MR JUSTICE MICHAEL PEART

Occupation: Judge of the High Court. Formerly, a solicitor (admitted to the Roll of Solicitors in Michaelmas Term 1970). Until recently, principal of Dublin law firm Pearts (formerly John R Peart & Son). Had practised continuously with the firm since 1970

Education: BCL from University College, Dublin, 1969

Law Society career: First elected to the Law Society Council in 1995. Member of Education Committee since 1996, served as chair of that committee in 1999, 2000, 2002. Has served as vice-chairman of the Professional Practice and Ethics Committee. Member of the Practice Management Committee, Finance Committee, Litigation Management Committee and *Gazette* Editorial Board.

Chaired the taskforce set up to examine again whether the Law Society should introduce a regime of mandatory continuing professional development for the solicitors' profession.

Currently a member of the Superior Courts Rules Committee

Advocacy experience: During his career, he has argued cases at every level, including the High Court, Supreme Court, Central Criminal Court and Special Criminal Court

Solicitors' cos and the CLI

The unacceptable practice of charging clients a flat fee and passing it off as 'solicitor-and-client costs' must come to an end, writes Taxing Master James Flynn, who sets out in general terms what a client is liable to pay his or her solicitor

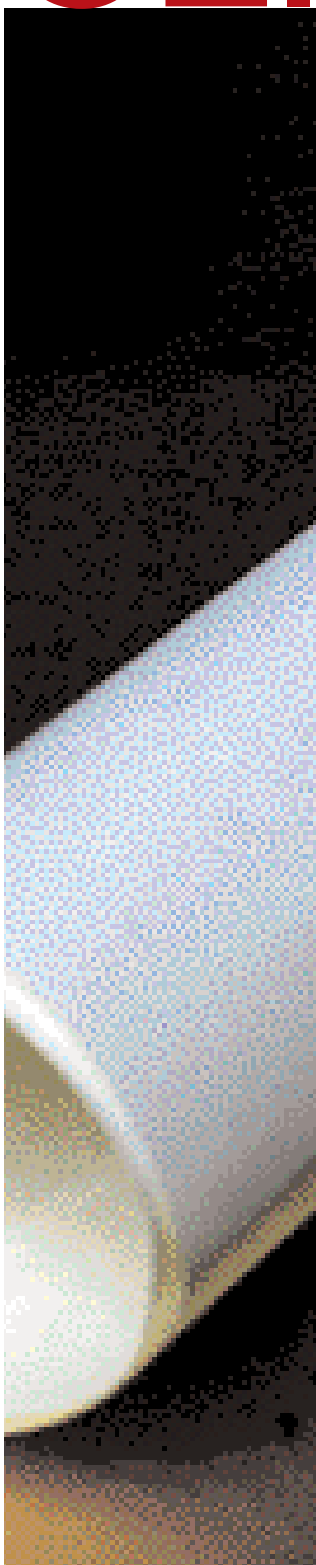
MAIN POINTS

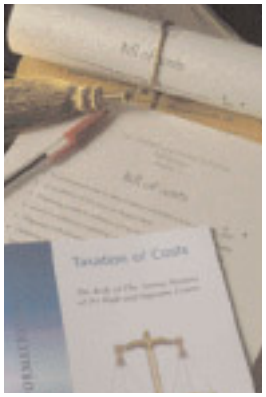
- Party-and-party costs explained
- Solicitor-and-client costs explained
- Highest ethical standards needed in the profession

It is a prerequisite to an entitlement to costs to ensure that the client is under a legal liability to discharge the costs that are sought and that he or she is put on notice of this. Even the simplest application to court will give rise to costs. These costs have to be recovered so that the lawyer who has rendered the service is fairly and adequately rewarded. Either the client or an opposing party will be expected to discharge the costs involved.

Legal costs are divided into a number of categories, and in litigation the most common of these are 'party-and-party costs' and 'solicitor-and-client costs'. The solicitor-and-client fee is the amount that a client owes to his solicitor in respect of work undertaken on his behalf. There is a mistaken impression among some solicitors that a solicitor-and-client fee is chargeable in every case. Quite the contrary is in fact the case. To appreciate this area of legal costs, one must understand the concept of 'party-and-party' costs. It's my belief that if the labels attached to the mechanics of charging were simplified, then the general public would understand what costs are being charged, what they refer to and their appropriateness.

Party-and-party costs are simply the costs that a successful party receives from the opposing party in an action. A solicitor can only seek such costs as are necessary and proper from the paying party. It does not matter whether the paying party is the client or the loser in the costs game. Any costs which are unnecessary or improper or which have been





STS
ENT

PARTY-AND-PARTY COSTS: WHAT THE RULES SAY

Order 99, rule 37(18) of the *Rules of the superior courts* provides that:

'On every taxation, the taxing master shall allow all such costs, charges and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for enforcing or defending the rights of any party, but, save as against the party who incurred the same, no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake, or by payment of special fees to counsel or special charges or expenses to witnesses or other persons or by other unusual expenses'.

incurred or increased through over-caution, negligence or mistake are only recoverable in certain circumstances. I will deal with those later in this article.

In the overall run of a civil action, most costs are necessary and proper to advance the case to the hearing of the trial. The taking of instructions, the gathering of evidence, the investigation of the matter, the engagement of counsel, the marshalling of witnesses, the retaining of appropriate experts where necessary, and so on, are all examples of necessary and proper costs.

Normally, in personal injury litigation where the defendant party does not accept liability for the accident, the plaintiff is forced to secure the attendance of factual witnesses. Although the costs involved in this are relatively small, the amount of work involved for a solicitor may indeed be relatively higher. For example, the witness may have to be served by way of subpoena and *viaticum*. The time involved in securing the witness is a necessary and proper expense. The solicitor will have to ensure that there are enough factual witnesses to support the plaintiff's case but must not present too many of them, as this would not be a necessary expense.

The retention of doctors, consultants and such may be necessary in order to satisfy the court of the extent of the injuries and the impact they have had on the plaintiff. To strictly comply with statutory instrument 391 of 1998, the medical experts retained should be those whose reports will be relied upon at the trial of the action. However, a medical expert may be necessary to eliminate a certain aspect of the nature of an injury or to assess its likelihood of affecting the plaintiff in the future. This type of expert, although not used at trial if the likelihood proves negative, may be a necessary cost in the overall litigation. The number and speciality of the expert medical witnesses has to be tightly monitored, or else they could be disallowed on taxation on the grounds of 'over-caution, negligence or mistake'.

In relation to certain procedures or previous accidents involving the defendants, it may be necessary to seek discovery of certain records and documents. Again, the costs of these are a necessary and proper expense and the award of costs will support this.

Another area is the plaintiff's prospective loss of earnings into the future. It is normal to retain an actuary to compute the estimate of loss. Moreover, for self-employed individuals, it may be necessary to retain an accountant to estimate future loss of profits. Again, these experts are necessary and proper and are allowable expenses at a party-and-party taxation.

It is not too difficult to identify the costs that are necessary and proper. Accordingly, under order 99, rule 37(18), it appears that the party-and-party category should cover all costs incurred in litigation. This should indeed be the case, and the exception to the rule is strictly regulated by the *Rules of the superior courts*.

The cost of litigation is quite high, whether or not the client or another party ultimately discharges the bill. The party to litigation is exposed to three classes of costs: a) court fees, duties, stamping fees and so on; b) the costs of obtaining evidence, documentation, witnesses and experts; and c) the costs of legal personnel. The bill of costs is made up of disbursements and the solicitor's professional fee, commonly referred to as the 'instruction fee'. Almost invariably, the winner is awarded party-and-party costs, so the successful client cannot recover more than what is deemed necessarily and properly incurred.

The process of taxation exists to ensure fairness to both sides, and it does so by subjecting the successful party's itemised bill of costs to the scrutiny of the taxing master in the presence of the unsuccessful party, where items are allowed, reduced or disallowed, as the case may be, with the objective of justifying the costs of the litigation.

'The process of taxation exists to ensure fairness to both sides'

Solicitor-and-client costs

Quite a number of solicitors are content with the costs recovered from the unsuccessful side. It must be remembered that there is no general entitlement to a solicitor-and-client fee and it cannot be levied against a client except in special circumstances as prescribed by the *Rules of the superior courts*. Work undertaken by the solicitor that exhibits over-caution, negligence or mistake, or which is merely precautionary in nature, cannot be recovered from the client unless the client has authorised the solicitor to undertake this work or incur the expense.

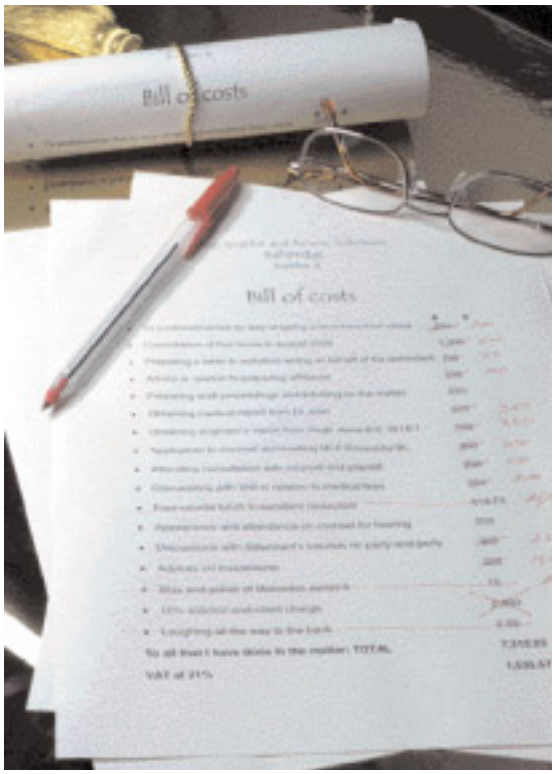
There are certain items which have in the past been claimed from the client under the solicitor-and-client fee category (for example, **opinions sought prior to the institution of proceedings** from counsel as to whether a party has a case or the likely *quantum* of damages). These are charges which might very well be disallowed on a solicitor-and-client taxation, because a solicitor is deemed to have the skill, knowledge and experience to advise on whether a case is stateable or speculative.

During the course of the proceedings, it may be necessary to advise a client in relation to a **lodgment** and whether or not the client is likely to be awarded an amount in excess of the sum lodged. It is well within a solicitor's competence to advise on this, and counsel's opinion could be considered a

luxury for the simple reason that the solicitor has lived with the case and is singularly familiar with all the relevant information. But in certain cases such counsel's opinions would be allowable, even on a party-and-party basis: for example, it might be proper and necessary in an infant/incapacity case.

Private investigators, although of factual value, have no evidential value in court and are not an allowable expense on a party-and-party basis. However, if one were to be retained, the client should be told the reason why, this reason would have to be justifiable and an authorisation would have to be received in writing from the client. Similarly, **briefing a second senior counsel** is a luxury and cannot be recovered from the client.

In relation to the **amendment of pleadings**, a difficulty may arise in relation to the recovery of costs. In cases where it is necessary to amend the pleadings in the light of new facts so as to put the client's full case before the court, the client should be advised of the need for amended pleadings and



the cost would be recoverable from the client and, in certain circumstances, recoverable on a party-and-party basis. However, if the amendment is necessary as a result of faulty pleading, the client cannot be expected to pay for this (see *Wolfe v Wolfe* [2001] 1 IR 313).

Pre-trial consultations are allowable on a party-and-party basis. Consultations held before or during a trial may constitute a solicitor-and-client expense. However, if a solicitor arranges an **inordinate number of consultations**, and the attendances show that the matters discussed at these meetings had been addressed on previous occasions, then the client would not be expected to pay for this. Accordingly, when arranging consultations, you must ensure that an agenda is drawn up and that the consultation is in fact necessary.

The marshalling or **requisitioning of witnesses** is a complex area. If witnesses are unlikely to get on the stand, it may be in order to place them on stand-by rather than having them attend court. For example, if a solicitor forces the witness to attend when it would have been appropriate merely to have him on stand-by, the client may have to finance the amount in excess of the stand-by fee, which in certain circumstances may be considerable. If the solicitor can demonstrate that he acted reasonably careful and reasonably prudently in ensuring the attendance, the costs would be recoverable on a party-and-party basis. If there is doubt about whether or not a witness is likely to take the stand, the solicitor should make a judgement call and ask the client to authorise the attendance of such a witness.

It is very difficult to gauge what are and are not solicitor-and-client costs. If in doubt whether certain items are allowable at a party-and-party taxation, it is wise to seek the **client's authorisation** before incurring the costs. The solicitor will safeguard his firm against irrecoverable costs if he adheres to the principles as set out in order 99, rule 11 of the *Rules of the superior courts*:

'*1) On a taxation as between solicitor and client, all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred*

2) Any costs which in the circumstances of the case are of an unusual nature and such that they would not be allowed on a taxation of costs as between party and party shall, unless the solicitor shall have expressly informed his client in writing before they were incurred that they might not be so allowed, be presumed, until the contrary is shown, to have been unreasonably incurred

3) On a taxation as between solicitor and own client, all costs incurred with the express or implied approval of the client evidenced by writing shall be conclusively presumed to have been reasonably incurred, and where the amount thereof has been so expressly or impliedly approved by the client, to have been reasonable in amount

4) In sub-rule (2), the reference to the client shall be construed:

a) if the client was at the material time of unsound mind and represented by a person acting as guardian ad litem *or next friend, as a reference to that person acting, where necessary, with the authority of the court*

b) if the client was at the material time an infant and represented by a person acting as guardian ad litem *or next friend, as a reference to that person.*'

The solicitor is not limited in his charges against his own client to such sums as may be allowed against an opponent in a party-and-party taxation. But regard must be had to the fact that charges in excess of party-and-party are invariably in respect of items that have been independently considered as

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

CONTENTS

ORDER YOUR COPY NOW!

ORDER FORM

Gazette Diary 2003 page-a-day **€40** incl VAT Qty: ☐
Gazette Diary 2003 week-to-view **€32** incl VAT Qty: ☐

I enclose a cheque for ☐ made payable to *Gazette* Desk Diary
or please charge my credit card ☐ Visa ☐ Mastercard
Card no: ☐☐☐☐ ☐☐☐☐ ☐☐☐☐ ☐☐☐☐ Card expiry date: ☐☐/☐☐

PLEASE PRINT IN BLOCK CAPITALS

Name

Address (of credit statement)

Delivery address

Tel DX no My order ref

Signed Date

Please forward all orders to *Gazette* Desk Diary, 4 Iona Drive, Dublin 9

Orders will not be processed unless payment is received with the order. Please allow 28 days for delivery after printing.

Postage and packaging FREE.

FOR FURTHER INFORMATION, CONTACT SEAN Ó HOISÍN, TEL: 01 830 5236, E-MAIL: seanos@iol.ie

unnecessary and improper. Accordingly, for a solicitor to be able to recover such sums, he is obliged to demonstrate that he had the client's authority to incur those expenses.

Any **unusual costs** that would not be incurred by a solicitor in the ordinary course of conducting a case of a similar nature – for example, if he undertook work which was the province of another faculty or profession, namely that of an expert, specialist or counsel (when counsel is so briefed) – cannot be recovered unless the solicitor has protected himself by taking his client's express and clear authority to incur these costs or to perform such work. Then, and only then, can the solicitor recover such costs from his client. But the client must be given the opportunity of considering such items and must have been made aware of the fact that they might not be allowed on taxation.

Where costs have been incurred improperly or without any reasonable cause, or where there has been **misconduct or default** on the part of the solicitor resulting in costs (although properly incurred) that are unnecessary, duplicatory, and/or fruitless to the client, such costs will invariably be disallowed.

As I said, a solicitor is not entitled as of right to charge a solicitor-and-client fee. Any charges which come under this umbrella of cost recovery must be set out in detail for the client and the reason given for them. There can be no 'guesstimation' of this cost by merely saying that 'such and such an amount will definitely cover our solicitor-and-client fee'.

On the taxation of a solicitor-and-client bill of costs, the client's special authority is required in most circumstances if the solicitor is to be allowed recover such costs from his client. No blanket authority can be given by the client. For instance, at the time of taking instructions, solicitors in certain circumstances request their clients to sign the actual retainer which occasionally contains an open authority in relation to the work undertaken. Such an authority does not authorise the solicitor to incur an unnecessary and/or improper cost. The *Rules of the superior courts* are clear on this and a general and open authorisation would be seen as an attempt to defeat the spirit of the rule. It must be emphasised that the client must be given an opportunity to consider whether or not to incur the costs, and this authorisation cannot be retrospectively sought (*Wagstaff v Wilson* (1832) 4 B & Ad 339).

For a solicitor-and-client charge to be legitimately incurred, the charge must have some relevance to the case. In *Dyott v Reade* (10 ILTR 111), the master of the rolls stated that 'the principle to be considered in relation to party-and-party costs is that you are bound in the conduct of your case to have regard to the fact that your adversary may in the end have to pay your costs'.

It is not unreasonable for this principle to apply to the solicitor-and-client fee. The solicitor is obliged to have regard to the fact that such costs that are disallowed at the taxation must be paid for by the client and it is therefore essential that the client is given the opportunity to assess whether or not to incur these costs, because the client usually pays for these costs out of his damages.

SOLICITOR-AND-CLIENT COSTS: WHAT THE RULES SAY

Order 99, rule 11(3) of the *Rules of the superior courts* provides that:

'On a taxation as between solicitor and own client, all costs incurred with the express or implied approval of the client evidenced by writing shall be conclusively presumed to have been reasonably incurred, and where the amount thereof has been so expressly or impliedly approved by the client, to have been reasonable in amount'.

If the approval, whether expressed or implied, of the client has been given, there is a presumption that the costs were reasonable in the amount.

'The practice of routinely charging a solicitor-and-client fee must cease. The fee is only chargeable if costs are incurred and approved by the client'

A general charge in respect of solicitor-and-client fees of, say, 10% is outrageous if it cannot be shown what it was for and why it was incurred. Costs recoverable or disallowed on the indemnity basis should not be used to penalise the client; a solicitor cannot expect to profit from this element of costing (*Wailes v Stapleton & Commercial Services Ltd (Unum Ltd)* [1997] 2 Lloyd's Rep 112).

In relation to the solicitor and client relationship, propriety and fairness must be observed at all times. It is unfair to look for an open-ended ticket in relation to solicitor-and-client fees.

The practice of routinely charging a solicitor-and-client fee must cease. The fee is only chargeable if costs are incurred and approved by the client. As I said, clients can, in the main, only afford to pay such costs out of damages, and damages, as we know full well, are geared to restore the client to the position he was in before the injury. The law can only compensate a person for an injury; it does not have the miraculous power or ability of invoking the maxim *restitutio in integrum*.

The court awards damages for injuries sustained, but if a solicitor deducts an amount in respect of solicitor-and-client fees, then the award is depleted by the amount of that deduction and so the client is not restored financially to the position that the court deems appropriate. The fruits of the litigation would be eroded.

Solicitors who are prepared to accept party-and-party costs in an action do so because they actually discharge all the costs incurred. If a solicitor charges a solicitor-and-client fee, he must support this fee by furnishing details and informing the client that, before these costs were incurred, the client gave his authorisation.

The routine application of a solicitor-and-client fee as a matter of course is no longer a legitimate recoverable cost. Given the ever-increasing scrutiny under which the legal profession is coming, it is up to each and every solicitor to ensure that he or she is observing the highest standards within the profession. G

James Flynn is a taxing master of the High Court.

‘COMPO CULTURE’: an alter

As the media frenzy about the so-called compensation culture continues, it seems to be becoming less of a debate and more of a diatribe against the victims of personal injuries and their lawyers. Stuart Gilhooly tries to redress the imbalance by focusing on the English approach to this issue

MAIN POINTS

- The UK *Access to Justice Act 1999*
- Reform of the personal injury system in England
- Higher esteem for victims and their lawyers in the UK

The English government has always maintained a fair and equitable system for the provision of legal advice to its citizens. This is an example that our government could follow if it were not so one-dimensional in its policies towards the distribution of justice. Essentially, until 1999, there was full legal aid available and this funded most personal injury cases in England. However, this was abolished and an alternative system was provided by the *Access to Justice Act 1999*. This new system, while far from ideal, gives an indication of the value that the English place on victims’ rights to obtain justice and the role that solicitors play, not only in ensuring that their clients receive the best service possible but also in providing the funding for the claims to be brought.

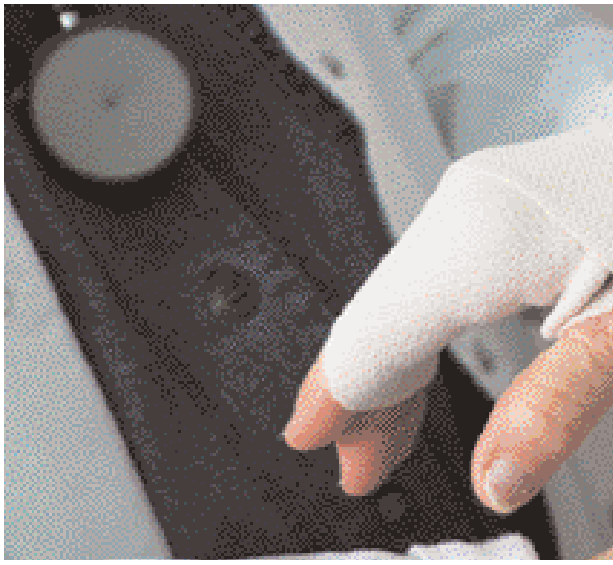
Nothing succeeds like success

The English system recognises the risk that any solicitor runs when he or she takes on a client who is unable to fund the claim either by way of the disbursements/outlay or by discharging the solicitor’s fee. It creates a system whereby the solicitor obtains a success fee when the case is concluded satisfactorily. This is done by way of a conditional fee agreement, which is agreed between the solicitor and the client at the outset of the litigation.

Upon taking instructions from the client, the solicitor assesses the risk associated with taking on and funding the case. This applies only in a case which is not being funded by the client. The solicitor then decides what percentage of risk attaches to the case in question, and this percentage then seems to determine the level of the success fee that will be received.

The success fee percentage can be anything from 0% to 100%, depending on the level of perceived difficulty attached to the case. For instance, in a particularly difficult medical negligence case or in a groundbreaking employers’ liability case, it would not be unusual to see a 100% success fee.

So what is the fee a percentage of and, most importantly, who pays you? Well, this is the interesting part. The success fee is a percentage of the basic party-and-party professional fee which the claimant receives from the third party. What will be most surprising to practitioners here is that it’s the unsuccessful defendant that picks up the tab for everything. There is no question of the client being



responsible for the success fee. It is established law in England that a successful claimant is entitled to claim a success fee in almost any case.

This was provided for by section 27 of the *Access to Justice Act*, but it was subsequently argued by insurers that no success fee should be recoverable in straightforward cases, as there was no risk. In the recent, long-awaited decision of the House of Lords delivered on 27 June 2002 in the case of *Callery v Gray*, the lords confirmed that solicitors were entitled to seek a 20% success fee in any case, even one involving a passenger in a road traffic accident. It was argued by the plaintiff, and ultimately accepted, that all cases attract a degree of risk for a solicitor and so the solicitor was entitled to be compensated for the risk he takes when funding a case that has no guarantee of yielding a fee.

This is not to say that all straightforward cases attract a 20% success fee and, indeed, it would only be envisaged that the full 20% would be recoverable

native view

if the case went to trial or was settled at or very near trial. If such a case settled early, then a smaller success fee in the region of 5% or 10% would be recovered.

It should be noted that, although a solicitor may agree a large percentage with the client, the insurance company will almost always seek to lower the percentage by arguing that the case was not as risky as the solicitor alleges. This would then lead to the faintly ridiculous scenario of an insurance company fighting a case tooth-and-nail right through a hearing and then arguing that it was not really that difficult a case at all and that the solicitor's risk was

minimal. Notwithstanding this, however, some very substantial success fees have been recorded and there are two recorded 100% success fees in medical negligence cases.

Event horizon

A further aspect of the English system is its method of funding outlays. Our neighbours find it unthinkable and unworkable that a solicitor would fund a personal injury case from his office account. They almost invariably insist that their clients obtain 'after the event' (ATE) insurance, the cost of which varies from case to case. This insurance will provide opponents' legal costs insurance but, most importantly, will provide finance for disbursements in general up to quite a high level. It is also possible for some claimants to have 'before the event' insurance, as with a motor vehicle policy, but most people do not have this and it only covers disbursements to a certain level.

Although there has been a small amount of activity in this jurisdiction which would suggest that ATE insurance has become available, it appears to apply only in cases where the solicitor confirms that the case will more than likely be successful. In England, it can be provided in all cases and the ATE insurance company measures the premium against the prospects for success.

One further interesting outcome of the *Callery* decision is the allowance by the court of up to a stg£350 ATE insurance premium in a straightforward case, which is also recoverable against the unsuccessful defendant in any case.

High esteem

I have not outlined the above system to extol its merits – as I believe it has as many flaws as benefits – but rather to illustrate the level of esteem in which our colleagues in England are held not only by their judiciary, but by their government. They actually receive monetary recognition for the provision of funding and the assumption of risk in personal injury cases and nobody bats an eyelid. Yet in this country, we provide a form of legal aid for our client, largely from our own pockets, and we expect nothing in return but our costs. It is a sad fact, but a fact nonetheless, that the average victim of personal injury simply cannot afford to fund a personal injury claim due to the level of outlay involved.

During his year in office, the immediate past president of the Law Society, Ward McEllin, consistently called for reform of the legal aid system in this country. This call was completely ignored. Instead, we have received a barrage of criticism from various quarters levelled at victims and their lawyers, but showing no regard whatsoever for the myriad genuine claimants who would not receive a cent in compensation were it not for the financial assistance of their lawyers. No-one is suggesting that we are doing this out of the goodness of our hearts, and we all recognise that this is a business decision, but ask yourself the following question: what business pays its clients' bills, puts in often hundreds of hours of work, and then hopes that it will recover its outlays and its fees some years into the future if everything goes well?

No successful businessman would do that, would they? G

Stuart Gilhooly is a member of the Law Society Council and is a solicitor with the Dublin law firm HJ Ward & Co.

'In this country, we provide a form of legal aid for our client, largely from our own pockets, and we expect nothing in return but our costs'

If justice is meant to be seen to be done, then where does the *in camera* rule fit in? Does it protect children and litigants from prurient publicity or merely cast a shadow over judicial transparency? Here, the Law Society's Law Reform Committee discusses the background to the rule and asks readers to return a questionnaire on their experiences of how it works in practice

CAMERA angl

MAIN POINTS

- Interpretation of the *in camera* rule
- Effects of publicity on parties to cases
- Questionnaire on the *in camera* rule

In general, Irish law is committed to open justice. This principle is guaranteed by the constitution. Article 34(1) states that 'justice shall be administered in courts established by law by judges, and, save in such special and limited cases as may be prescribed by law, shall be administered in public'.

The importance of publicity in a democratic society was emphasised in the case of *Irish Times Limited v Murphy* ([1998] 2 ILRM 161), where, in a unanimous decision, the Supreme Court upheld the right of the media to report the details of a major drugs trial. The chief justice noted that 'justice is best served in an open court where the judicial process can be scrutinised. In a democratic society, justice must not only be done but must be seen to be done. Only in this way can respect for the rule of law and public confidence in the administration of justice, so essential to the workings of a democratic society, be maintained'.

Exceptions to the rule

By way of exception to this general principle, however, family law cases and cases involving children are among the categories of cases that may by law be shielded from public and media scrutiny. In general, the public and the media are not admitted to family proceedings. The *Courts (Supplemental Provisions) Act, 1961* provides that justice may be administered otherwise than in public in specified circumstances. Section 45(1) of the act states these as being:

- Applications of an urgent nature for relief by way of *habeas corpus*, bail, prohibition or injunction
- Matrimonial causes and matters
- Lunacy and minor matters, and
- Proceedings involving the disclosure of a secret manufacturing process.

The discretion to hear cases 'otherwise than in public' was tested by the courts in the case of *In re R Limited* ([1989] ILRM 757). Walsh J stated that 'the constitution of 1937 removed any judicial discretion to have proceedings heard other than in public save where expressly conferred by statute'. The Supreme Court held that, unless the matter came under the statutory exception to the general principle of open justice, the courts had no discretion to hear a case *in camera*. Where a statute provided discretion to hear a case *in camera*, the courts, in exercising such statutory discretion, must keep in mind the overarching duty to do justice and the general principle that justice is best administered in public. It should be noted that Walsh J in *In re R Limited*, considering section 45(1) of the 1961 act, stated that it was 'in addition to any other cases prescribed by acts of the Oireachtas'.

There are undoubtedly situations where a public hearing of all or part of the proceedings would militate against doing justice. The family is afforded a protected constitutional status. Moreover, the right to the protection of, and strict adherence to, the application of the *in camera* rule has become the sacred cow of the family law system in Ireland.

Individual family law statutes provide that the *in camera* rule is mandatory in most family law matters.[1] Curiously, however, the *in camera* rule is not mandatory in private law children cases, although the courts are very eager to uphold the privacy of minors as permitted by the 1961 legislation.[2]

Reporting of cases

Not only are the cases heard behind closed doors, albeit with the parties to many other similar cases waiting – in the public eye – to be heard outside those doors, but the cases are generally not reported in the press. The *Child Care Act, 1991* specifically prohibits the publication or broadcast of any matter that would serve to identify a child who is the subject of care proceedings (section 31). General and specific restrictions concerning the publication of reports of judicial proceedings are contained in the *Censorship of Publications Act, 1929* (see sections 14[1] and [2]).

This latter act was amended by the *Family Law (Divorce) Act, 1996* to remove an anomalous provision permitting the reporting of identifying information about the litigants in family law proceedings. But the 1929 act still authorises the publication of law reports. As a matter of practice, identifying information is removed from law reports. The Law Reform Commission, in its 1994 consultation paper on family courts, noted that this was a matter of convention rather than law. There have been many instances where people involved in *in camera* proceedings that were reported in general terms still felt that they were in fact identified by the details contained in the reported and unreported judgments.

Breaches of the rule by litigants or the media are treated seriously. This is not to say, however, that the facts of cases heard *in camera* are never published. The facts are indeed often published, but in a manner that does not identify parties. Even in cases where the court specifically permits the publication of the details of cases heard *in camera*, it does so in a manner that respects the privacy of the litigants. For example, Laffoy J in *In the matter of an inquiry pursuant to article 40.4.2 of the constitution and in the matter of Baby A, an infant: Eastern Health Board v E, A and A* ([2000] IR 430) permitted the publication of some details that were set out in an edited version of an approved judgment in a case involving the attempted private adoption of a baby by the proprietor of an agency that ran a crisis pregnancy counselling service. Such adoptions were rendered unlawful by amendment to

the adoption legislation in 1998, and Laffoy J felt that the evidence and information contained in the approved judgment should be made public because the issues involved were truly in the public interest. She also ordered, however, that there was to be no more extensive publication than that, without the leave of the court.

Notwithstanding that order, Independent Newspapers Limited published the name of the agency involved. Consequently, the *Irish Times*, RTÉ and other representatives of the media applied for permission to publish the identity of the proprietor of the agency and his wife. They also sought to publish the names of the doctor and barrister who were involved as witnesses in the case and to whom reference was made in the judgment.

The application came before McGuinness J ([2000] IR 451), who decided that, having regard to the circumstances, it was in the public interest to allow the publication of the name of the agency but refused permission to publish the names of other people involved. She pragmatically noted that, it being in the nature of media coverage and the competition between the various branches of the media, efforts would be made to interview these individuals or efforts could be made to photograph them or members of their families. Even in the case of the print media, there could be inadvertent disclosure that could ultimately lead to the identification of the children and mothers involved. The danger of live coverage in television and radio could also result in more information coming into the public domain than had been ordained by the court. The issue was one of public curiosity rather than public interest in the real sense.

The purpose of the *in camera* hearing was to protect the interest of the welfare of the children and, by extension, of their mothers. In balancing the interaction of constitutional rights, it was not always possible to achieve a harmonious result. In the hierarchy of rights which then fall to be considered, the privacy rights and the welfare of children in *in camera* proceedings will normally come ahead of the right to freedom of expression and the right to have justice done in public. Clearly, however, in exceptional circumstances – for example, in child-abduction matters – the court may allow the publication of identifying information about a child. But there is no doubt that the norm is that information which in any way identifies a child who is the subject matter of *in camera* proceedings is treated as a contempt of court.[3]

Unresolved questions

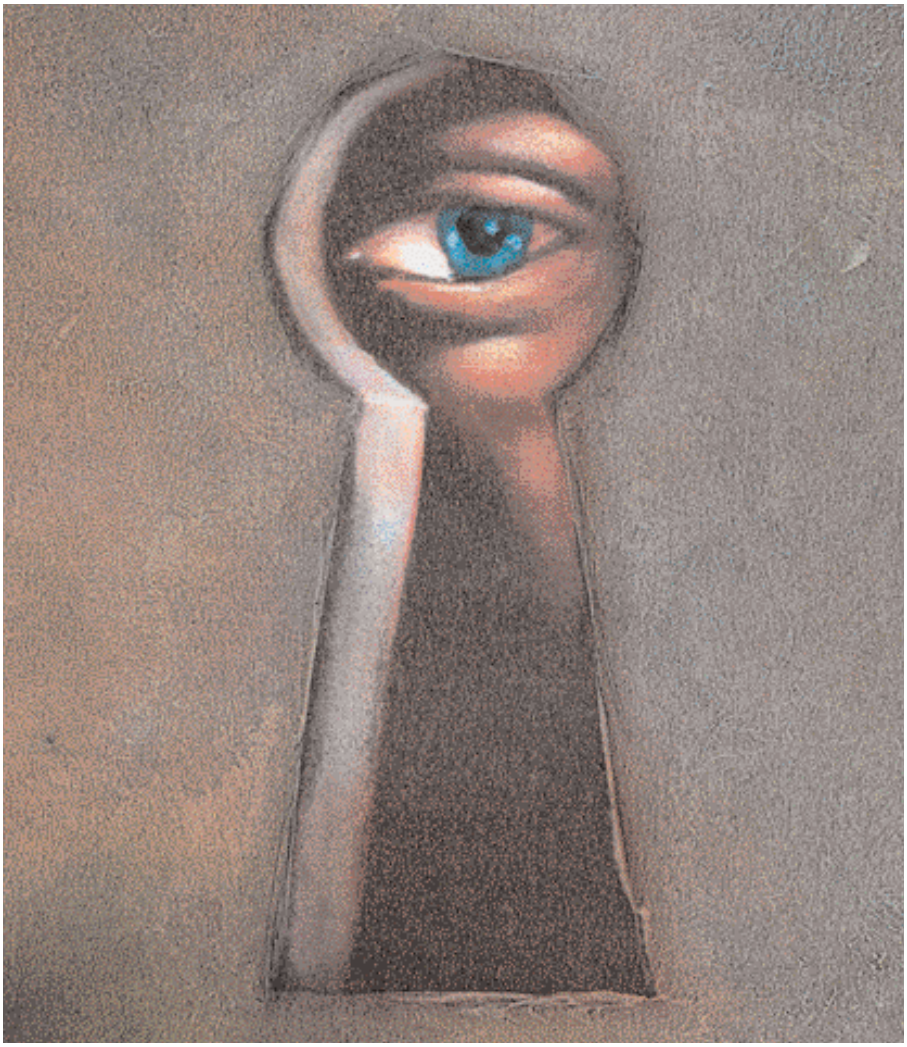
Two ancillary questions remain unclear, however. First, whether the *in camera* rule also cloaks all documents, records and information introduced into such proceedings, and, second, the question of whether the matter of professional misconduct or incompetence can be investigated in subsequent proceedings. The answer to these questions is not clear. Carney J, in the case of *People (DPP) v WM* ([1995] 1 IR 226), took the view that the *in camera* nature of the proceedings under the *Punishment of Incest Act 1908* meant that the court was precluded from giving the Eastern Health Board information necessary to institute civil proceedings to protect children who might be at risk and in need of care and protection by virtue of the conviction of the accused.

Barr J, in the case of *Eastern Health Board v Fitness to Practice Committee of the Medical Council* ([1998] IEHC 210, [1998] 3 IR 399), adopted a more nuanced approach, expressing the opinion that even a mandatory imperative contained in family law legislation did not prevent the court from exercising a discretion to permit disclosure of protected information in circumstances where justice requires that disclosure be made. Although McGuinness J found the analysis of the issues outlined in the latter case to be both impressive and convincing,[4] the case was not followed by Murphy J in the later case of *RM v DM* ([2000] 3 IR 373). While Murphy J cited Barr J and his view that 'there is no absolute embargo on disclosure of evidence in all circumstances', he concluded that section 34 of the *Judicial Separation and Family Law Reform Act, 1989* 'made privacy mandatory in relation to all such proceedings'.

Documents and records

Morris J, in *Tesco Ireland Limited v McGrath & Anor* (unreported, High Court, 14 June 1999, [1998] no 526SP), determined that matrimonial proceedings and, perhaps, any orders made in those proceedings could not be produced to solicitors for the purchasers in a conveyancing transaction in order to establish that the conveyance was not a disposal for the purpose of defeating a claim to relief as defined by section 35 of the *Family Law Act, 1995* and in section 37 of the *Family Law (Divorce) Act, 1996*. He acknowledged that Budd J, in the case of *S(PS) v Independent Newspapers (Ireland) Limited* (unreported, High Court, 22 May 1995), referred to 'an established practice at common law recognised in England and in this jurisdiction' that permitted the dissemination of material from an *in camera* hearing. Such dissemination was discretionary where it was in the interests of justice to do so and where due and proper consideration had been given to the interests of the person or persons intended to be protected by the conduct of the proceedings *in camera*. He acknowledged that, in given circumstances, a crucial public interest such as the prosecution of a crime or the protection of vulnerable children could outweigh the importance of the *in camera* rule. That said, however, Morris J saw nothing in the conveyancing case that would indicate that the interests of justice or a crucial public interest outweighed the *in camera* status in the case. It would seem, therefore, that it remains for the Supreme Court to determine the circumstances in which the dissemination of *in camera* material will be permitted, whether the *in camera* rule is mandatory or discretionary.

It has to be said, however, that a strict interpretation of the judgment of Morris J in *Tesco Ireland Limited v McGrath & Anor* would lead to the extraordinary situation that certain orders that must



come into the public arena, such as property adjustment orders, which must be registered in the (public) registry of deeds, cannot be exhibited in family law declarations in conveyancing transactions. Similar orders would, for example, be those dispensing with the consent of a spouse for the sale of a family home. Clearly these would have to be produced to purchasers of that property. There are many other orders in family law proceedings that by statutory authority, or simple necessity, reach the public eye. It is unlikely that Morris J intended his judgment to be construed so strictly.

The approach adopted by Morris J was followed by Murphy J in the later case of *RM v DM*. Murphy J concluded that there was an absolute embargo on the production of information which derived from, or was introduced in, proceedings protected by a mandatory *in camera* requirement such as section 34 of the *Judicial Separation and Family Law Reform Act, 1989*.

European convention on human rights

Of special significance when discussing the *in camera* rule are the relevant provisions of the *European convention on human rights and fundamental freedoms*, the incorporation of which into Irish law is to be by way of statute. In *Werner v Austria* (judgment of 24 November 1997), the European Court of Human Rights stated that 'the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of article 6', save where there is 'a pressing social need' and the reasons advanced for the restriction are 'relevant and sufficient'. The right to a public hearing mirrors, of course, the explicit obligations under article 6 of the convention, but it is also a right that arises under the guarantee of freedom of expression enshrined in article 10 of the convention.

The recent decision of the ECHR in *B and P v United Kingdom* (application nos 36337 and 35974/97, judgment 27/7/2001) states that a rigid interpretation of a mandatory *in camera* rule may be in breach of the convention if it is disproportionate. This case related to two fathers who wanted their residence applications concerning their sons to be heard in public, with a public pronouncement of the judgment. They pleaded breach of articles 6 and 10 of the convention. The court noted the existence of a judicial discretion in English domestic law to hear *Children Act* proceedings in public, if merited by the special features of the case. As both cases were routine and 'run-of-the-mill' in their nature, the hearings *in camera* did not give rise to a violation of article 6.1 of the convention. Neither was there a breach of article 10 that the fathers could not share information revealed in the cases with others, as the restrictions imposed were to protect the rights of others, to prevent the disclosure of information received in confidence and to maintain the authority of the judiciary. The restriction of disclosure was proportionate to these aims.

Life through a lens

Ireland now has a complex and sophisticated matrimonial law regime with a very wide degree of judicial discretion. Separation and divorce are life-events for many couples and their children. The manner in which judicial discretion is exercised within that regime is of vital importance to society. Indeed, society is now far more open than it was ten or 20 years ago.

Supporters of the privacy rule argue that it gives the widest possible protection and assistance to the family and children's rights within the family. Victims of domestic violence would be inhibited in seeking protection if they had to run the gauntlet of publicity in seeking a remedy from the courts. Publicity, and the threat of publicity, could affect the dynamics of some disputes and be used as a tactic in negotiations to the detriment of the vulnerable party and the children of the marriage. This may inhibit access to justice as well as justice as between the parties to the litigation.

The dangers of misinformation and inaccurate and unfair reporting would outweigh the benefits of permitting the publication of identifying information. The Joint Committee on Marriage Breakdown in its 1985 report noted this danger: 'the reason why family law proceedings are dealt with in private is that frequently evidence in the case refers to personal and intimate aspects of the parties' lifestyles, and if such

matters were dealt with in open court many who have a just cause of action may be deterred from proceeding further'.[5]

Critics of the privacy rule argue that it prevents public scrutiny of the family law process and prevents proper and healthy discussion on political and moral issues that are of seminal importance to society. In this regard, the observations of the joint committee should be noted: 'public scrutiny is the natural enemy of arbitrariness and injustice in a legal system. Our courts, while hearing family cases, have operated without this salutary check. When decisions are made in private, members of the general public can often misunderstand what takes place in the court. This can diminish confidence in the fairness of the administration of justice in this particular field'.

The Law Reform Commission, in its 1994 consultation paper on the family courts, adopts a similar approach: 'it is increasingly recognised that the absence of any opportunities for external scrutiny of family proceedings, even if it does not in fact affect the quality and consistency of judicial behaviour, creates an unhealthy atmosphere in which anecdote, rumour and myth inform the public's understanding of what goes on in the family court' (paragraph 7.09).

The perceived unequal struggle of fathers to maintain custody or contact with their children after separation or divorce is seen by some as compounded by the unfairness surrounding the hearing of such cases in private. Other groups make similar arguments in relation to the perceived plight of custodial mothers forced to work outside the home or rely on the state for support in the wake of separation and divorce. While 'public policy' may be 'a very unruly horse',[6] the development of 'public policy' on such personal and nuanced family law issues is clearly impeded, if not rendered impossible, by the lack of informed debate. On the other hand, one must ask whether the blanket removal of the privacy rule from these cases would in fact improve the level of debate or merely cloud the issues further.

The Courts Service annual report for the year 2000 provides a very welcome glimpse into the operation of the courts. However, the statistics furnished fall far short of the detail needed to engage in any but the most basic analysis. In an *in camera* system, which is an exception to the general rule of 'open justice', a much more detailed analysis of the case statistics is surely merited and necessary. The significant element of judicial discretion in the area of family law and the absence of reasoned judgments explaining the exercise of that discretion can result in a lack of public confidence in the system. The absence of strict formality and relaxation of the rules of evidence can also lead an unsuccessful litigant to feel hard done by.

The fact that the 'best interests of the child' test is applied over the rights or wrongs of the parties in dispute can be lost on a litigant rooted in the adversarial system. The common response is a desire to shine the light of public opinion on the court and court process and the other parent or health board.

Reform of this area will require walking a very measured and narrow path, with sensitivity to the arguments on both sides of the debate and with careful regard to the constitutional and convention rights of all the parties involved. G

Rosemary Horgan, Brian Gallagher and Geoffrey Shannon are members of the Law Society's Law Reform Committee. Please return the questionnaire on the opposite page to Geoffrey Shannon, Law Reform Committee, Law Society of Ireland, Blackhall Place, Dublin 7.

'In the hierarchy of rights, the privacy rights and the welfare of children in in camera proceedings will normally come ahead of the right to freedom of expression and the right to have justice done in public'

Footnotes

1 See section 34 of the *Judicial Separation and Family Law Reform Act, 1989*; section 38(5) of the *Family Law (Divorce) Act, 1996*; section 25(1) and (2) of the *Family Law (Maintenance of Spouses and Children) Act, 1976*; section 29 of the *Child Care Act, 1991*; section 38(6) of the *Family Law Act, 1995*; and section 16(1) of the *Domestic Violence Act, 1996*. There is no mandatory provision in the *Guardianship of Infants Act, 1964-1997* or the *Family Home Protection Act, 1976*. That said, the discretionary provision of section 45 of the 1961 act applies to such applications.

2 See *RM v DM & Ors* ([2000] 3 IR 373), which distinguished the decision of Laffoy J in *MP v AP (Practice:* in camera*)* ([1996] 1 IR 144) and the decision of Barr J in *Eastern Health Board v Fitness to Practice Committee* ([1998] 3 IR 399) on the basis that the former related to matrimonial proceedings, which are by statute subject to mandatory *in camera* practice, and the latter case where the rule was not mandatory but motivated by the need to provide protection for minors from harmful publicity. In this category of case, the paramount consideration is to do justice. See also *Attorney General v X and Another* ([1992] 1 IR 1), where it was determined that the interests of justice and the dominant welfare of the first-named defendant, in particular, required that the proceedings should be heard *in camera*.

3 See *Maguire v Drury* ([1995] 1 ILRM 108), where O'Hanlon J required the deletion from an article of all material taken from the hearing of judicial separation proceedings, but otherwise permitted the publication of a newspaper article on the question generally.

4 *In the matter of an inquiry pursuant to article 40.4.2 of the constitution and in the matter of Baby A, an infant: Eastern Health Board, applicant, v E, A and A, respondents (no 2)*, p454.

5 See the *Report of the Joint Committee on Marriage Breakdown* (March 1985). See also the submission by the National Women's Justice Coalition to the attorney general's department in relation to the *Report on publicity in family law cases: proposals for amendments to the* Family Law Act – *section 121* (submission dated 8 August 1997) at *www.nwjc.org.au/publicity.html*.

6 *Richardson v Mellish* ([1824] 2 Bing 229; 130 ER 294).

The *in camera* rule in family law proceedings

QUESTIONNAIRE

Please return this questionnaire, or a photocopy of it, to Geoffrey Shannon, Law Reform Committee, Law Society of Ireland, Blackhall Place, Dublin 7.

1. How aware are you of the legal implications of the *in camera* rule in relation to family law proceedings?

Aware ☐ Reasonably aware ☐ Not aware ☐

2. Are your clients advised with regard to the implications of the *in camera* rule?

Always ☐ Sometimes ☐ Never ☐

3. Are clients concerned about the privacy of their family law proceedings as a main issue?

Frequently ☐ Sometimes ☐ Never ☐

4. Are clients critical of some aspects of the *in camera* rule?

Frequently ☐ Sometimes ☐ Never ☐

5. Do issues of breach of the *in camera* rule arise in the general context of correspondence in relation to family law proceedings?

Frequently ☐ Sometimes ☐ Never ☐

6. Have you ever sought leave of the court to release documents from an *in camera* family law hearing:

a) For the purposes of a criminal law prosecution? ☐

b) For the purposes of a referral to a professional enquiry? ☐

c) For referral to the Revenue Commissioners? ☐

d) For referral to a health board in connection with an allegation of child sexual abuse? ☐

7. What practical difficulties have arisen for you as a legal practitioner in relation to the *in camera* rule in matters of:

a) Conveyancing? _____

_____

_____

b) Probate? _____

_____

_____

c) Tax? _____

_____

_____

d) Other? _____

_____

_____

8. Is leave of the court generally sought in respect of the provision of extract family law court orders made by the court?

Frequently ☐ Sometimes ☐ Never ☐

9. Do you feel that there is a need for change in the *in camera* rule as currently interpreted in family law cases?

Total change ☐ Limited change ☐ No change ☐

10. What is your view on the presence of a court recorder in court for the purposes of reporting family law cases but preserving the anonymity of the parties involved?

Should always be available ☐

On a pilot project ☐

Should never be available ☐

11. Do you, as a practitioner, fully understand the publication restrictions arising from the current interpretation of the *in camera* rule?

Yes ☐ Generally ☐ No ☐

12. Please provide any personal comments on:

a) The desirability or otherwise of reform in this area

_____

_____

_____

_____

_____

b) Discriminatory elements of existing law

_____

_____

_____

_____

_____

c) Any general personal comments in relation to this issue

_____

_____

_____

_____

_____

_____

No reservations

Keeping up-to-date with court decisions is a full-time job, says Conor O'Mahony, so the establishment of a new register of reserved judgments is a welcome development

MAIN POINTS

- *Courts and Court Officers Act, 2002*
- Register of reserved judgments
- Access to judgments to be made easier

The court judgments that comprise a substantial part of the law are so numerous that it is next to impossible to keep track of them. Until recently, there was simply no alternative to sifting through volumes of hard-copy reports and stacks of loose-leaf unreported judgments – a process which, by its very nature, lent itself to errors and omissions.

The advent of electronic databases and the Internet have improved matters by making it possible for lawyers to call up hundreds of relevant cases at the touch of a button. However, such resources share a difficulty with traditional libraries: they have no way of accurately establishing how complete or otherwise their holdings are, since no publicly-available official index of reserved judgments exists. Consequently, it is impossible for even the most diligent and meticulous practitioner, through no fault of his own, to stay informed of all new developments.

Curious omission

Section 46 of the *Courts and Court Officers Act, 2002* is therefore to be regarded as a highly welcome development. Sub-section 1 places a statutory duty on the Courts Service to 'establish and maintain in the prescribed form and manner a register of every judgment reserved by the Supreme Court, the High Court, the Circuit Court and the District Court in any civil proceedings, to be known as the register of reserved judgments'. Curiously, the Court of Criminal Appeal has been omitted from the provision. Sub-section 7 entitles any person, upon the payment of a fee, to inspect and obtain a certified copy of any entry or entries in the register. Sub-sections 3 and 4 provide for the prescription of time limits on the delivery of reserved judgments.

The register has its foundations in the proposed incorporation into Irish law of the *European convention on human rights* and two cases in which complaints were brought against Ireland under article 6(1) of the convention in relation to delay in the issue of reserved judgments (application nos 28995/95, *Flattery v Ireland*, 8/7/98 and 50389/99, *Doran v Ireland*, 28/2/02). According to the former minister for justice, John O'Donoghue, section 46 is intended as a monitoring provision that will help to secure the legitimate expectation of litigants that judgment in their cases will be delivered within a reasonable timeframe.

The establishment of this register should, if properly run and availed of, enable librarians and providers of electronic databases alike to accurately establish what gaps they have in their system and consequently provide a more comprehensive service. This will have a positive effect on the ability of practitioners to become aware of new developments and to properly research an area of law, thereby enhancing their ability to represent their clients. Brendan Howlin TD recognised this fact in the Dáil on 26 March 2002, when he stated that the register would 'facilitate the administration of justice through access to judgments by practising lawyers but also by members of the public, where appropriate'.

The administrative details of the register are currently being drawn up in a consultative process between, among others, the Department of Justice and the Courts Service. It is hoped that these will be given effect in a statutory instrument by the end of the year. G

Conor O'Mahony is project co-ordinator of BAILII at University College, Cork.

The Irish Legal Information Initiative (*www.irlii.org*), a sister site of BAILII (*www.bailii.org*), currently provides, among other free services, an index of decisions of the High Court, Supreme Court and Court of Criminal Appeal from 1997 to the present, including citations of reported cases and links to the full text of decisions which are available on BAILII. The IRLII index of cases is updated regularly and is fully searchable. Log on to *www.index.irlii.org*.

Hail to the CHIEF

On 3 December last, the chief prosecution solicitor was formally appointed as the solicitor to the director of public prosecutions, taking over from the chief state solicitor. So what will the new position entail? The DPP's office explains

Claire Loftus, the newly-appointed chief prosecution solicitor, was selected for the post in November 2000, having worked in the criminal division of the Chief State Solicitor's Office since 1993. The movement of all operational staff working on behalf of the director to his office was one of the central recommendations contained in the report of the Public Prosecution Systems Study Group, chaired by Dermot Nally, former secretary to the government.

The stated objectives of the recommendations, as they applied to the DPP's office, were:

- The greater cohesion of the prosecution service under the DPP and the elimination of 'waste and duplication'
- Greater consistency in implementing the DPP's decisions
- Greater transparency in the operation of the office, which has been achieved through the publication of an annual report and the *Statement of general guidelines for prosecutions*, and
- The possible delegation of some decision-making powers to the professional officers in the solicitor division and, in due course, to the state solicitors.

Implementation involved the transfer of a group of staff previously dealing with criminal prosecutions in the Chief State Solicitor's Office. A significant number of additional staff will be recruited this year.

On 11 May 2002, the office of the chief prosecution solicitor was formally launched at a reception following the third annual prosecutors' conference in the Royal Hospital Kilmainham. Members of the judiciary, the bar and other invited guests attended. Dermot Nally, as the chairman of the study group, addressed the reception. In his remarks, he expressed satisfaction that an anomaly which had existed since the creation of the Office of the Director of Public Prosecutions had been rectified. He went on to say that, as an architect of the Top Level Appointments Committee system in the civil service, he felt strongly that there should be maximum freedom of movement of legal staff between departments in the civil service.

In her address to the reception, the Chief Prosecution Solicitor, Claire Loftus, said that the re-organisation had already resulted in greater interaction between directing and operational staff within the DPP's office. It had, for example, allowed for shared IT databases, which have speeded up communication. She also said that she intended to carry out a review of the structure of the legal departments in her division with a view to creating more manageable units.

Ms Loftus added that the re-organisation represented an opportunity to review the relationship of the DPP's staff with the various groups that they deal with on a daily basis. These include the Courts Service, the Garda Síochána, victims, professional witnesses and defence solicitors. She aims to improve communications and working relationships with all of these players in the criminal justice system, and this forms a major part of the strategy of the office for the years ahead.

Another important recommendation in the report proposed that the state solicitor service for the entire country would be transferred from the attorney general to the DPP. Most of the work of state solicitors is in fact carried out on behalf of the director. It is hoped that the legislation to effect this transfer will be introduced soon. G

Chief Prosecution Solicitor Claire Loftus with James Hamilton, director of public prosecutions, and Dermot Nally, chair of the Public Prosecution Systems Study Group

MAIN POINTS

- **Establishment of the Office of the Chief Prosecution Solicitor**
- **Report of the Public Prosecution Systems Study Group**
- **Re-organisation of DPP's office**

This article was prepared by the communications and development unit in the Office of the Director of Public Prosecutions.

Key Issues in Planning and Environmental

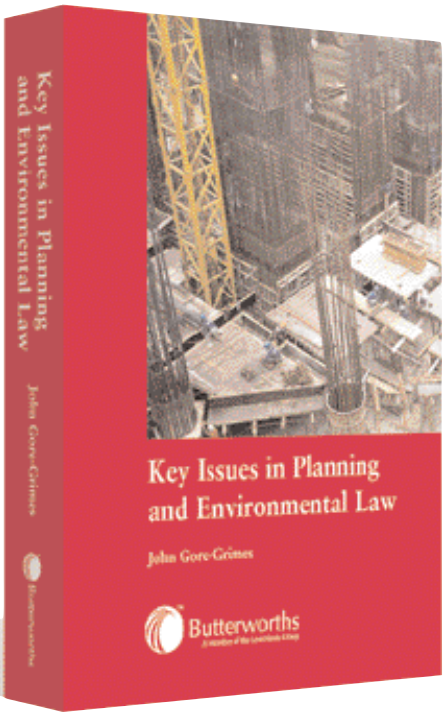
John Gore-Grimes (BA, LLB, FCI Arb)

This essential new book explores in detail all the key terms that are in everyday use in planning and environmental law. Detailing what the terms mean, where they originate and whether they have been interpreted by the courts in any case, this book will prove invaluable. Written in a practical, easy to read style it explains complex concepts clearly and concisely in a straightforward language giving you a definite understanding of your area of expertise.

Key Issues in Planning and Environmental Law will prove to be an ideal purchase for legal practitioners, especially property lawyers, planning officials, architects, town planners, engineers, auctioneers, property developers, students, academics and others interested in planning law issues.

New Regulations covered

Key Issues in Planning and Environmental Law will cover the far-reaching Planning and Development Act 2000 and Regulations 2001.



Butterworths™
A Member of the LexisNexis Group

Your Priority Order Form

1. Order Details

(Qty)	Title	ISBN	Product Code	Unit Price	Total
	Key Issues in Planning and Environmental Law			£100.00	

Orders are subject to a charge of £7.40

Total amount due £

2. Confirm Delivery Details

Delivery details

E-mail .....

Name .....

Job Title .....

Company .....

Address .....

.....

Postcode .....

Tel .....

3. Make Payment Choice

Using my:

Butterworths account, no. .....

or by credit card as follows: ☐ Mastercard ☐ Amex ☐ Visa

My credit card no. is .....

and its expiry date is .....

or with the attached cheque for £ ..... (made payable to Butterworths)

My VAT registration no. is .....

☐ Please supply the above with a 21 day money back

4. Return Your Order

Post

Matthew Rowe Butterworths
Dept AA579 PO Box 4214 Freepost Dublin 2

Phone

Please phone Customer Services on: (01)873 1555

Fax

Please fax your order to: 0044 20 7400 2570

E-mail

Please e-mail your order to: order.line@butterworths.com with details of goods required, delivery address, customer account number or credit card number, issuer and expiry

Area Managers

Madeleine Roche Tel/fax: (01) 840 0638 Mobile: 087 2597659

Toni Ryder Tel/fax: (01) 288 4005 Mobile: 087 2566793

Gerry McCallion Tel +44 (28) 9077 1254

21 Day Money Back

The book mentioned in this advert is available on 21 days money back guarantee. This allows you to try it out and assess its usefulness before buying. If you should decide not to purchase the book, simply return it to us in good condition and your invoice will be

Editorial Enquiries
If you are interested in writing for Butterworths Ireland, please call Louise Leavy on (01) 872 8514 [law]

All orders placed with Butterworths are subject to our standard terms of trade, available on request and with the invoice

The book detailed in this advert is intended to be a general reference guide to the law and cannot be a substitute for legal advice

☐ We like to keep our customers informed of other relevant books, journals and information services produced by Butterworths or by companies approved by Butterworths. If you do not wish to receive

• Thank you for your order, prices are subject to change without notice.

Butterworths™
A Member of the LexisNexis Group
Butterworths (Ireland) Limited is a division of Reed Elsevier (UK) Ltd

butterworths.ie

A182

Book reviews

Waste management legislation

Dónall Ó Laoire. Round Hall Sweet & Maxwell (2001), 43 Fitzwilliam Place, Dublin 2. ISBN: 1-85800-260-5. Price: €90.

The recent alarming discovery of so many illegal dumps in so many areas of Ireland raises the spectre of this once unspoilt island sinking under the weight of its own reckless consumption. We may be thankful to the EU, whose stream of environmental edicts requires us to remain green when, through laziness or avarice, we seem tempted to mortgage our children's inheritance for the sake of the now.

Enter, thankfully, Dónall Ó Laoire, whose book is a timely production that succeeds in the daunting task of bringing together the two *Waste Management Acts* (1996 and 2001), 23 ministerial orders and regulations made thereunder, as well as regulations from 1993 to 2001 made pursuant to other acts of the Oireachtas and in order to give effect to various EU directives and decisions. The *Waste Management Acts* are included in full, with detailed helpful notes and cross-references to the relevant statutory instruments (also included in full) and with notes and references to numerous other statutes, to cases (reported and unreported) and to journal articles relevant to this tangled subject.

The book will be an invaluable help to environmentalists and to practitioners struggling to retain a grip on the shifting wall of legislation designed to control our rising tide of waste. An unwieldy web of material has been rendered accessible by means of an exceptionally coherent index.

This is a book for our time: a valuable reference for anyone practising in the area of environmental law and the essential guide to an almost impossible terrain. G

Anthony Brady is a solicitor and a member of the Law Society's Technology Committee.

Map of District and Magistrates' Courts of Ireland 2002

Des Fitzgerald, solicitor, Barna, Co Galway. Price: €70.

It is unusual to be asked to review a map rather than a book. But then this is no ordinary map. It is a map of the 32 counties of Ireland, showing the exact boundary divisions of each District Court area. As such, it will be an invaluable tool for any solicitor who struggles to be certain as to the area in which to commence proceedings.

The 'author' of this work is a recently-qualified solicitor, Des Fitzgerald, who has set up in practice in Barna, Co Galway. He has spent the last six months researching his project, having discovered that there was no map of the country's District Court system. Having examined statutory instrument 5 of 1961, he discovered that many of the District Courts listed were no longer operating, so he needed to get precise, up-to-date information as to the present District Court areas and the courts sitting in each.

This painstaking labour has produced a work of art. The map clearly sets out each of the 23 District Court areas in the Republic of Ireland, and shows the court venues into which each area is divided.

The map is in a laminated finish, ideal for framing and hanging on your office wall. Each District Court area is coloured distinctly. There is also a complete alphabetical index of all towns where the District Court sits, with grid references for each.

Des Fitzgerald is to be commended for the enthusiasm and commitment with which he has completed his task. A work of this kind can become an obsession, but there is no doubt that his map will be invaluable for the practitioners of this jurisdiction, and also for our colleagues in Northern Ireland, who for the first time can hang on their office wall a solution to the age-old problem of trying to determine with certainty the correct area and court for proceedings. G

Mr Justice Michael Peart is a recently-appointed High Court judge and a member of the Law Society's Council.

Civil procedure in the superior courts

Hilary Delany and Declan McGrath. Round Hall Sweet & Maxwell (2001), 43 Fitzwilliam Place, Dublin 2. ISBN: 1-85800-241-9. Price: €195.

Once again, Round Hall Sweet & Maxwell has published a book that will stand the test of time and be an invaluable reference point for any solicitor or barrister practising in the superior courts.

Hilary Delany and Declan McGrath have contributed a fine book to the shelves of the office library. In their preface, the authors acknowledge the fact that O'Floinn and Gannon's *Practice and procedure in the superior courts* provides an invaluable resource to the practitioner, as indeed it does.

But this work goes further than being an annotated *Rules of the superior courts*. In textbook form, it sets out the relevant procedures and guiding principles behind everything that takes place between the commencement of proceedings and their conclusion.

In recent years, there has been a great deal of case law dealing with procedural matters as opposed to substantive law. For example, in the area of discovery of documents, many developments have occurred. These are covered in great detail over some 170 pages. The text is sufficiently up-to-date to deal with the important case of *Swords v Western Proteins Limited* ([2001] 1 ILRM 481). This case decided that a strict application of the provisions of SI 233/1999 was required if the purpose of the instrument was to be achieved, namely a reduction in the number of discovery applications coming before the courts. Accordingly, it is vital for solicitors that great care be taken in the drafting of the required letter seeking voluntary discovery, before any motion for discovery is issued. The consequence of failure to observe strictly the requirements of SI 233/1999 will result in the motion being struck out, presumably with costs being awarded to the notice party.

Another important subject which is dealt with is the introduction of new disclosure rules in personal injury cases, by virtue of SI 391 of 1998. Already there has been a Supreme Court decision in relation to whether a report by an 'in-house' expert, as opposed to an independent expert, is covered by the requirements of disclosure under the SI. This is a judgment of Murphy J in *Galvin v Murray* ([2001] 2 ILRM 234). The answer was that such a report does not lose its status as an expert report simply because its author is an in-house expert.

All other areas of practice and procedure are comprehensively covered, with up-to-date relevant case law referred to and discussed.

It was sometimes, perhaps often, difficult to find a particular rule that one was looking for in the 1986 version of the *Rules of the superior courts*, as the indexing is somewhat difficult to navigate. If a book of this kind is to be used constantly, as indeed it will, it is vital for the practitioner that it is easy to find the information required. The quality, therefore, of the index and table of contents plays a very important role in the popularity of a book such as this. The authors and the publishers must be congratulated on the quality of the table of contents and index in this publication. They are truly first class, as is the standard of production generally. This is definitely a 'must buy' book for any serious litigator or student. G

Mr Justice Michael Peart is a recently-appointed High Court judge and a member of the Law Society's Council.

Consolidated *Circuit Court Rules*: practice and procedure

Margaret Cordial BL. Round Hall Sweet & Maxwell (2001), 43 Fitzwilliam Place, Dublin 2. ISBN: 1-85800-226-5. Price: €565.

The *Circuit Court Rules 2001* came into operation on 3 December 2001. Prior to that, practitioners in the Circuit Court operated by reference to the *Circuit Court Rules 1950*, which had been amended and added to from time to time since that date. In his foreword to this volume, the President of the Circuit Court, Judge Esmond Smyth, refers to the fact that since the introduction of the 1950 rules, no less than 62 statutory instruments have been made adding new rules.

The new rules now provide, within one volume, the totality of the rules of court now applicable in the Circuit Court. That in itself is of enormous benefit. But reading the rules themselves is never sufficient, and is certainly tedious. It is necessary also to be aware of a great number of court decisions which affect how the rules operate.

Margaret Cordial and Round Hall Sweet & Maxwell have produced, with admirable speed, a loose-leaf volume that guides the practitioner through the new rules for the Circuit Court, in much the same way as O'Floinn and Gannon's *Practice and procedure in the superior courts* does for the High and Supreme Courts.

This volume not only sets out the rules themselves, but also discusses and explains them in a clear and informative way and deals with all the relevant case law. It also identifies which rules are new, such as the introduction of a voluntary discovery procedure prior to bringing a motion for discovery, procedures for non-party discovery, and interrogatories. The new third party procedures under order 7 are commented upon and explained in great detail, and this will be most useful.

Another innovation is order 15, rule 21, relating to the 'offer of payment in lieu of lodgment' procedure available to a 'qualified party'. This rule mirrors the similar procedure introduced into the *Rules of the superior courts* by SI 328/2000.

Practitioners in the area of landlord and tenant law will find a most detailed chapter dealing with order 51, which relates to proceedings under this heading. In particular, the 1950 rules contained no rules governing procedures under the *Landlord and Tenant (Amendment) Act, 1980* or the amendments made to that act by the *Landlord and Tenant (Amendment) Act, 1994*.

Practitioners in the area of family law will be greatly assisted by the author's commentaries on the rules in order 59, dealing with such matters as declarations of parentage, blood tests where parentage is at issue, foreign divorces, applications for maintenance, and domestic violence.

There is no doubt that practitioners will find this volume indispensable as a reference point. In the past, it was never possible to conveniently research matters relating to procedure. This volume is well researched and written in clear and concise language. It will appeal to solicitors and barristers alike, and no doubt students will also benefit greatly from this scholarly work. I recommend it unreservedly. G

Mr Justice Michael Peart is a recently-appointed High Court judge and a member of the Law Society's Council.

Construction and building law

James Canny. Round Hall Sweet & Maxwell (2001), 43 Fitzwilliam Place, Dublin 2. ISBN: 1-85800-225-7. Price: €100.

James Canny's book is an essential practitioners' guide. The first three chapters deal with contracts for land, building contracts and building agreements. At once, it can be seen that Mr Canny presents his text in a user-friendly and easily understandable way. The basic principles are clearly stated and from reading these chapters I realised just how easy it is to forget essential matters of contract law that conveyancers use in everyday practice.

Mr Canny's book deals with the law that was substantially in effect on 1 April 2001. In dealing with building contracts, it does not take account of the judgment delivered on 5 December 2001 in the High Court in the matter of an application pursuant to regulation 8(1) of the *European Communities (Unfair Terms in Contracts) Regulations*. Mr Justice Kearns did not have any difficulty in granting the order sought by the Director of Consumer Affairs, Carmel Foley, and in declaring that the 15 sample terms submitted were both unfair and in breach of the regulations.

The EU rules on tendering and public procurement are concisely set out in chapter 5. For solicitors such as myself, who qualified light-years before council directive 93/97, when public procurement became effective in Ireland, this is a most valuable chapter. An example of discrimination in the area of public procurement is cited in the case of *Commission of the EC v Ireland* (case 45/87 [1986] ECR 4929), where Ireland was held to have acted in a discriminatory manner by refusing to allow products included in a tender that conformed with national standards of other member states but did not conform with Irish national standards. Effectively, Ireland was trying to guarantee that only Irish products would be used.

The whole subject can be extremely complex, but Mr Canny's book has clearly summarised the ground rules dealing with the principles of European legislation that have been incorporated into Irish law. Council directive 93/97, public procurement, advertising requirements, the procedure for tendering, time limits, criteria for selection, technical ability and financial standing, and criteria for award of contracts are all explained. If, like me, these headings are unfamiliar territory, you will find these paragraphs invaluable in getting to grips with the rules of tendering and public procurement. Having read chapter 5, I have developed a new confidence in a subject which I had always considered to be well beyond me.

There is a short chapter on new house grants which explains the system which solicitors sometimes leave to the clients to deal with as between builders and the DoE. The grant is €3,810, or €12,110 for new dwellings situated on certain islands in the south and west coasts of Ireland. Mr Canny points out that 'the grant is sometimes referred to as a first-time buyers' grant; however, this is not strictly correct, as the applicant need not be a first-time buyer of property in the strict sense. The applicant may have purchased other property but may not have bought them for their own occupation'.

Once again, having read this chapter, I would feel much happier about giving advice to clients on new house grants.

The question of negligence and builders is well set out and covers many familiar topics and many more of which it is good to be reminded. The same comment applies to builders' and occupiers' liability.

Chapter 11 is the longest chapter in the book and deals with safety, health and welfare at work. Many solicitors, other than the few specialists on this topic, will have a fairly hazy notion of the concepts defined by the act of 1989. The timing of this chapter is excellent, and it coincides with a genuine attempt on the part of inspectors appointed by the Health and Safety Authority to enforce the provisions of the act and the regulations made under it. The 1993 regulations are comprehensively covered, as are the *Safety of Workplaces* and the *Safety, Health and Welfare at Work (Construction) Regulations 1995*. The latter regulations implement council directive 92/85 EEC, dealing with minimum safety and health requirements at temporary or mobile sites. Asbestos claims are now commonplace, and the summary of the *European Community (Protection of Workers) (Exposure to Asbestos) (Amendment) Regulations 1989 to 1993* give the reader an invaluable understanding of the law dealing with the protection of workers from risk related to exposure to asbestos. The same remarks apply to paragraphs 19 and 20, dealing respectively with the *Safety, Health and Welfare at Work (Carcinogens) Regulations 1993* and regulations made for the protection of children and young persons in 1998.

From my perspective, the chapter dealing with safety, health and welfare at work is the most valuable. Too often we are inclined to leave this subject to architects, but James Canny's clear writing on the subject will be of great assistance to solicitors.

The *Building Control Act, 1990* is well covered, with clear explanations of old friends such as commencement notice and fire safety certificates. Some of the regulations made under the act are also usefully summarised.

The final chapter deals with planning and development in relation to builders. At the time the book went to press, not all of the *Planning and Development Act, 2000*, which replaces the nine planning acts of 1963 to 1969, had been commenced. This has now happened since 11 March 2002, with the exception of section 239 – dealing with certificates of safety for fairgrounds and so on – and section 261, which is a controversial section dealing with quarries. The final chapter deals with the provisions of the 2000 act from a builder's point of view. The sections referred to have been commenced without any alteration since Mr Canny's cut-off date of 1 April 2001, and the information is completely valid except in relation to control of quarries, in respect of which section 261 has not yet been commenced and may indeed undergo some change if the quarry operators' lobby have their way.

Some reference is made to planning regulations. While in many cases there has been no change, it should be pointed out that the *Planning and Development Regulations 2001* were published on 19 December 2001, although copies were not available for some time after that. The 2001 regulations comprehensively replace all existing planning regulations and have been fully in force since 11 March 2002.

I fully endorse this book as a work that should be placed on the bookshelves of solicitors, builders, architects, developers and other people with an interest in this field. G

John Gore-Grimes is a partner in the Dublin law firm Gore & Grimes.

Davy
STOCKBROKERS

Property or equities: which is best?

The equities bubble has burst and property may seem a more attractive investment option right now, but Robbie Kelleher argues that the choice is not as clear-cut as it seems

Robbie Kelleher: 'House prices in Ireland are now in line with the trendiest cities in the world'

Few investors will need reminding of the scale of the losses that have been incurred in equity markets over the past couple of years. The main benchmark indices in both Europe and the US have fallen by about 40% over this period and losses in high-profile tech companies have been very much greater. One of the side effects of these declines is that it has re-opened the debate on the merits of investing in different types of asset classes – property versus equities in particular.

An obvious starting point is to compare how the two asset classes have performed in the past, although it is not possible to do so in as comprehensive a way as one might wish. Data on equities goes back hundreds of years and is available across a range of markets and sectors. Overall equity indices are comprehensive and transparent. Because of the liquidity in the markets, one knows – all day, every trading day – exactly how much one's equity holdings are worth. Not so for property: returns are typically calculated using a portfolio of specific properties and values are based on estimates rather than actual transactions.

Bricks and mortar

For Ireland, the most comprehensive index of commercial property values is the SCS/IPD index and it dates back to 1982. In the intervening 20 years, values have increased just over tenfold. A £30,000 (we will stick to the 'old money') investment would now be worth £300,000. That is a pretty good return by any standards. It equates to almost 13% a year over a period when overall price inflation was just over 3%. Overall price levels in the economy at large have only doubled in the 20-year period.

In recent times, the focus of many investors has been on residential property rather than commercial. Data on house prices is available from the Department of Enterprise and Employment and goes back as far as 1984. In that year, the average price of a second-hand house in Ireland was £35,600; last year the average price had risen to £162,300. That represents a return that would have been very much inferior to commercial property but, nevertheless, well ahead of general inflation.

Painless dividends

But however attractive these returns from property appear, they pale into insignificance when compared with equities, even after the recent shake-out in markets. Over that period, a typical portfolio of Irish equities has appreciated more than thirtyfold, the equivalent of almost 19% a year.

A £30,000 investment 20 years ago would now be worth more than £900,000. A real live example is the Bank of Ireland. Some 20 years ago, the stock was trading at the equivalent of around 30 cent; today it is trading at approximately €12, an increase of more than fortyfold. The income generated annually from dividends now exceeds the original capital investment. Moreover, this income comes painlessly in the post twice a year and carries none of the costs and risks associated with rental income from property.

Looking back over the last 20 years, therefore, there is no disputing what the best investment has been. A £30,000 investment in a house would now be worth about £150,000, a commercial property portfolio would be worth about £300,000, but an equity portfolio would be valued not far from £1 million.

Rates of return

But the past is not necessarily a good guide to the future. One must also take cognisance of the relative rates of return currently on offer. For this purpose, let us go back to the Bank of Ireland again. It is currently trading at approximately €12 and it is estimated that the bank will generate post-tax profits of the equivalent to 112 cent per share this year. That is an after-tax return on your behalf of 9.3%. Moreover, unless one is particularly gloomy on prospects for the economy, it is highly likely that these profits will grow over time and this will enhance the initial return even further.

In contrast, the initial yield on a good quality office block is only about 6% and, given the large quantities of unlet office space in Dublin at present, it is unlikely there will be any growth in rental income for a number of years ahead.

Bubbling under

Valuations in the residential property market seem even more daunting. Gross rental yields here are only about 5% and that takes no account of maintenance and other associated costs or the risks of rental default or being unable to rent the property for lengthy periods of time. Hence, in order to make the sums work, one has to believe that house prices can continue to rise at a reasonable clip. That seems a tall order. House prices in Ireland over the past five years have risen more rapidly than almost anywhere else and absolute prices per square foot are now in line with or exceed prices in some of the trendiest cities in the world.

This may well be the next asset bubble to burst. G

Robbie Kelleher is head of research with Davy Stockbrokers.

Report of Law Society Council meeting held on 17 May 2002

Motion: *Guide to professional conduct*

'That this Council approves the publication of the second Guide to professional conduct.'

Proposed: John P Shaw
Seconded: Keenan Johnson

John P Shaw said that the revised guide had been under consideration for approximately four years and had been independently considered to ensure its accuracy on the general law and its compliance with competition law. The existing guide was 14 years old and he urged that the revised guide would be published as soon as possible. The Council approved the publication of the guide.

Motion: Report on court cases

'That this Council requests the officers of the Law Society of Ireland to furnish to it (the Council) a comprehensive report on all of the issues (including costs) and the parties thereto involved in the court cases in which Mr Giles Kennedy was a plaintiff, defendant, applicant or respondent. The report to be furnished to this Council and each member thereof within 21 days from this date.'

Proposed: Patrick O'Connor
Seconded: Andrew Dillon

Following a discussion, the Council approved the following amended motion by 30 votes to 1: *'That this Council resolves (a) that the Compensation Fund Committee shall furnish to it (the Council) a comprehensive report on all of the issues in relation to the court cases involving the society and Mr Giles Kennedy following the conclusion of the case which was the subject of the Supreme Court decision in December 2001 and, in any event, as soon as practicable after it has concluded; and (b) that, until the conclusion of the case, there shall be no discussion by the Council of matters arising from the case (including by means of any correspondence about it).'*

Motion: Eligibility for membership of the Council

'In the interest of (a) the public and (b) the Law Society of Ireland and its members, this Council resolves that no person who is either a member of the Disciplinary Tribunal or is a director or employee of any financial institution (whether insurance company or otherwise) which sells or provides professional indemnity insurance to solicitors in Ireland shall be eligible to sit on, or be a member of, the Council of the Law Society of Ireland or any of its committees.'

Proposed: Patrick O'Connor
Seconded: Andrew Dillon

Patrick O'Connor said that the society consistently emphasised the independence of the Disciplinary Tribunal. Indeed, the Council regulations prevented a member of the tribunal from serving on either the registrar's or the compensation fund committees. It made sense to extend the restriction to membership of the Council. He also believed that there was a conflict between those who served as directors of the SMDF and who also served on the Council.

John P Shaw noted that the motion concerned only three or four Council members. Personally, he was happy to rely on their integrity and noted that conflicts could arise in the Council chamber at any stage and it was the duty of the Council to rely on its members to excuse themselves in such circumstances.

James MacGuill supported the proposal in relation to the Disciplinary Tribunal. In relation to board members of the SMDF, he suggested that the restriction might apply immediately in relation to the regulatory committees of the society and, for the future, in relation to membership of the Council.

Owen Binchy said that the proposal was *ultra vires* the Council. It was not within the Council's powers to place restrictions on who might serve as a Council member. Under the bye-laws, any member of the society whose name was on the roll and who was not suspended could offer themselves for election to the Council.

Keenan Johnson noted that, as both the regulatory and representative body of the solicitors' profession, every Council member faced a conflict between these two roles. So far, no problems had arisen that had not been overcome. John D Shaw said that, as drafted, the motion would mean that a member of the board of the SMDF could not serve on the PII Committee of the society, although this was required under the PII regulations. He felt the restriction should be confined to the Compensation Fund Committee and the Registrar's Committee.

Michael Irvine agreed with a restriction being placed on membership of the Compensation Fund Committee or the Registrar's Committee. However, if procedures were to be amended to prevent certain conflicts of interests within the Council itself, he queried whether other potential conflicts should also be identified and whether Council members should be required to declare their membership of the boards of any organisation. Patrick O'Connor agreed to adjourn the motion to consider the views expressed by Council members.

Personal Injuries Assessment Board

Ward McEllin updated the Council in relation to developments on the PIAB. He noted that the society was opposed to the proposal, as it introduced an extra unnecessary layer of bureaucracy and was inherently biased against claimants. However, the society also accepted that the personal injuries system would benefit from reform and he outlined a number of proposed reforms that would streamline the system and reduce costs.

The director general reported on the views of the members elicited at local bar association meetings and at a meeting of presidents and secretaries of the bar associations held on 8 May. He also outlined discussions with others involved in the courts system on various aspects of the PIAB proposal and of the society's proposed reforms.

The view was expressed that the profession was being criticised for the level of delivery costs, while it was the fault of the insurance industry that legal fees were at the level they were, as many cases should be settled much earlier. The number of motions for judgment every Monday morning was given as an example of the inefficiencies of insurers.

The Council noted that the MIAB Implementation Group had been established with a three-month time frame and all the political parties were in favour of the PIAB. It was agreed that, notwithstanding its reservations, the society should engage with the process, consider the PIAB proposals when published and advocate for meaningful changes in the existing system.

Law reform

The Council approved the recommendations of the Law Reform Committee on the *Case for reform of aspects of charity law*, which had been circulated. G

Committee reports

BUSINESS LAW

Competition law

The enactment of the *Competition Act, 2002* in April 2002 will result in significant changes in Irish competition and merger control law. The most significant changes are:

- The abolition of the regime under which undertakings notify agreements and similar arrangements to the Competition Authority for review. In future, the parties to such arrangements will have to decide for themselves (subject, ultimately, to review by the courts) whether they comply with the *Competition Act* or not
- The increase of the imprisonment penalty from three to five years for 'hard-core' offences (such as price-fixing or market-sharing cartels)
- Significant increases in the investigatory powers of the Competition Authority
- The replacement of the minister for enterprise, trade and employment by the Competition Authority as the decision-making body in relation to mergers (other than media mergers, which will remain subject to final approval by the minister).

The new regime for the review of mergers will be brought into effect towards the end of 2002. Most other provisions of the act are expected to be brought into effect during the summer.

A copy of the Law Society's submission on the *Competition Bill* is available on the Business Law Committee web page on the Law Society's website.

Communications regulation

The *Communications Regulation Act, 2002* was hurried through both houses of the Oireachtas shortly before the general election. The act:

a) Provides for the establishment of the Commission for Communications Regulation, which will take over the functions of the Office of the Director of Telecommunications Regulation. Although the commission is to be independent in the exercise of its functions, the minister may give such policy directions to the commission as he considers appropriate and the commission must comply with any such direction
b) Gives the commission extensive law enforcement powers, including powers of entry, search and seizure in relation to premises or records connected with the provision of electronic communications services, networks or associated facilities or postal services
c) Provides that a network operator shall not commence any roadworks unless he has obtained the prior written consent of the road authority in whose functional area the operator proposes to carry out the works. A network operator who fails to obtain such consent or to comply with any conditions contained in such consent is guilty of an offence and is liable to a fine not exceeding €3,000 or on conviction on indictment to a fine not exceeding €1 million
d) Provides that a network operator has the right to negotiate an agreement to share physical infrastructure with other infrastructure providers. The commission may specify the period within which negotiations on physical infrastructure sharing shall be completed. Where agreement is not reached within the specified period, the commission shall take such steps as are necessary to resolve the dispute.

The enactment of the *Communications Regulation Act, 2002* has been welcomed by the telecommunications industry and by bodies such as IBEC, which had lobbied intensively for its introduction as a necessary step towards creating a suitable regulatory environment for telecommunications infrastructure providers and network operators.

Business Law Committee

CONVEYANCING

Proposed ordnance survey annual licence fee

It is noted that the Ordnance Survey Office has, in the course of the past few weeks, issued application forms for annual copyright licences to solicitors' firms throughout the country.

The Conveyancing Committee was contacted some time ago by the Ordnance Survey Office concerning the OS proposal to introduce an annual copyright licence fee for users of the OS service, including solicitors. The committee sought the views of practitioners who already used the existing licence at a cost of £300 a year, and the view expressed was that the service was over-priced. Following correspondence with the OS office and several meetings with OS personnel, the Conveyancing Committee made a submission to the Ordnance Survey Office on behalf of practitioners in the following general terms.

The committee submitted that it is opposed in principle to payment of a licence fee by solicitors. It distinguished the use of ordnance survey maps and Land Registry filed plans by solicitors from the use of such maps by other professionals, such as auctioneers or architects. Architects require the ordnance survey map as a template for their work and in that regard it can be expected that the architect might require several copies of a map in connection with a project. Similarly, auctioneers require an OS map in order to make multiple photocopies for advertising purposes, brochures and so forth. In the case of unregistered conveyancing, properties are usually described by words and if reference is made to a map, this would either be to a map on an earlier deed or else to a map prepared specially by an architect or engineer acting for the client who would have already paid the licence fee to the OS office. Conveyancing of registered land is processed through the Land Registry and the Land Registry is, effectively, a reseller of OS maps. The Land Registry charges €25 for a filed plan and €60 for a map with any special features marked on it. These are substantial charges. The OS pointed out that copying a Land Registry filed plan is a breach of OS copyright. The committee sees a profound distinction between the use made of Land Registry maps by solicitors and the use of OS maps by other professionals, and it submitted that the fee paid to the Land Registry should include the making of up to five photocopies of the map by the solicitor.

The committee submitted that it is happy to acknowledge the copyright of the Government of Ireland and the Ordnance Survey Office in ordnance survey maps and that the Law Society would advise its members not to breach this copyright. The OS office was also advised that the thinking of the committee was that, if the OS office imposes a licence requirement and/or a new fee structure for obtaining OS maps, it should advise its members to have sub-division maps purchased and prepared by architects or engineers.

In light of the submission outlined above, the committee is disappointed to note that its views have not been taken on board by the Ordnance Survey Office and it intends to revisit the issue with that office again.

Conveyancing Committee

PROBATE, ADMINISTRATION AND TAXATION

New Revenue code of practice for audits

The Revenue Commissioners intend issuing a new code of practice for the future conduct of revenue audits. Practitioners are advised that the new code will apply not only to direct taxes audits, but also to stamp duty and capital acquisitions tax audits. The normal stamp-duty adjudication process is not an audit and will continue as heretofore. The committee understands that the code will be published imminently on the Revenue website with the intention of taking immediate effect. Practitioners who are involved in audits are advised to check the Revenue website and, once published, to read the code carefully.

A more detailed note will be published by the committee on implementation of the code.

TAX BRIEFING

The following extract from *Tax briefing*, June 2002 issue, is reproduced by kind permission of the Revenue Commissioners:

Guidelines on seeking Revenue opinions

The Revenue Commissioners have a range of services that enable practitioners and taxpayers to obtain information on many areas of tax legislation. These services assist taxpayers' and practitioners' requirements for clarity on a wide range of issues, even complex ones. There should be a limited number of circumstances where a taxpayer or practitioner requires an opinion from Revenue in advance of a transaction actually taking place, given the volume of detailed information in the public domain.

The Revenue view is that the request for an opinion is appropriate only where the circumstances are complex or the transaction is unusual and the existing information services do not provide the clarity required. Queries or opinions should only be submitted or sought where information is not readily available from the applicant's own resources and the information is not in the public domain or available from the local tax office. For example, prior to contacting Revenue, it is expected that a detailed search of the published material under the freedom of information be undertaken on the subject.

Opinions will only be given in respect of certain transactions, and the purpose of this article is to outline the formal procedures for seeking such opinions. This article also outlines the range of information services available and the clearance given by Revenue where such clearance is provided for by statute.

In addition, where a taxpayer has a doubt about the tax treatment of a specific item, he or she may take a view on the issue and express doubt on the tax return under section 955, TCA 1997 or section 8 of the *Stamp Duties Consolidation Act, 1999* and section 19b of the *VAT Act, 1972*, inserted by section 107, FA 2002. A formal expression of doubt protects the taxpayer from interest and penalties should Revenue take a different view of the tax treatment of the transaction at a later date.

Revenue Information Services

Literature

Details of the policies and practices of Revenue as applied to particular areas of tax law are set out and clarified in a wide range of publications, including *Tax briefing*, information leaflets/booklets, the precedent database and the reference book published under the *Freedom of Information Act*. Booklets and guides are also available on a number of topics from Revenue offices throughout the country and are reproduced on the Revenue website at *www.revenue.ie*. A comprehensive list of Revenue publications is available on the Revenue website under *Publications*. This list is also available in the *Tax briefing* supplement, which issued in June 2001.

Routine queries

Where the available literature does not contain the information required and, in the case of practitioners, the information is not readily available from their own resources, the taxpayer or practitioner may obtain information on tax legislation by contacting Revenue directly by phone, e-mail or letter. Details of all Revenue offices throughout the country are available in all phone books under 'government departments'. They are also reproduced on the Revenue website under *Contact us*. In general, queries should be directed to the office dealing with the taxpayer's affairs.

Transactions requiring statutory clearance

In certain circumstances, the governing legislation requires that Revenue clearance or approval be given before a tax relief applies. The issues listed below are dealt with by Direct Taxes International and Administration Division, Dublin Castle, Dublin 2:

- Requests for determination for the purposes of section 141, TCA 1997 (that dividends from patent royalty income derive from a patent taken out in respect of an invention which involved radical innovation)
- Requests for determination for the purposes of section 195, TCA 1997 (artists' exemption)
- Requests for determination for the purposes of section 236 and 606, TCA 1997 (loan of certain art objects)
- Relief for investments under business expansion scheme
- Requests for determinations relating to public access to significant buildings for the purposes of section 482, TCA 1997
- Relief for investment in films under section 481, TCA 1997
- Relief for investment in renewable energy projects under section 486B, TCA 1997
- Distribution test – offshore funds: distributing funds, part 1, schedule 19, TCA 1997.

Dealt with in the Office of the Chief Inspector of Taxes:

- Approval of profit-sharing and share option schemes – sections 509 to 519d, TCA 1997.

Procedures for requests for opinions

The procedure is suitable for use where the issue is complex or unusual and cannot be dealt with under the existing information services and is also only available in respect of specific issues noted in this article. The particular offices providing the service are listed hereunder and the address and phone number of each office is listed in the table on page 44.

Issues covered by this procedure

Office of the Chief Inspector of Taxes:

- Certain transfers within a group involving a non-EU resident company
- Withholding tax in respect of professional services – as regards its application to 'accountable person'. (Note: queries in respect of taxpayers who have had withholding tax deducted should be made to the taxpayer's own tax office)
- Complex restructuring and re-organisations
- Permanent establishment with regard to double-taxation agreements
- Partition of family trading company
- Foreign dividends (encashment tax)
- Trade benefit test arising on the acquisition by a company of its own shares
- Capital allowance issues arising from incentives.

Direct Taxes International and Administration Division:
- Issues arising on large investment projects, including classification of income as trading
- Securitisation within the financial services industry.

Dublin Audit District 5 (DAD 5) (Financial Services, Banking and Insurance):
There are comprehensive articles on the following topics in *Tax briefing*:
- Captive insurers in the IFSC, issue 16
- EU accounts regulations for life assurance, issue 24
- New life assurance tax regime, issues 41 and 43
- Deposit interest revenue information notice, issue 44.

Queries on subjects relating to the financial services industry not dealt with in the above articles may be directed to DAD 5.

Capital Taxes Division:
Capital Taxes Division deals with the non-routine queries relating to stamp duties and capital acquisitions tax. An informal pre-transaction opinion or interpretation service is provided in respect of complex transactions relating to:
- Stamp duty and capital duty aspects of company reconstructions and amalgamations – section 80 and section 119 of the *Stamp Duties Consolidation Act, 1999* (SDCA)
- Exemption from stamp duty transfer of assets within a group (section 79, SDCA)
- CAT business relief under the *Finance Act, 1994* (part vi).

VAT
Based on specific information supplied, the chief inspector of taxes, VAT Technical Services and VAT Interpretation Branch will give an opinion on the correct VAT treatment of a complex transaction in accordance with EU and Irish VAT legislation. The issues that arise relate to:
- Property transactions
- Share dealings
- Apportionment of input credit
- The place of supply of service
- The amount of the consideration applicable
- Intra-community acquisitions and supplies
- VAT on financial services.

Customs and Residence Division
- Qualification for charitable tax exemption, section 207, TCA 1997
- Trading activities by charities and qualification for tax exemption, section 208, TCA 1997
- Eligibility of donations for tax relief under donations scheme for charities, section 848a, TCA 1997
- Qualification for sporting tax exemption, section 235, TCA 1997
- Application of withholding tax or exemptions to relevant distributions (DWT).

Information required
Where a pre-transaction opinion or interpretation is required in respect of any of the transactions specified in this article, it is essential that all information relevant to the case be submitted with the request. The quality of a pre-transaction opinion or interpretation will depend on the information contained in the request. Care should be taken to ensure that Revenue is fully apprised of all the facts and surrounding circumstances which may potentially impact on the tax status of the transaction. The submission should normally include the following:
- Name, personal public service (PPS) number or company reference number of the taxpayer/company and the tax office to which returns are made
- Name, PPS number and company reference numbers of all other parties connected to the transaction
- A statement confirming that as far as the applicant is aware none of the specific issues involved in the opinion/interpretation are in respect of:
  - an earlier return made by the applicant
  - a specific issue that is being considered by another Revenue office at the applicant's request or at Revenue's instigation
  - a related issue in the case which is under appeal or before the courts, the subject of a previous request for opinion or a matter that is currently being considered by another area in Revenue
- A complete description of the facts and a complete description of each proposed transaction
- The business purpose behind the transaction and details of any prior or further steps involved
- Details of the relevant sections of the act and the taxpayer's/practitioner's interpretation of the application of these provisions of the act or regulations
- Relevant case law should be quoted, including cases that would not support the practitioner's contention
- The date it is intended to finalise the transaction
- The implications of the transaction for the liability to tax of the applicant under any tax head
- Any implications for international tax liabilities
- Aspects of the transaction about which the applicant is doubtful
- In respect of sections 207 and 235, the following information is also required:
  - sight of the draft governing instrument
  - short statement of activities by the body to date or, if newly established, a short statement of activities to be undertaken

CONTACT ADDRESSES AND PHONE NUMBERS

Chief Inspector of Taxes
1st Floor, Setanta Centre,
Nassau Street,
Dublin 2.
Tel: 671 6777
Fax: 671 6668
E-mail: techtax@revenue.ie

Custom and Residence Division
Government Offices,
Nenagh,
Co Tipperary.
Tel: 1890 25 45 65
Fax: 067 32916
E-mail: charities@revenue.ie

Direct Taxes International and Administration Branch
Revenue Commissioners,
Dublin Castle, Dublin 2.
Tel: 647 5000
Fax (incentives): 671 0012
Fax (other reliefs): 679 9287
E-mail: dirtaxe@revenue.ie

DAD 5
Lansdowne House,
Lansdowne Road,
Dublin 4.
Tel: 668 9400
Fax: 660 4316
E-mail: dubaudit5@revenue.ie

VAT Interpretation Branch
Dublin Castle,
Dublin 2.
Tel: 674 8858
Fax: 679 5236
E-mail: vatinfo@revenue.ie

Capital Taxes
Stamp Duty Technical Unit
CAT Technical Unit
New Stamping Building,
Dublin Castle, Dublin 2.
Tel: 647 5000
Fax (stamp duty): 679 3261
Fax (CAT): 679 4115
E-mail: captax@revenue.ie

Contact should only be made directly with those offices listed above when statutory clearance is required or an opinion on a specific issue is being sought as outlined in this article.

going forward
– Full details of every officer/director/trustee of the body including any connection or formal involvement with any other charity or sports body.

In addition, the letter of application should incorporate written confirmation to the effect that, to the best of the taxpayer's/practitioner's knowledge, all facts that are relevant to the request for the opinion have been given and that the request is in respect of a genuine proposed transaction. The application should be addressed to the relevant area mentioned above at the addresses listed.

Tax avoidance

An opinion will not be given where Revenue, having considered all the documentation submitted, are of the view that the transaction(s) is part of a scheme or arrangement for the purposes of tax avoidance.

Status of opinions

Opinions given by Revenue are not legally binding and it is open to Revenue officials to review the position when a transaction is complete, and all the facts are known. In this regard, it is important to disclose the full facts and circumstances surrounding the transaction as outlined in the section governing information required.

Time frame

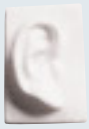
Where a transaction is subject to a particular deadline, Revenue will make every effort to ensure that a reply issues prior to the specified date. However, in order to ensure that an opinion is given in time, practitioners should endeavour, where possible, to submit the case and all requisite information at least six weeks before the proposed transaction date.

Change of circumstances

Any opinion or interpretation given by Revenue is based on the specific facts relevant to that case and its particular circumstances only. Any material change in the facts or circumstances could affect an interpretation and taxpayers/practitioners are advised to draw any such changes to the notice of the office that gave the opinion or interpretation so that the case can be reviewed. An opinion given in relation to a specific case should not be relied on in other cases. Some opinions will arise from a unique set of circumstances. However, if an opinion is likely to have wider application, Revenue will publish a practice note in *Tax briefing*.

It should also be noted that an opinion will be given on the basis of the legislation as it exists at the time of the request. If this changes in advance of the completion of the transaction, then the opinion may no longer be valid. G

Probate, Administration and Taxation Committee



Practice notes

COMPLIANCE WITH PLANNING CONDITIONS

In the light of an increasing number of queries relating to compliance with planning conditions generally, the Conveyancing Committee has decided to make the following recommendations:

1) Conveyancers dealing with second or later purchases of residential houses, where there is a certificate from the local authority that the roads and services are in their charge, should not concern themselves with enquiries as to compliance with bonding and financial conditions in a planning permission
2) Where, in a residential housing estate, there is a requirement under the planning permission for the provision of a bond or for the payment of financial contributions and/or levies by instalments, and where the estate has not been taken in charge (or there is no evidence available that it has), conveyancers should only be concerned with the provision of the bond or with the payment of contributions up to the date of the first purchase of the subject house
3) The foregoing recommendations only apply to dwellings forming part of a building estate and built at the same time as the main development. They do not apply to once-off houses or to in-fill development
4) If the solicitor for a purchaser is on notice of a particular difficulty regarding the taking in charge of roads and services by the local authority, then he/she should advise his/her clients and consider qualifying his/her certificate of title. The matter should be raised as a pre-contract enquiry, and the client advised before contracts are exchanged, so that a decision can be reached as to whether or not to proceed. The provisions of section 180 of the *Planning and Development Act, 2000*, which require the local authority to take roads and services in charge in certain circumstances, may assist in resolving the difficulty
5) The foregoing recommendations do not change the obligation on a purchaser's solicitor to seek evidence that there is, in fact, planning permission for the house, and, where appropriate under other recommendations, to seek a certificate/opinion from an architect or engineer that the house has been built in accordance therewith and in accordance with the regulations in force under the *Building Control Act, 1990*
6) Where a condition in any planning permission states 'Before any development commences the applicant shall submit to the local authority proof/evidence of compliance with…', conveyancers need not obtain written proof or confirmation from the local authority where there is in existence a certificate or opinion from a suitably qualified architect or engineer confirming compliance with all conditions attaching to said planning permission/building regulations
7) The committee wishes to draw the attention of practitioners to its long-standing recommendation that it is unreasonable for solicitors to insist now on being furnished with documentation which it was not the practice to furnish at the time of a previous investigation of title.

Note: the foregoing note is produced in substitution for that which was published in the April 1987 issue of the *Gazette* (and which appears at page 7.12 of the *Conveyancing handbook*).

Conveyancing Committee

Practice notes

IMPORTANT NOTICE!
REGULATION OF SECTION 68 OF THE *SOLICITORS (AMENDMENT) ACT, 1994*

Practitioners are reminded that provisions of section 68 of the *Solicitors (Amendment) Act, 1994* have been the law for upwards of eight years and that all practices must be fully compliant with its provisions. The Law Society's regulatory committees (Compensation Fund Committee and Registrar's Committee) are referring solicitors to the Disciplinary Tribunal for breaches of section 68, and practitioners' attention is drawn to section 68(2) (percentage charging in litigation cases) and section 68(6) (minimum information to be included in solicitor/client bills at the conclusion of litigation cases, including details of party/party costs received).

Compensation Fund Committee and Registrar's Committee

HYBRID AGREEMENTS FOR SALE OF NEW HOUSES

Concerns have been expressed to the Conveyancing Committee about the practice of builders' solicitors issuing documents which are an amalgam of excerpts from the standard building agreement and contract for sale. Practitioners should remember that, while in practical terms the sale of a new dwelling is a single transaction as far as the client is concerned, from the legal point of view two separate transactions are involved. The committee, in ease of the profession generally, has over the years encouraged universal acceptance of the standard documentation, and is always reluctant to see any departure from it.

The view of the committee is therefore that in an appropriate transaction the two standard documents should be used. This saves trouble, not only for the purchaser's solicitor but also for the vendor's, as he is not obliged to deal with queries in relation to the minutiae of a non-standard document. It also allows the purchaser's solicitor to give an unqualified certificate of title, as the standard certificate of title requires the purchaser's solicitor to certify that the property was acquired 'on foot of the current Law Society's conditions of sale and/or building agreement'. The committee has previously confirmed in its practice note published in the March 2001 issue of the *Gazette*, *inter alia*, that this phrase is intended to mean, in relation to the purchase of a new dwelling house, that both documents should be used.

As usual, any amendments or additions to the standard documentation should be dealt with by special condition.

Conveyancing Committee

1) SOLICITORS' UNDERTAKINGS TO DOCTORS RE: FEES
2) ISSUING OF SUBPOENAS

It has come to the attention of the committee that some members of the medical profession now require solicitors to furnish an undertaking to the effect that the solicitor will be responsible for the doctor's stand-by and court attendance fees. The society does not approve of the giving of such undertakings.

Solicitors are under no obligation to furnish such undertakings. However, where an undertaking is given, the solicitor will be personally liable and failure to honour its terms is *prima facie* evidence of professional misconduct.

Conventionally, solicitors do not subpoena medical practitioners where the practitioner has confirmed in writing that he/she will be in attendance or on standby, as the case may be, on the trial date. Where such confirmation of availability has not been received in due time on a basis acceptable to the solicitor, or where the solicitor has any doubt whatever regarding the medical practitioner's attendance, it is incumbent on the solicitor to secure the medical practitioner's attendance, if necessary by way of subpoena.

Litigation Committee

LEGISLATION UPDATE: 21 MAY – 22 JULY 2002

ACTS PASSED

Electoral (Amendment) (No 2) Act, 2002
Number: 23/2002
Contents note: Extends the period for furnishing election expenses statements to the Standards in Public Office Commission for the general election held on 17/5/2002, under s36 of the *Electoral Act, 1997*, pending the appeal to the Supreme Court following the High Court decision in *Kelly v Minister for the Environment*, McKechnie J, 16/5/2002, concerning certain exemptions to election expenditure set out in paragraph 2 of the schedule to the *Electoral Act, 1997*
Date enacted: 3/7/2002
Commencement date: 3/7/2002

Minister for the Environment and Local Government (Performance of Certain Functions) Act, 2002
Number: 24/2002
Contents note: Amends the *Planning and Development Act, 2000*, the *Environmental Protection Agency Act, 1992* and the *Waste Management Act, 1996* to make provision for the performance by the minister for the environment and local government of functions transferred from the minister for community, rural and gaeltacht affairs (formerly the minister for arts, heritage, gaeltacht and the islands)
Date enacted: 3/7/2002
Commencement date: 3/7/2002

SELECTED STATUTORY INSTRUMENTS

Building Regulations (Amendment) Regulations 2002
Number: SI 284/2002
Contents note: Amend part L of the second schedule to the *Building Regulations 1997* (SI 497/1997) (conservation of fuel and energy) to set higher thermal performance/insulation standards for the provision of dwellings, where work commences on or after 1/1/2003

Business Names Regulations 2002
Number: SI 291/2002
Contents note: Revoke all previous regulations made under the *Regulation of Business Names Act, 1963* and replace them with consolidated regulations incorporating current fees and forms
Commencement date: 3/7/2002

Central Bank Act, 1998 *(Commencement) Order 1998*
Number: SI 338/2002
Contents note: Appoints 23/5/1998 as the commencement date for all sections of the act, other than ss13, 14, 15 and 16, which came into force on 1/1/1999 (per SI 526/1998)

Company Law Enforcement Act, 2001 *(Section 56) Regulations 2002*
Number: SI 324/2002
Contents note: Prescribe the form of the liquidator's report for the purposes of s56(1) of the *Company Law Enforcement Act, 2001*

Company Law Enforcement Act, 2001 *(Winding–up and Insolvency Provisions) (Commencement) Order 2002*
Number: SI 263/2002
Contents note: Appoints 1/6/2002 as the commencement date for part 5 (ss43 to 58) of the act, other than s47. Provides for the commencement of s56 only insofar as it relates to: a) liquidators who are appointed on or after 1/6/2002, or b) liquidators who were appointed on or after 1/7/2001 and before 1/6/2002 where, in respect of the company to which the liquidator was appointed, an order has not been made under s249(1) of the *Companies Act, 1963* or the meetings required under s273(1) of the *Companies Act, 1963* have not been held

Competition Act, 2002 *(Commencement) Order 2002*
Number: SI 199/2002
Contents note: Appoints 1/7/2002 as the commencement date for part 1; part 2 (other than ss4[8], 5[3], 6[4](c), and 10); part 4; part 5 (other than s48[b]); schedule 1; schedule 2 (other than paragraph 4) and schedule 3. Appoints 1/1/2003 as the commencement date for ss4(8) and 5(3); part 3; s48(b) and paragraph 4 of schedule 2

Criminal Justice (Theft and Fraud Offences) Act, 2001 *(Commencement) Order 2002*
Number: SI 252/2002
Contents note: Appoints 1/8/2002 as the commencement date for all provisions (other than s57) of the act that did not come into force on the passing of the act. The following provisions come into force on 1/8/2002: parts 1, 2, 4, 6 and ss16 to 22, 54 to 56, 59, 60(2) and 61 to 65

Dormant Accounts Act, 2001 *(Establishment Day) Order 2002*
Number: SI 272/2002
Contents note: Appoints 5/6/2002 as the establishment date for the Dormant Accounts Disbursements Board as per s30 of the *Dormant Accounts Act, 2001*

European Communities (Corporate Insolvency) Regulations 2002
Number: SI 333/2002
Contents note: Provide for the administration of council regulation (EC) no 1346/2000 on insolvency proceedings (which came into effect on 31/5/2002), insofar as they concern corporate insolvency; amend the *Companies Acts, 1963 to 2001*
Commencement date: 2/7/2002

European Communities (Electronic Money) Regulations 2002
Number: SI 221/2002
Contents note: Give effect to directive 2000/28/EC on the taking up and pursuit of the business of credit institutions, and directive 2000/46/EC on the taking up, pursuit of and prudential supervision of the business of electronic money institutions
Commencement date: 29/5/2002

European Communities (Personal Insolvency) Regulations 2002
Number: SI 334/2002
Contents note: Provide for the administration of council regulation (EC) no 1346/2000 on insolvency proceedings (which came into effect on 31/5/2002), insofar as they concern personal insolvency; amend the *Bankruptcy Act, 1988*
Commencement date: 2/7/2002

European Communities (Public Contract Notices) (Standard Forms) Regulations 2002
Number: SI 343/2002
Contents note: Give effect to directive 2001/78/EC which introduces new standard forms for mandatory use in publishing notices on public contracts in the *Official Journal of the European Communities*. The new standard forms are attached as annexes to the directive published in OJ L285 of 29/10/2001 and are available on the EU Commission's public procurement website, *http://simap.eu.int*
Contents note: 19/6/2002

Finance Act, 2001 *(Commencement of Section 64) Order 2002*
Number: SI 210/2002
Contents note: Appoints 15/5/2002 as the commencement date for s64 of the *Finance Act, 2001* (scheme of capital allowances in respect of capital expenditure incurred on the construction or refurbishment of buildings used as private hospitals)

Finance Act, 2002 *(Commencement of Section 34) Order 2002*
Number: SI 211/2002
Contents note: Appoints 15/5/

2002 as the commencement date for s34 of the *Finance Act, 2002* (scheme of capital allowances in respect of buildings used as private sports injury clinics)

Finance Act, 2002 *(Section 94(1)(a)(ii)) (Commencement) Order 2002*
Number: SI 318/2002
Contents note: Appoints 1/7/2002 as the commencement date for s94(1)(a)(ii) of the *Finance Act, 2002* (gives effect to the new definition of cigars as defined in directive 2002/10/EEC)

Freedom of Information Act, 1997 *(Prescribed Bodies) Regulations 2002*
Number: SI 359/2002
Contents note: Prescribe each of the bodies listed in the schedule to the regulations as a public body for the purposes of the *Freedom of Information Act, 1997* by their inclusion in paragraph 1(5) of the first schedule to the act. The Legal Aid Board is included in the list of prescribed bodies
Commencement date: 1/6/2002

Horse and Greyhound Racing Act, 2000 *(Section 8) (Commencement) Order 2002*
Number: SI 185/2002
Contents note: Appoints 1/5/2002 as the commencement date for s8 of the act (transfer of Registry Office functions from the Turf Club to Horse Racing Ireland)

Housing (Miscellaneous Provisions) Act, 2002 *(Commencement) (No 2) Order 2002*
Number: SI 329/2002
Contents note: Appoints the date of the making of this order, that is, 27/6/2002, as the commencement date for ss1 to 10, 13 to 16, 17(d), 18 to 24 (s24 is the section dealing with trespass on land), schedule 1 to the extent set out in the order, and schedule 3

Industrial Designs Act, 2001 *(Commencement) Order 2002*
Number: SI 275/2002
Contents note: Appoints 1/7/2002 as the commencement date for all sections of the act with the exception of s89(b). That provision, which provides for an amendment to s79(2) of the *Copyright and Related Rights Act, 2000,* is made redundant by the repeal of s79(2) of the *Copyright and Related Rights Act, 2000* in s89(g) of the *Industrial Designs Act, 2001*

Local Government Act, 2001 *(Commencement) (No 2) Order 2002*
Number: SI 213/2002
Contents note: Appoints 16/5/2002 as the commencement date for ss109 and 110 of the act, which enable local authorities to establish a community fund and associated community scheme for the financing and support of projects considered of benefit to the local community

Local Government Act, 2001 *(Commencement) (No 3) Order 2002*
Number: SI 218/2002
Contents note: Appoints 1/1/2003 as the commencement date for part 15 of the act (ethical framework for the local government service), other than s169 and any reference to a code of conduct in ss166(1), 167(2), 170(1), 171(1)(b) and 174(b)

Local Government Act, 2001 *(Commencement) (No 4) Order 2002*
Number: SI 250/2002
Contents note: Appoints 1/1/2004 as the commencement date for chapter 5 of part 9 of the act (consolidation of water and waste water treatment and related functions at county level); appoints 1/1/2004 as the commencement date for s5(1) and schedule 3 of the act for the purposes of the repeal of the *Local Government (Amendment) (No 2) Act, 1934*

Pensions (Amendment) Act, 2002 *(Part I and Sections 6, 9 to 12, 15 to 28, 30 to 36, 40, 44, 50 to 55 and 59) (Commencement) Order 2002*
Number: SI 276/2002
Contents note: Appoints 1/6/2002 as the commencement date for the above sections of the act

Public Health (Tobacco) Act, 2002 *(Commencement) Order 2002*
Number: SI 251/2002
Contents note: Appoints 31/5/2002 as the commencement date for part 2 of the act (establishment of the Office of Tobacco Control and the establishment of the Office of the Tobacco Free Council)

Regulations of the Pharmaceutical Society of Ireland (Amendment) Regulations 2002
Number: SI 212/2002
Contents note: Amend the *Pharmaceutical Society of Ireland (Amendment) Regulations 1977* to make provision for the granting of recognition and approval by the society to courses offered by institutions in the state leading to a degree in pharmacy. In the adoption of the criteria for the granting of its recognition and approval of courses, the council of the society shall have regard to: the minimum conditions for the award of diplomas, certificates or other formal qualifications in pharmacy as specified in points 1, 2, 3 and 5 of article 2 of directive 85/432/EEC; recommendations of the Advisory Committee on Pharmaceutical Training, established by virtue of EU council decision of 16/9/1985, on the education and training of pharmacists at higher education institutions; and the minimum conditions of qualification specified in article 49(2) of directive 2001/83/EEC
Commencement date: 16/5/2002

Social Welfare (Miscellaneous Provisions) Act, 2002 *(Sections 14, 15 and 16) (Commencement) Order 2002*
Number: SI 132/2002
Contents note: Appoints 11/4/2002 as the commencement date for ss14 and 15 and for s16 insofar as it relates to the *Charities Act, 1961*

Value-Added Tax (Amendment) (Property Transactions) Regulations 2002
Number: SI 219/2002
Contents note: Amend and update regulations 4 and 19 of the *Value-Added Tax Regulations 1979* (SI 63/1979)
Commencement date: 24/5/2002 for the amendments to regulation 4; 25/3/2002 for the amendments to regulation 9

Waste Management (Licensing) (Amendment) Regulations 2002
Number: SI 336/2002
Contents note: Amend the *Waste Management (Licensing) Regulations 2000* (SI 185/2000) primarily to give effect to certain requirements of directive 1999/31/EC on the landfill of waste
Commencement date: 2/7/2002 and see statutory instrument for various dates in relation to certain articles. G

Prepared by the Law Society Library

Personal injury judgment

Negligence – employer's liability – liability of third party to the employee of another employer – fall from shelves in a supermarket – dispute as to liability – whether duty of an employer to inspect premises of a third party where an employee carries out work – previous back injury of claimant – long-standing degenerative changes in lumbar spine of claimant – extent of medical problems – hobby of long-distance cycling affected – post-accident ability to cycle on a mountain bike – fact that claimant would have to compete with younger, fitter, better-educated people in the labour market – discount for vulnerable back and that there could have been an intervening illness despite the accident – extent of contributory negligence

CASE

***Thomas McMahon v Irish Biscuits Ltd and Power Supermarkets, t/a Quinnsworth*, High Court, judgment of Mr Justice Diarmuid O'Donovan of 28 January 2002.**

THE FACTS

Thomas McMahon, a married man and the father of four grown-up children, one of whom – the eldest daughter – suffers from multiple sclerosis, lives outside the town of Monaghan. On 10 June 1996, in the course of his employment as a sales representative with Irish Biscuits Ltd, he fell from shelving and suffered injuries while checking stock in Quinnsworth Supermarket in Cavan town.

In the normal course of his work, Mr McMahon was required to visit Quinnsworth's premises in Cavan town to check its stock of biscuits with a view to preparing an order for the forthcoming week. Irish Biscuits supplied Quinnsworth with many lines of its products, and in an average week some 220 cartons of biscuits would be delivered to Quinnsworth. Quinnsworth required delivery of fresh supplies of biscuits on the Wednesday of each week. Incidentally, Dunnes Stores Ltd, Quinnsworth's competitors, also received deliveries on the same day. So Mr McMahon was required to submit a fresh order to Irish Biscuits on behalf of Quinnsworth on or before 10.30am on the Monday of each week. If he did not make the deadline, the order would not be delivered until the Thursday of that week, which would have consequences for Mr McMahon.

On one previous occasion, Mr McMahon missed the deadline and he had been severely criticised after a complaint by Quinnsworth to Irish Biscuits. Mr McMahon therefore considered that it was very important to meet the Monday deadline. On Monday 10 June 1996, he carried out a similar exercise in Dunnes Stores in Cavan town, and so it was not until approximately 9.40 to 9.45am that he reached Quinnsworth. He had only about 45 minutes to check the stock, agree an order for the forthcoming week with the manager or assistant manager and then phone the order to his employers. He was thus under considerable pressure to meet his deadline, and sometimes he had to use a public telephone because the Quinnsworth office phone was unavailable.

The task of checking stock for the purpose of preparing an order for the forthcoming week was not a straightforward exercise. Stocks of biscuits in the Quinnsworth store were located in racks with metal shelving; the top shelf was nine feet, three inches from the ground. Access to those top shelves could only be gained by means of a mobile platform that was in the storeroom and eminently suitable for that purpose. However, on 10 June 1996, the platform could not be used because pallets of stock were in the aisles, leaving no room for the platform. In its absence, Mr McMahon considered that he had no option but to climb up the shelving to gain access to stock on the upper shelves. Michael McHugh, one of Mr McMahon's area managers, was aware of this fact.

When, on Monday 10 June 1996, Mr McMahon attended the Quinnsworth premises at Cavan town at around 9.45 to 9.50am, he set about checking the biscuit stocks and found there were pallets full of stock on the floor in front of the biscuits section. His access to the section was inhibited. He asked a young man who was driving a pallet truck to move the pallets, and the young man responded that he would do so when he was finished what he was doing, but he never came back. Mr McMahon, under his usual time constraint, considered that he had no option but to climb the shelving. In particular, he climbed onto the third shelf so that he might check the stock on the top shelf, which he did with his right hand while steadying himself by holding a vertical bar in the centre of the rack with his left hand. While doing do, he heard someone speaking and turned in the direction of the voice, and, as he did, his hand slipped and he fell to the ground from a height of a little over nine feet. He landed in a more-or-less sitting position between two pallets, and in the course of his fall he broke jars of coffee that were on one of the pallets.

Mr McMahon issued High Court proceedings against his employer, Irish Biscuits Ltd, and Power Supermarkets, trading as Quinnsworth.

The medical symptoms

After the fall, Mr McMahon was immediately conscious of pain in his lower back. Members of Quinnsworth staff came to his assistance; he rested for a while and then was taken to a medical practitioner in Cavan town, who gave him a pain-killing injection. After that, he was driven home. When he got home, Mr McMahon went to bed where he complained of a lot of pain and little sleep. The next day, he went to his own GP, Dr O'Gorman, who gave him more pain-killing injections, but that only afforded him short-term relief.

Four days after the accident, Mr McMahon was still experiencing considerable low back pain which radiated into both legs, so much so that Dr

O'Gorman sent him to Monaghan County Hospital, where he was put under the care of a general surgeon. An x-ray was carried out on Mr McMahon's spine and revealed spondylosis but no evidence of fracture. Mr McMahon spent one week in the hospital, where he had more pain-killing injections and also a CT scan, which revealed degenerative changes in the facet joints but no disc prolapse. However, there were also degenerative changes at the level L5/S1 disc. He was referred to an orthopaedic surgeon who had him admitted to Navan County Hospital for a further two weeks, during which he had an epidural injection that gave him some relief from his symptoms for about six to eight weeks. During that time, he also received physiotherapy treatment and was advised with regard to exercises that he could carry out at home to ease his back.

THE JUDGMENT

On 28 January 2002, delivering judgment, O'Donovan J referred to the facts set out above. The judge stated that climbing the shelves to check the stock was an extremely hazardous exercise. Indeed, the judge noted that Mr McMahon himself conceded under cross-examination that he recognised that it was a risky activity, particularly for a man like himself who had a vulnerable back. But Mr McMahon protested that the job had to be done and, given the time constraints under which he had to operate, there was no way that he could check the stock other than climbing the shelving. The judge noted that while Mr McMahon agreed that the activity was a hazardous one, he could never recall actually having it in his mind that he was risking injury when he was climbing the shelving. He did say to the judge that he complained to members of the Quinnsworth staff, both management and those on the floor, about the fact that the aisles were so cluttered that he could not conveniently gain access to the biscuit stocks and, more often than not, the reply he received was 'what else can we do?'. Mr McMahon recognised that staff were under pressure on Monday mornings.

The judge observed that the assistant manager of Quinnsworth at the time stated that he never saw Mr McMahon climbing shelves nor did he know that Mr McMahon was accustomed to doing so. The assistant manager said that he had no recollection of ever having any complaints from Mr McMahon with regard to his inability to access stocks of biscuits. He added that, if it were the case that Mr McMahon was in the habit of climbing shelving every Monday, he would have noticed it, although he agreed that he was always very busy on a Monday morning. The assistant manager also gave evidence that there were signs affixed to the shelves containing legends such as 'think safety – always use a ladder' and 'climbing up or down racking is forbidden'. Photographs were produced showing those signs on racks of shelves. The judge noted, however, that Mr McMahon strenuously denied that such signs were on the racks of shelving that he climbed. O'Donovan J stated that he had no doubt that, at some stage, such signs were affixed to the racks of shelving in the Quinnsworth warehouse, but he was satisfied with Mr McMahon's evidence that he was

never aware of them and that neither were they brought to his attention. The judge gave the assistant manager at Quinnsworth the benefit of the doubt in accepting that he was so busy on Monday mornings that he just did not notice what Mr McMahon was doing.

In so far as Irish Biscuits was concerned, it was clear that its area sales manager was aware that Mr McMahon was engaging in the potentially dangerous practice of climbing racks of shelving to check stock in the Quinnsworth warehouse and yet the employer took no steps whatsoever to ensure that the practice was discontinued. However, Mr McMahon did not appear to have complained to anyone else in Irish Biscuits and neither did he follow up the complaint when nothing was done about it. There had been evidence from the national sales manager with Irish Biscuits to the effect that, in the absence of complaints, the company had no obligation to carry out any checks on the working conditions of its sales staff. Indeed, she never visited the Quinnsworth warehouse. Her excuse was that, as Irish Biscuits had over 1,000 outlets for its products, it was impractical to check them all.

O'Donovan J stated that what Mr McMahon was doing in the sense of climbing the shelves was inherently dangerous, so much so that it might be suggested that Mr McMahon was entirely the author of his own misfortune. The judge was satisfied, however, that on all Monday mornings Mr McMahon was under pressure to ensure that Quinnsworth's order for biscuits for the coming week was with his employers before 10.30am and that he reasonably feared that there would be serious consequences for him if he failed to meet that deadline.

The judge noted that Mr McMahon could be faulted for not following up the complaint that he made to Mr McHugh and, in particular, for not putting more pressure on his employers to do something to ensure that he was not required to climb shelving for the purpose of checking stock in the Quinnsworth warehouse.

The issue of liability

It was settled law, according to O'Donovan J, that Mr McMahon's employers owed him a duty of care. Reference was made to the *dicta* of the Supreme Court in the case of *Dalton v Frendo* (judgment of 15 December 1997) 'to take reasonable care for the servant's safety in all the circumstances in the case'. However, it was noted that this did not mean that Irish Biscuits was the insurer of the safety of Mr McMahon in the course of his employment, but it did mean that the company was required to take all reasonable steps to ensure that he was not exposed to reasonable risk of injury in the course of his employment.

O'Donovan J noted that Irish Biscuits had a duty to acquaint itself with the facilities that were provided by its customers to enable the sales staff of Irish Biscuits to carry out duties that were for their mutual benefit and to satisfy itself that those facilities and the system operated by the customers did not pose a threat to the well-being of the staff. The judge said that Irish Biscuits 'fell down badly' with regard to that duty. However difficult it might be to inspect all the outlets, the judge stated that the duty of care that Irish Biscuits owed to its employees obliged it to ensure that the facilities afforded to its employees by its customers to enable its employees to carry out duties for the mutual benefit of itself and its customers did not threaten the safety of the employees.

Senior management at Irish Biscuits were aware of the risk to which Mr McMahon was exposed while checking stock in the Quinnsworth warehouse and yet they did nothing about it. That failure amounted to negligence that significantly contributed to Mr McMahon's fall and resultant injuries. The judge rejected the submission by counsel for Irish Biscuits that, in the absence of any relevant complaint, it was unreasonable to expect an employer to inspect the premises of a third party in which members of the employer's staff were expected to carry out duties on behalf of the employer or to make enquiries with regard to the system of work maintained for members of their staff on the premises of the third party for the purpose of satisfying themselves that their staff were not exposed to avoidable risks. If that were so, said the judge, an employer would be entitled to abrogate the duty of care he owed to his employees in favour of a third party. Not only was Irish Biscuits negligent for its failure to act upon the complaint made by Mr McMahon, but it was also negligent in failing to apprise itself of the system of work involving its employee that was tolerated in the Quinnsworth warehouse.

In relation to Quinnsworth, where the accident happened, O'Donovan J considered that he had no doubt that the supermarket was in a controlling position. It appeared that it did nothing to avoid the risk to Mr McMahon; that was a negligent omission which contributed to Mr McMahon's accident.

As between Irish Biscuits and Quinnsworth in the context of liability, Quinnsworth was in control of the situation at the material time and had the immediate opportunity of doing something that might have avoided the accident. Accordingly, it was more to blame than Mr McMahon's employers. The judge was influenced by the fact that Mr McMahon's visit to Quinnsworth on a Monday morning was a scheduled visit and that Quinnsworth knew and accordingly should have ensured that its premises were in a state of preparedness for Mr McMahon, which they obviously were not. In that context, the judge apportioned blame for Mr McMahon's accident with 60% against Quinnsworth, 30% against Irish Biscuits and 10% contributory negligence on the part of Mr McMahon.

The court's view of the medical symptoms

O'Donovan J referred to an MRI scan of Mr McMahon's lumbar spine, carried out on 21 January 1997, which showed a disc bulging at level L2. In addition, however, there were long-standing degenerative changes at level L5/S1 and some disc narrowing at that level.

How was Mr McMahon to cope in the future? Mr McMahon did inform the judge in evidence that, prior to the accident, he did experience occasional twinges of pain in his lower back but it did not interfere with his capacity to work or indeed his capacity to indulge in his hobby of long-distance cycling, which involved riding a racing bicycle for over 100 miles a week. Apparently, Mr McMahon had been accustomed to riding 75 miles every Saturday and 30 to 35 miles every Sunday and, in the summertime, 15 to 20 miles on one or two evenings in the week.

However, in the summer of 1994, Mr McMahon experienced an episode of severe pain in his back which radiated into his left leg and which incapacitated him from work for a period of 39 days. A bone scan at the time proved normal. He received an epidural injection and some traction, which afforded him some considerable relief. He was, however, involved in a road traffic accident on 16 July 1994: while cycling, he was in collision with an army vehicle and was thrown across its bonnet. He suffered injuries to his neck more so than his back and, in fact, was able to return to work a few days later.

Apparently, Mr McMahon was able to carry out his work

and indulge his hobby of cycling without any interruption on account of back problems, although he did admit to occasionally taking pain-killing medication for twinges of pain in his back. However, the surgeon in relation to the previous injuries advised Mr McMahon that he ought to be a 'back-conscious' person, and Mr McMahon accepted in evidence that, since the summer of 1994, he had been conscious that he had a vulnerable back and behaved accordingly.

A surgeon testified that Mr McMahon had aggravated pre-existing degenerative changes in his lumbar spine which gave rise to the pain that he experienced since that time. While surgery was not indicated, the likelihood was that, to a greater or lesser extent, Mr McMahon would experience pain in his back for the rest of his days and that, as a result, he would have to be 'a back-conscious person' and, in particular, would only be fit for light work in the future. The surgeon expressed the view that, had it not been for the incident which gave rise to this claim, the likelihood was that Mr McMahon would have been able to continue working as a sales representative for Irish Biscuits. The doctors accepted that Mr McMahon would only be fit for light work in the future and must avoid lifting heavy objects, stooping or bending to any great extent. Furthermore, their view was that Mr McMahon would not be able to resume his pre-accident cycling activities, although one surgeon agreed that he might derive some benefit from cycling a mountain bike, a suggestion that Mr McMahon had adopted apparently with some beneficial results.

Mr McMahon said that, since the accident, the pain in his back had been aggravated by standing or sitting in one position for long periods of time. Mr McMahon made it clear to the judge that a mountain bike was no substitute for the long-distance cycling that he was accustomed to prior to the accident, that he very much missed being able to continue that activity, and that he was disappointed with the fact that he could no longer resume his work with Irish Biscuits as a sales representative. O'Donovan J observed that he had rarely come across a 'plaintiff who is so upset at being unable to resume his pre-accident employment and one who was so anxious and motivated to get some work to occupy himself'. The judge was satisfied that since he was 'let go' by Irish Biscuits, Mr McMahon had done all that could reasonably be expected of him in his efforts to obtain alternative employment. The judge quoted Mr McMahon: 'I do not want to be stuck with the social welfare for the rest of my life'.

The judge accepted the evidence of a rehabilitation therapist who said that Mr McMahon would never succeed again in obtaining a worthwhile job because employers would be reluctant to hire people who had a history of back injury and, in any event, he had now been out of work for six years and that would deter prospective employers from taking him on. Moreover, while he may be fit for light work, his lack of formal education, his poor tolerance for sitting and standing and the fact that he would be competing in the labour market with younger, fitter and better-educated people would, in the judge's view, all combine to make it extremely unlikely that he would ever gain a worthwhile job again. The judge said that he could not accept the views of one surgeon who said that he had fully recovered from the injuries as a result of the incident. The judge preferred the views of other doctors. However, in relation to the evidence of a pain specialist, who said that Mr McMahon would require lumbar rhizotomies at regular intervals for the rest of his life in order to alleviate the on-going pain that he experienced, O'Donovan J said he was not convinced that it had been established on the balance of probability that Mr McMahon would require repeat lumbar rhizotomies for the rest of his life. G

This judgment was summarised by solicitor Dr Eamonn Hall, chief legal officer of Eircom plc.

THE AWARD

O'Donovan J awarded Thomas McMahon the following damages under various headings:

- **General damages** for the injuries sustained in the accident some five-and-a-half years previously, which had deprived him of the enjoyment of many aspects of his living: €40,000
- **Damages in the future**, bearing in mind that Mr McMahon would be 'a back-conscious person', would experience a certain amount of back pain, had been permanently deprived of his employment with Irish Biscuits (which he had thoroughly enjoyed) and that it was extremely unlikely he would be gainfully employed and never able to resume long-distance cycling (which he also thoroughly enjoyed): €63,500
- In the context of **special damages**, loss of earnings amounted to €109,197. 'Specials' were awarded in respect of fees to Dr O'Keeffe (€2,285.53), fees to Mr Dowling (€107.93), fees to Blackrock Clinic (€126.97), fees to Dr O'Gorman (€148.56), fees to the Adelaide Hospital (€79.99), pharmaceutical fees (€144.75) and damage to a watch (€165.07).

If Mr McMahon were still in the employ of Irish Biscuits, his net weekly salary would be €593, on top of which he would reasonably expect a bonus of approximately €22 a week. Accordingly, if he were still employed by Irish Biscuits, he would be taking home an average of €615 a week. The capital value of the loss of income that Mr McMahon would suffer as a result of being unable to resume his pre-accident employment for the rest of his working days was calculated at €310,575. However, this did not allow for the fact that, even if Mr McMahon had not been involved in the accident that gave rise to the claim, there was a possibility that, at some stage in the future during his normal working life, he would have lost his job with Irish Biscuits (for one reason or another) or that he would have developed some illness that would prevent him from working. In accordance with the views expressed by the Supreme Court in *Reddy v Bates* ([1983] IR 141), O'Donovan J considered that a discount should be allowed against Mr McMahon's future loss of earnings on that account.

The fact that Mr McMahon had a vulnerable back before the incident that gave rise to the claim, and notwithstanding his good work record, he considered the appropriate amount of that discount should be 20%. Accordingly, the court awarded a figure of €248,460 in respect of future loss of earnings.

In addition, because of the premature termination of his employment, the judge was advised that Mr McMahon's pension would be reduced by a sum of €386.25 a week, and, accordingly, the court allowed the sum of €130,552.05 for the elimination of Mr McMahon's pension rights.

The **gross damages** awarded were €594,763.30, which had to be reduced by 10% on account of Mr McMahon's contributory negligence. Accordingly, Mr McMahon was awarded the sum of €535,291.47, with €356,860.98 payable by Quinnsworth and €178,430.49 payable by Irish Biscuits Ltd.

First Law Update
www.firstlaw.ie
News from Ireland's on-line legal awareness service
Compiled by Robert Forde BL for FirstLaw

AMENDMENT OF PLEADINGS

Lodgment, practice and procedure

Litigation – costs – lodgment – specific performance suit – whether order of High Court accurately reflected judgment – whether application for amending pleadings included making of lodgment – Rules of the superior courts 1986, *order 22, rules 1 and 3*

The first-, fourth- and fifth-named defendants appealed against an order of the High Court granting them leave to amend their defence but with the proviso that all the costs of the plaintiff to date be paid.

The Supreme Court (Geoghegan J delivering judgment; Denham J and Fennelly J agreeing) allowed the appeal, holding that the actual order drawn up by the High Court did not accurately reflect the judgment delivered. It was clear that the costs of the plaintiff were to be paid if the defendants amended their defence, including the making of a lodgment. It would seem doubtful whether the actual amended pleas in the amended defence gave rise to a payment into court. It was entirely inaccurate to describe the application in the High Court as an application for a late lodgment. The order made in the High Court was not a just order in that it failed to take into account the possibility that the defendants might succeed in one or more of their original grounds of defence. Consequently, the appeal would be allowed and a substituted order made, allowing for the payment of a certain portion of the plaintiff's costs should the defendants successfully defend the case on the exclusive basis of one of the amended grounds.

***Larkin v Whitony Limited and Others*, Supreme Court, 19/6/2002** [FL5509]

BANKRUPTCY

Costs, practice and procedure

Application for injunction – time limits for adjudication – legal profession – recovery of costs – whether bankruptcy proceedings should be stayed – Bankruptcy Act, 1988

In previous proceedings, the appellant had sued his former solicitors (the respondents) for negligence and the claim was dismissed. The respondents were granted their costs and a bankruptcy summons was issued in respect of same. The appellant sought to have the bankruptcy summons dismissed and was unsuccessful. The appellant appealed against the judgment. As part of the grounds of the appeal, the appellant sought to stay the bankruptcy proceedings pending receipt of information from the Court of Human Rights.

The Supreme Court (Murphy J delivering judgment; Hardiman J and Geoghegan J agreeing) dismissed the appeal, holding that the bankruptcy summons was not of itself an operative order of the High Court. The summons was either valid or invalid. There was nothing in the arguments presented which would cast a doubt on the validity of the summons. However, the relevant time limits would indicate that the summons could not at this point ground a petition for adjudication in bankruptcy. There was nothing to prevent the respondents from seeking a new bankruptcy summons and thereafter seeking adjudication. The relief sought by the appellant would not be granted.

***Carthy and Others v McMullen*, Supreme Court, 7/6/2002** [FL5508]

BIAS

Probate

Judicial review – litigation – probate – bias – certiorari – *practice and procedure – whether part of case inappropriately held in chambers – whether applicant had established arguable case – whether justice properly administered* – Succession Act, 1965 – Rules of the superior courts 1986, *order 84, rule 21(1)*

The applicant had previously been a claimant in an action under the *Succession Act, 1965* in the Circuit Court and subsequently brought judicial review proceedings in respect of the order made in the proceedings, claiming that the Circuit Court judge hearing the case had heard some of the evidence in chambers, giving rise to a suspicion of bias. In the High Court, Mr Justice Kearns was satisfied that nothing improper had occurred and refused the relief sought. The applicant appealed. The Supreme Court (Keane CJ delivering judgment; Murphy J and Murray J agreeing) dismissed the appeal. The trial judge could not have come to any conclusion other than that the application for judicial review was wholly without foundation. It had long been the practice that, on occasions, a trial judge might invite legal representatives to come to his chambers in the absence of their clients with a view to facilitating the resolution of issues, which, if discussed in open court, might imperil rather than facilitate a just resolution of the case. In an unfortunate family dispute, this was clearly an approach that the trial judge was entitled to adopt. The court would presume in the absence of evidence to the contrary that in so acting, the trial judge would ensure that the rights of the parties to the proceedings were not affected by the adoption of such a course. The court would also assume that counsel, who were there to protect the interests of their respective clients, would have taken any steps necessary to ensure that those rights were protected. The court would leave for another occasion the question of whether the application for judicial review had been made in an expeditious manner.

***Shannon v Judge McCartan and Others*, Supreme Court, 19/6/2002** [FL5520]

CERTIORARI

Judicial review

Practice and procedure – whether arguable grounds for granting leave to seek judicial review had been made out – whether right of appeal to Circuit Court precluded judicial review proceedings

The appellant had been convicted of a road traffic offence in the District Court. The appellant was unhappy with the nature of some of the evidence given by the prosecution and brought judicial review proceedings seeking to challenge the conviction. Leave was granted to seek judicial review by Butler J in the High Court, which was subsequently set aside by Kearns J. The appellant appealed against the judgment.

The Supreme Court (Fennelly J delivering judgment; Murphy J and Geoghegan J agreeing) allowed the appeal. The court, in its approach, must be careful not to influence the result of the substantive hearing of the judicial review application. Leave to obtain judicial review was granted if an applicant had an arguable case in law. The setting aside of the granting of leave should be exercised sparingly by the High Court. It had not been shown that the appellant's case for judicial review was unarguable. The original order of Butler J granting leave should not have been set aside.

***Gordon v Director of Public Prosecutions and Judge McGuinness*, Supreme Court, 7/6/2002** [FL5502]

COMPANY

Intellectual property

Statutory interpretation – intellectual property – restoration to register of companies – whether petitioner creditor of company – whether Circuit Court had exclusive jurisdiction in matter – Companies Act, 1963 – Companies (Amendment) (No 2) Act, 1999

The petitioner (Orlaford) had brought a petition seeking to have a company (Deauville) restored to the register of companies. The restoration was sought in order to aid Orlaford pursue related proceedings involving an alleged infringement of a patent. Orlaford brought the petition on the basis that it was a creditor of Deauville. In the High Court, O'Higgins J granted the order sought. Deauville appealed against the order. It was contended that the application should have been brought in the Circuit Court, that Orlaford was not a creditor and, thirdly, that the claim in question was not a *bona fide* one.

The Supreme Court (Keane CJ delivering judgment; McGuinness J and Fennelly agreeing) dismissed the appeal. The relevant statutory provisions enabled the application to be brought to the Circuit Court. A creditor was still entitled to obtain an order from the High Court for the restoration of a company to the register. It would seem unjust that the question of whether a person was entitled to have a company restored to the register would depend on whether their claim was for a liquidated sum. Orlaford had satisfied the test that its claim might succeed and there was nothing to indicate that the proceedings were frivolous.

***In the matter of Deauville Communications*, Supreme Court, 15/3/2002** [FL5404]

CONSTITUTIONAL

Company law, confidentiality

Right to privacy – litigation – administration of justice – whether applicants entitled to have proceedings held in camera – *practice and procedure* – Bunreacht na hÉireann 1937, *article 34.1*, *article 38*

The applicants had issued proceedings relating to what was colloquially known as the 'Ansbacher investigation'. The applicants were seeking an order enabling them to bring proceedings *in camera* so that their names would not be disclosed. The ultimate aim of the applicants was to prevent the publication of their names in the inspectors' report on the matter.

McCracken refused the relief sought. The court did not have jurisdiction to hear the matter *in camera*. The fact that article 34.1 required courts to administer justice in public by its very nature required the attendant publicity, including the identification of parties seeking justice. It was a small price to be paid to ensure the integrity and openness of one of the three organs of the state, namely the judicial process, in which openness was a vital element. Justice must not only be done, but must also be seen to be done. If this involved innocent parties being brought before the courts in either civil or criminal proceedings, and wrongly accused, that was unfortunate but was essential for the protection of the entire judicial system. The right to have justice administered in public far exceeded any right to privacy, confidentiality or a good name.

***In the matter of Ansbacher (Cayman) Limited and Others*, High Court, Mr Justice McCracken, 24/4/2002** [FL5408]

CONTRACT

Damages, defamation

Slander and defamation – evidence – compensation – whether contract existed to provide refreshments – whether alleged words constituted actionable slander – whether proof of special damage

The plaintiffs instituted proceedings against the defendants over what they alleged was a failure to provide light refreshments for a small post-wedding reception. The defendants were the owners of a public house and denied that there had ever been an agreement to provide refreshments. In the Circuit Court, the plaintiffs were awarded £20,000 in damages for breach of contract and slander. The defendants appealed against the judgment.

Murray J awarded a total of €12,000 in damages. The court was satisfied that a specific arrangement had been entered into to provide refreshments. The evidence tendered by the first-named defendant was not satisfactory and the court did not find him to be a credible witness. There had been a premeditated and conscious decision to refuse the plaintiffs service, notwithstanding the prior agreement. The plaintiffs had not

established that they had suffered any special damage arising from the alleged slander. The loss which the plaintiffs had suffered was a denial of the occasion for enjoyment and happiness to be shared with their family and friends. The plaintiffs were entitled to be compensated for the breach of contract and a sum of €6,000 would be awarded to each plaintiff.

***Dinnegan and Dinnegan v Ryan and Ryan*, High Court, Mr Justice Murray, 13/5/2002** [FL5360]

CRIMINAL

Delay, extradition

Fair procedures – delay – whether unjust to order extradition of plaintiff by reason of lapse of time – Extradition Act, 1965, *section 50* – Extradition (Amendment) Act, 1987 – Extradition (European Convention on the Suppression of Terrorism) Act, 1987

The plaintiff had been arrested in 1998 on foot of warrants issued in Northern Ireland for extradition to that jurisdiction. The plaintiff had allegedly committed an offence in 1989. The plaintiff issued proceedings pursuant to section 50 of the *Extradition Act, 1965*, seeking to prevent the extradition on the grounds that it would be unjust, oppressive or invidious to order the extradition due to the lapse of time involved. In the High Court, Finnegan J attributed much of the delay involved to the plaintiff's failure to answer bail. The factors involved were not exceptional and the relief sought by the plaintiff would be refused. The plaintiff appealed against the order.

The Supreme Court (McGuinness J delivering judgment; Denham J and Geoghegan J agreeing) allowed the appeal. The delay on the part of the prosecuting authorities in extraditing the plaintiff amounted to an exceptional circumstance. In addition, the Garda Síochána had been aware of the whereabouts of the plaintiff over the years. If the plaintiff was to be delivered up, it was likely that he, his wife and child would lose their family home. The plaintiff had made no effort to hide his presence in this jurisdiction. Bearing in mind all the circumstances, it would be oppressive to return the plaintiff to Northern Ireland.

***McNally v O'Toole*, Supreme Court, 9/5/2002** [FL5398]

Evidence, provocation

Right to fair trial – provocation – murder – whether jury should have been discharged – whether defence of provocation should have been allowed – whether evidence tendered by witness prejudicial to applicant

The applicant had been charged with murder and violent disorder and was found guilty on both counts. The applicant sought leave to appeal against his convictions, claiming that evidence adduced by one of the witnesses was prejudicial to his case and that the trial judge had erred in not discharging the jury. The second ground related to the failure by the trial judge to allow the defence of provocation to go to the jury. Third, the applicant complained about the trial judge's direction to the jury.

The Court of Criminal Appeal (Keane CJ delivering judgment; Carroll J and Butler J agreeing) dismissed the application. The trial judge was entitled to take the view that the evidence complained of could be dealt with by way of a direction to the jury. There was no doubt that there was no evidence of a sudden and temporary loss of self-control on the part of the applicant and there was no question of an act of provocation. The trial judge had carefully instructed the jury as to the nature of the *mens rea* that was required if they were to find the applicant guilty of murder and the court was satisfied that there was no reason to suppose that the jury were misled in any way in assessing the evidence complained of.

***Director of Public Prosecutions v Doyle*, Court of Criminal Appeal, 22/3/2002** [FL5471]

Evidence, sexual offences

Corroboration – whether evidence of complainant credible – whether trial judge's direction to jury regarding corroboration correct – whether verdict of jury unsafe – Courts (Supplemental Provisions) Act, 1961

The accused sought leave to appeal against his conviction for having unlawful sexual intercourse contrary to section 1 of the *Criminal Law (Amendment) Act, 1935*. In the application, two main grounds of appeal were put forward. First, it was contended that the evidence of the complainant had been shown to be wrong, contradictory and vague. It was argued that the jury had acted perversely in treating the complainant as a credible witness. Second, it was contended that the trial judge had erred in the direction he had given to the jury that the complainant's evidence regarding the layout of the accused's house could amount to corroboration.

The Court of Criminal Appeal (Murray J delivering judgment; Barr J and Kinlen J agreeing) quashed the conviction and directed a re-trial. There were serious issues raised as to the credibility of the complainant's evidence. However, the jury, having heard all the evidence, were entitled to act as they had done and the court was not satisfied that the verdict could be identified as perverse. The trial judge's direction to the jury regarding the complainant's evidence and whether it could constitute corroboration was wrong. The jury had not found the accused guilty of the other six charges. The accused had only been convicted on one of the charges, which was subject to an erroneous direction. It would be unsafe to allow the verdict to stand.

***Director of Public Prosecutions v Collins*, Court of Criminal Appeal, 22/4/2002** [FL5454]

DAMAGES

Employers' liability, personal injuries

Negligence – safe system of work – damages – expert evidence – causation – test for contributory negligence – whether employer failed to provide safe system of work

While working as an employee of the defendant, the plaintiff had sustained serious injuries. The plaintiff sued and was awarded £588,181.60 in damages. A finding of contributory negligence was made against the plaintiff in the amount of 25%. The defendants appealed against the finding of negligence and the apportionment thereof. The accident occurred while the plaintiff had been acting as a guard on a freight train which was moving onto a sideline at a train station. The plaintiff had been subsequently found lying on the tracks by the train driver and was unable to give evidence due to his injuries. The argument made on behalf of the plaintiff was that the employer had failed to provide a safe system of work and had actively condoned an unsafe system of work, namely embarking from a moving train. The defendants urged that there had been no indication of how the plaintiff had fallen, as the driver had not seen the plaintiff disembarking from the cab of the train.

The Supreme Court (Keane CJ delivering judgment; Denham J and Geoghegan J agreeing) dismissed the appeal. The trial judge was entitled to infer that as a matter of probability the plaintiff had descended from the moving train and as a result had lost his balance. It was patently an unsafe system of work. The trial judge was also entitled to make a finding of contributory negligence as the plaintiff was an experienced enough man. There was unquestioned evidence that the defendants had been operating a manifestly unsafe system of work and, in such a situation, the greater burden of blame would be attributed to the defendants. The trial judge had made a perfectly reasonable apportionment.

***O'Reilly v Iarnród Éireann*, Supreme Court, 8/5/2002** [FL5400]

Health boards, medicine

Judicial review – medicine – health boards – damages – domiciliary midwifery services – whether health board legally obliged to provide domiciliary midwifery services – whether applications moot – Health Act, 1970

The applicants sought an order of *mandamus* to compel the respondent to provide domiciliary midwifery services. In addition, it was argued that, where no such service existed, the health board was obliged to compensate the applicants for the expense of hiring independent midwives. The applicants based their claim largely on the *Health Act, 1970*. The question of mootness arose as the children in question were born before the hearing of the applications.

Murphy J dismissed the applications. The health board was obliged to provide services by a medical practitioner. Midwives were not medical practitioners even though they might be more experienced in midwifery, particularly where medical practitioners no longer held themselves out as obstetricians. This was clearly a policy matter for the health boards and for the medical profession. If a case was moot, no substantive remedy could be granted. Damages depended on a breach of obligation which, if not proven, did not arise. Damages as a subsidiary issue could not arise in law without there being a breach.

***Tarrade and Others v Northern Area Health Board*, High Court, Mr Justice Murphy, 15/5/2002** [FL5382]

DELAY

Evidence, forgery

Judicial review – criminal law – constitutional law – financial services – banking law – forgery offences – examination orders – evidence – order of prohibition – jurisdiction of Circuit Court – whether orders of examination ultra vires *– whether fair procedures complied with in obtaining orders – whether evidence obtained admissible in criminal prosecution – whether Circuit Court judge empowered to determine validity of District Court order* – Bankers Books Evidence Act 1879 – Forgery Act 1913 – Larceny Act 1916

The applicant had been charged with offences of forgery and fraudulent conversion. In addition, orders of examination had been granted in relation to the applicant under the *Bankers Books Evidence Act 1879*. The applicant initiated judicial review proceedings seeking to have the orders of examination quashed and also sought an order prohibiting the impending criminal prosecution. The applicant contended that the orders of examination were bad on their face for failing to show their relevant statutory basis and that they were *ultra vires*. Arguments were also advanced that the orders in question breached the privacy rights of the applicant and were obtained in breach of fair procedures. Allegations of delay were made on behalf of both sides. In the High Court, O'Neill J held that it could not be said that the prosecuting authorities were guilty of inordinate delay and accordingly the application for an order of prohibition would be refused. The question of whether certain evidence was admissible would fall to be determined by the trial judge. The application for an order of *certiorari* would be refused. The applicant appealed to the Supreme Court.

The Supreme Court (Keane CJ and Fennelly J delivering judgments; Hardiman J agreeing) dismissed the appeal. Fennelly J held that the trial judge in the Circuit Court had the power to rule on the legality of orders which authorised the collection of evidence, which in this case were orders made under the *Bankers Books Evidence Acts*. It was not necessary for a party to apply for judicial review in order to have such orders quashed. The trial judge had correctly exercised his discretion to refuse *certiorari*. The delay period was not comparable to cases in which orders of prohibition had been granted. The delay that had arisen was not culpable. Keane CJ delivered *obiter* comments relating to the judgment in *Guardians of the New Ross Union v Byrne* (130 LR [Ir] 160).

***Blanchfield v Judge Harnett and Others*, Supreme Court, 16/5/2002** [FL5355]

EMPLOYMENT

Injunction

Termination of employment – wrongful dismissal – interlocutory injunction – balance of convenience – whether plaintiff entitled to injunctive relief in the absence of claim for damages for wrongful dismissal – whether damages adequate remedy

The plaintiff sought an interlocutory injunction which would continue the effects of an interim injunction which he had previously obtained. The plaintiff sought an order restraining the defendants from terminating his employment contract or from taking any steps on foot of a purported dismissal or suspension. In addition, declarations were sought that the plaintiff continued to be in the employment of the first defendant and damages for breach of constitutional rights, distress and defamation were sought, together with a claim for accounts of sums found to be due and owing to the plaintiff. The defendant claimed that, as the plaintiff had not sought damages for dismissal, no injunction could be given and, in any event, that the balance of convenience was against the continuation of the interim injunction.

Murphy J refused the interlocutory relief for declarations and the permanent injunction sought. Where there was a claim for damages for wrongful dismissal, the plaintiff might also be entitled to declarations and injunctions in aid of that common-law remedy, but equitable relief had no independent existence apart from a claim for damages for wrongful dismissal. As the plaintiff denied he had been dismissed and contended that his contract of employment was extant and had not claimed damages for wrongful dismissal – insofar as no proper notice was given – he had undermined his right to equitable relief. Whether or not there was a serious issue to be tried, damages would be an adequate remedy.

***Davis v Walshe and Plynth Limited*, High Court, Mr Justice Murphy, 14/5/2002** [FL5384]

JUDICIAL REVIEW

Election law

Powers of returning officer – whether returning officer entitled to remove description containing word 'father' – whether leave to seek judicial review should be granted – Electoral Act, 1992

The applicant was a candidate in the general election. As part of the nomination process, the applicant submitted his papers with a description of 'father and college lecturer'. The returning officer deleted the reference to 'father'. The applicant sought to judicially review the actions of the returning officer. Leave to seek judicial review was refused in the High Court and the applicant appealed.

The Supreme Court (Murphy J delivering judgment; McGuinness J and Fennelly J agreeing) dismissed the appeal. The trial judge was correct that the word 'father' was purely descriptive of a relationship and did not in any way connote an occupation. Accordingly, the judge was correct in refusing the leave to apply for judicial review and the appeal would be dismissed.

***Ó Gógain v Government of Ireland and Ors*, Supreme Court, 13/5/2002** [FL5410] G

The information contained here is taken from FirstLaw's Legal Current Awareness Service, published every day on the Internet at www.firstlaw.ie. *For more information, contact bartdaly@firstlaw.ie or FirstLaw, Merchants Court, Merchants Quay, Dublin 8, tel: 01 679 0370, fax: 01 679 0057.*

Eurlegal

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

Procurement law as it applies to public/private partnerships (part 2)

In addition to the procedures on EU public procurement law, contracting authorities should be aware of certain fundamental principles – as laid down in the *Rome treaty* – which should be applied in the PPP process and are binding on contracting authorities. The principles include the following:

- **Equality of treatment.** This principle requires that the contracting authorities take all measures necessary to ensure that all tenderers are treated in an equal manner. This means that similar tenderers are not to be discriminated against as being different. Contracting authorities are bound by this requirement and the ECJ interprets this obligation very strictly (see *Commission v Denmark*, case C-243/89 [1993] ECR I-3353)
- **Transparency.** The contracting authority must carry out the public procurement procedures with a level of transparency. The contracting authority must make public its intention to award a contract. It was decided by the ECJ in the *Unitron Scandinavian* case that a principle of transparency is to be complied with along with the principle of equality of treatment by the contracting authority
- **Proportionality.** The principle of proportionality, which is well established in European law, stipulates that any measure required by the contracting authority (under the procurement rules) must be necessary and appropriate in the circumstances of the contract. It may not, for example, require candidates to fulfil conditions that are excessive and disproportionate to the subject of the contract
- **Mutual recognition.** The principle of mutual recognition requires that member states recognise the products and services offered by candidates from other member state countries. This includes, for example, during the public procurement procedures, the acceptance of equivalent technical specifications and educational qualifications of another member state country.

Proposed amendments to directives

In 1996, a green paper entitled *Public procurement in the European Union: exploring the way forward* gave rise to a debate on public procurement rules, whereby the commission found inconsistencies between the public procurement directives. As a result, the European Commission has proposed a threefold objective to be achieved by the amendment of the public procurement directives: modernisation, simplification and flexibility. The modernisation objective is intended to cater for new technologies and changes in the environment. The simplification and flexibility objectives are intended to simplify some of the procedures that have been criticised as too rigid and complex. These proposals were set to be implemented by 2002, but they are presently still under discussion at European level. The European Parliament approved the proposed directives in May 2001. They are as follows:

- The proposal for a directive of the European Parliament and of the council on co-ordination of procedures for the award of public supply contracts, public service contracts and public works contracts, and
- The proposal for a council directive co-ordinating the procurement procedures of entities operating in the water, energy and transport sectors.

For the purposes of this article concerning procurement rules, I will concentrate on the first proposal.

Simplification: restructuring and clarification

The three public sector directives involving supplies, services and works are to be amalgamated into a single text in order to render the EU public procurement rules more comprehensible and consistent to both the supplier and the buyer. This may have the effect of eliminating the current confusion as to which directive is to apply to a particular public contract. Several member states have adopted the same approach in transposing directives into a single text at national level.

The structure of the proposed directive is more user-friendly. This means a reduction in the number of articles, more clearly laid out provisions, and each chapter, section and article has a heading for ease of identification by the reader.

The new provisions are set to logically follow the course of the contract-award procedure. There is a strengthening of the provisions relating to award and selection criteria.

The threshold provisions have also been amended. All thresholds are to be expressed in euros and have been simplified. These are as follows: for works contracts, a single threshold of €5,300,000 for all contracts and concessions falling under its scope; for supplies and services contracts, two thresholds of €130,000 or €200,000. Their application will depend on whether the contracting authority has the status of central or non-central authority.

A common procurement vocabulary is proposed in order to simplify administrative procedures.

Modernisation: adapting to a changing economy

The standard procedures laid down by the public supply, services and works directives leave very little scope for discussion between the parties during the award of contracts. This inevitably leads to difficulty when contracting authorities are involved in the negotiated tendering procedure. As a result, a new case for the use of negotiated procedures is being introduced, which for particularly complex contracts permits a 'dialogue' between the contracting authority and the various candidates, while ensuring that there is competition, transparency and general compliance

with the principle of equality of treatment. In this instance, the commission proposes to extend the existing negotiated procedure with prior publication of a notice. This will involve the contracting authority publishing a notice whereby it will choose one of two options in terms of criteria it wishes the candidates to submit, either by way of (a) normal documentation relating to the candidates, including their technical, economic and financial capacity, or (b) in addition to the normal documentation, the contracting authority may request the candidate to submit an 'outline solution', including details on how the candidate will meet the requirement needs of the contracting authority.

Following the selection of candidates, the contracting authority may then consult the selected participants to determine which candidate can best fulfil the particular contract. The contracting authority may then invite not less than three candidates to submit formal tenders. There will then be no further negotiations. It is possible that this amendment to the negotiated tendering procedure may lead to a reprieve on the limited scope of the current negotiated procedure and its current strict interpretation by the European Court of Justice. However, as it is intended that this amended procedure be 'appropriately supervised', its scope and effectiveness remain to be seen (COM [2000] 275 final/2 2000/0115 [COD], explanatory memorandum, 3.7 at p8).

There is a clarification of provisions regarding technical specifications. This is intended to simplify the lists of standard technical specifications, which are currently provided for in the public procurement directives, and to bring them into line with each other. These amendments are intended to allow public purchasers to stipulate their requirements in terms of performance levels as well, while safeguarding the European standardisation approach, as reference to the standards will remain an option. Certain sectors are excluded from the provisions of this new directive. One such example is the telecommunications sector.

The introduction of more flexible purchasing techniques in the form of 'framework agreements' is set to happen, on the basis of which contracts can be awarded without complying with all of the obligations of the directive. This is to allow for more flexibility in terms of the standard form of contracts. Framework agreements are not contracts, but they may be treated as contracts for the purposes of the directives. They are already provided for in the *Utilities directive*. Framework agreements can be extremely useful for pan-government agreements. They allow small departments to use the government's overall purchasing power. They may, however, be only suitable for PPP projects with cross-border implications.

The commission has also placed much emphasis on encouraging public purchasers to tender for contracts by electronic means. It has set a target of 2003, by which time it proposes that 25% of all procurement transactions take place electronically. This is to shorten the length of time for the tendering procedures, thereby rendering the procedures less onerous.

The proposed directive appears to deal with many issues concerning the European procurement rules that have been the subject of much criticism. It reflects a willingness on the part of the European Union to cater for the introduction of a more liberal and flexible approach to European procurement rules and the outcome can only be positive for the success of PPPs in Ireland.

Irish legislative PPP initiatives

Since 1999, PPP units have been set up in the departments of finance, environment and local government, public enterprise, and education. The government is committed to completing the National Development Plan. This involves a national capital investment of €51.54 billion between 2000 and 2006. One of the main elements is to develop the national road network and a particular portion of the investment is to be provided by PPPs. The government is keen to further accelerate the PPP process and to give confidence to investors, contractors and the public. Consequently, the *State Authorities (Public/Private Partnership Arrangements) Act, 2002* was enacted. This legislation is designed to provide certainty in relation to the powers of state authorities to enter into PPPs and to ensure that state authorities possess the appropriate power to enter into joint ventures. The act also empowers state authorities to form companies for the purpose of a PPP and gives state authorities the legal capacity necessary to contract with the private financiers of public/private partnerships.

The European Union's public procurement policy is to attain fair and open competition for public contracts above certain thresholds by allowing suppliers to gain the full benefit of the single market and contracting authorities to choose from a wider range of bids. Its application is of particular relevance. In addition, there is willingness on behalf of the Irish government to continue the development of PPPs in this country.

There is a new initiative emanating from Europe to facilitate a more flexible and modernised approach to the rigid European procurement rules, which are not to be taken lightly by any contracting authority at present. The extent and effect of these new initiatives, which remains to be seen, should contribute greatly to accelerating the status of PPPs beyond the pilot stage in Ireland and into the everyday normal course of business. G

Philip Daly is a partner in the Dublin law firm LK Shields. This is the second part of the article that appeared in last issue's Eurlegal.

Recent EU legislative developments:
March and April 2002

Design regulation. The European Council has adopted a regulation on the legal protection of community designs. This regulation, which implements the *Designs directive* (98/71/EC), came into force and has had direct effect throughout the European Economic Area from 6 March 2002. The Office for the Harmonisation of the Internal Market will administer the new community designs register. The two new rights in designs which the regulation creates are:

- The unregistered community design, which subsists in all designs to the extent that they are new and have individual character, for three years from the date on which the design was first made available to the public within the community. It is an exclusive right to deal in products in which the design is incorporated or to which it is applied, provided that the infringing use results from copying the protected design
- The registered community design, which lasts for an initial period of five years from a successful filing application and can be renewed for up to 25 years from that date.

European Council regulation (EC) no 6/2002 on community designs

***Kyoto protocol* commitment honoured.** On 4 March 2002, the EU council's environmental ministers adopted the commission's proposal for a decision to ratify the *Kyoto protocol*, which was strongly welcomed by the commission. The decision also makes the member states' greenhouse gas reduction commitments agreed in June 1998 binding in the EU. It is envisaged that by depositing member states' and the European Community's instrument of ratification with the United Nations by 1 June 2002, it will enable the entry into force of the protocol by the forthcoming World Summit on Sustainable Development in Johannesburg in September 2002.

EU Environment Commissioner Margot Wallstrom welcomed indications by Japan, New Zealand and Norway that they are preparing for ratification and called on other countries, notably Russia, to do likewise. She concluded by emphasising the need for further EU emission reduction measures.

European Commission press release, IP/02/355

Draft regulation for motor vehicle sector. This draft regulation plans a new regime for motor vehicle distribution, servicing and repair and the commission has invited comments from all interested parties, including the general public. Competition Commissioner Mario Monti welcomed European citizens' first opportunity to make known their views on the text. The draft regulation is intended to come into force on 1 October, when the *Block exemption regulation* (1475/95) that is currently in force will expire. Upon consideration of all comments received, along with the views of member states, the European Parliament and the Economic and Social Committee, the commission will submit the proposal, with any amendments, to the member states for a second consultation. The draft regulation substantially alters the current *Block exemption regulation* and the commission considers it stricter than its predecessor but less prescriptive. The new draft regulation is designed to lead to new competition between dealers, make cross-border motor vehicle purchases easier and lead to greater price competition in the sales and after-sales markets.

European Commission press release, IP/02/380

Recognition of professional qualifications. This proposed directive will clarify and simplify the rules in order to facilitate the free movement of qualified individuals within the EU, particularly in light of EU enlargement. The proposed directive constitutes the first comprehensive review of the community system in 40 years and would replace 15 existing directives on the recognition of professional qualifications. The proposed changes include extended liberalisation of the provision of services, extended automatic recognition of qualifications, and increased flexibility in the procedures for amending the directive. In order to keep citizens more informed of their rights and to aid them in having their qualifications recognised throughout the EU, the commission also proposes to develop its co-operation with the member states. The proposed directive also involves a simplification of the management and updating of the rules, particularly with regard to adapting them to progress in science and technology.

The Internal Market Commissioner, Frits Bolkestein, believes that 'the free movement of qualified persons contributes to the development of the knowledge-based economy, the flexibility of labour markets and improved public services. The purpose of this proposal is to ensure a clearer and simpler system for the benefit of the workers concerned and to step up our efforts to create in Europe, by 2010, the world's most dynamic and competitive economy'.

European Commission press release, IP/02/393

Protection of temporary agency workers. This draft directive is designed to provide a minimum EU-wide level of protection for temporary agency workers and to assist the agency worker sector to develop as a flexible option for employers and employees. The draft directive establishes the principle of non-discrimination, which includes non-discrimination regarding pay as between temporary agency workers and comparable workers in the user undertaking. The temporary worker must have been working for six weeks with the same user undertaking in order for the principle to apply. An exception to the principle of non-discrimination is permitted for objective reasons, particularly where temporary agency workers are offered permanent contracts with their agency and are paid even for those days for which they are not assigned to a user undertaking. Provision is also made for an exception where collective agreements stipulate the working conditions and allow an adequate level of protection.

The Commissioner for Employment and Social Affairs, Anna Diamantopoulou, believes that 'this proposal not only seeks to create more jobs, but also aims to provide "better jobs" for temporary agency workers through a basic minimum of protection throughout the EU. At the same time, it allows considerable margin for manoeuvre at national level in applying the rules in accordance with national practice in the sector'.

European Commission press release, IP/02/441

Single European sky. Three draft regulations provide for common air navigation services, the organisation of EU air-

space and the inter-operability of European air traffic management networks. The commission considers that further consolidation of the European aviation market is inevitable and has called for the EU and USA to negotiate a 'transatlantic common aviation area' to establish fair and competitive commercial market conditions. Loyola de Palacio, vice-president of the European Commission in charge of energy and transport, considered that 'direct cash subsidies should be avoided in Europe: our objective is to maintain and improve the liberalised European marketplace and have international agreements which will give more freedom to airlines to provide services, compete with each other and develop their business'.

The events of 11 September have put the emphasis on terrorism as a major and global threat. Loyola de Palacio has recognised that risks must be addressed on a multi-layered government system with, increasingly, shared roles and responsibilities between public and private stakeholders. In order to guarantee the risks, she said, 'we shall study the possible creation of a mutual fund financed through payments collected from airline passengers: it would operate with support from the insurance industry and, at least in the early years, an underlying guarantee from governments'. In cases where liabilities of airlines far exceed what is insurable and where states face potentially very high costs, she envisages a system of joint indemnity. In her view, the industry, on top of the commercial premium and the possible mutual insurance premium, would pay a premium for the state guarantee, which would not be exclusively market based. She considered that such a scheme would cover only member states, with a possibility to cover certain European third countries, while the insurance of large-scale liability related to war and terrorism attacks outside Europe would have to be addressed internationally.

European Commission press release, IP/02/188, IP/02/190

Civil liability for environmental damage. The proposal covers water pollution and damage to the biodiversity of flora and fauna on protected sites at both community and national level, in addition to land contamination. However, the proposed directive will not cover permitted pollution emissions and emissions not considered as dangerous to the environment. Only damage occurring after the entry into force of the directive, which is intended to be in 2004, will lead to liability. Under the proposal, the claimant bears the initial burden of proof, but the alleged polluter will be obliged to disclose to the member state's relevant investigating authority all the relevant data or information to help establish the facts of the case. The proposal foresees that member states should put in place 'safety nets' to ensure that 'orphan damages' (that is, damage for which no polluter can be identified or for which the identified polluter is insolvent) will be actually restored. Member states enjoy a wide latitude in determining how and by whom those 'safety nets' should be financed. The proposal also leaves a wide margin of manoeuvre to the competent national authorities with respect to the choice of restorative measures for damage. The proposal introduces liability for damage to biodiversity, which, it is understood, has not to date been done at national level by any member state.

European Commission press release memo, 02/10

Works council directive. The directive, which was published for consultation on 17 November 1998, seeks to introduce the concept of works councils at national level, covering some of the ideas already in the *European works councils directive* (94/45/EC). This proposal requires employers that have 50 or more employees to consult with works councils and to keep them informed. The work councils will be comprised of employee representatives, elected or appointed in accordance with national law. The timetable for implementation for those countries that already have 'general, permanent or statutory' systems for consultation, employee representation or information will be early 2005. The timetable for implementation for countries such as Ireland and the UK that currently do not have such structures will depend on the number of employees in undertakings or establishments: the timetable for undertakings with 150 employees or more or establishments with 100 employees or more will be early 2007, and for undertakings with 100 or more employees or establishments with 50 or more employees the timetable will be early 2008.

European Commission (COM/1998/612)

Cross-border movement of genetically-modified organisms. The aim of the proposed regulation is to establish international safeguards for the transfer, handling and use of genetically-modified organisms. The commission believes that these measures are essential for the protection of biodiversity at international level with special focus on developing countries. The proposed regulation also contains detailed rules on the implementation of the provisions of the United Nations' *Cartagena protocol on biodiversity*, but it does not lead to any modification of the existing EU legal framework on genetically-modified organisms that has been proven consistent with the provisions of the protocol. The proposed regulation complements existing EU legislation on biotechnology, mainly in the field of exporter obligations and information-sharing at international level.

European Commission press release, IP/02/299

'Next generation' Internet. A commission communication, entitled *IPv6 priorities for action*, requests a European action plan to speed up the roll-out of *Internet protocol version 6* (IPv6), a key technology for the 'next generation' Internet. IPv6 will significantly increase the capacity for IP addresses and provide greater stability, security, privacy, power and efficiency. It is expected that space on the current Internet will be exhausted by 2005, as already 74% of the current IPv4 addresses have been allocated to organisations in North America. Also, future Internet developments such as wireless machine-to-machine communications, mobile computing and third-generation telephony will put an even greater strain on these limited resources. The commission sees IPv6, alongside the European broadband strategy and many other initiatives launched since the Lisbon Council (which called for Europe 'to become the most dynamic knowledge-based economy in the world by 2010'), as a critical part of Europe's next generation Internet strategy. While some of the new addresses will be assigned to users' traditional PCs, most of the addresses are likely to be assigned to new types of Internet-capable devices, such as mobile phones, car navigation systems, home appliances, industrial equipment and other electronic equipment.

European Commission press release, IP/02/284 G

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

Recent developments in European law

COMPETITION

On 7 January 2002, the commission adopted a new notice on agreements of minor importance. The new notice increases the thresholds in the previous 1997 notice. The new threshold for horizontal agreements is 10% market share and 15% for vertical agreements. The notice introduces a new threshold of 5% for parallel networks of similar agreements which produce a cumulative anti-competitive effect.

Case C-221/99 *Giuseppe Conte v Stefania Rossi*, 29 November 2001. The case arose from legal proceedings between Mr Conte and Ms Rossi, an architect, on the question of the payment of her fees. Italian legislation provides for minimum tariffs in respect of the services provided by architects and engineers. These professional fees are fixed by law. Certain minimum fee levels are mandatory. The Italian civil code provides a procedure for a creditor to whom professional fees are owed to secure an enforceable court order on an *ex parte* basis. Such an invoice must be signed by the applicant and endorsed by the opinion of the competent professional association. The court is obliged to follow this opinion. Ms Rossi used this procedure to recover unpaid fees from Mr Conte. Mr Conte challenged the court order, arguing that the opinion of the association was a decision by an 'association of undertakings' contrary to article 81. The ECJ pointed out that the opinion ceases to be binding when a debtor institutes proceedings *inter partes*. Thus, it does not restrict competition contrary to article 81. The fee charged was at the discretion of the professional concerned. Thus, the legislation in question did not promote anti-competitive agreements.

CRIMINAL LAW

On 11 December 2001, the commission adopted a green paper on the appointment of a European public prosecutor. It is intended that this person would be an independent judicial authority, responsible for protecting the EU's financial interests from fraud and corruption. The prosecutor will be able to conduct investigations throughout the EU and use all national enforcement instruments as well as those established through EU judicial co-operation. The prosecution would be heard and judged in national courts. The commission is to present its conclusions no later than the beginning of 2003.

EMPLOYMENT

Case C-206/00 *Henri Mouflin v Recteur de l'Académie de Reims*, 13 December 2001. Mr Mouflin is a French teacher. As his wife was suffering from an incurable illness, he wished to retire early and claim his pension rights. In October 1998, he was permitted to do so, but a month later this permission was withdrawn. The withdrawal was due to a letter from the minister for education, specifying that the right to retire to take care of an invalid spouse was confined to female civil servants. Mr Mouflin challenged this policy as discriminating on grounds of gender, contrary to article 119 of the treaty. The ECJ was asked whether pensions provided under a retirement scheme fell within the scope of article 119. It held that it did. The policy concerned did infringe the terms of article 119. There was nothing to distinguish between the situation of a male or female civil servant whose spouse is diagnosed with an incurable illness and requires care. This policy therefore discriminated between male and female civil servants. G

Members of the Council of the Law Society of Ireland 2001/02

Pictured are *(front row, from left)* past president Laurence K Shields, past president Francis D Daly, past president Moya Quinlan, director general Ken Murphy, Law Society President Elma Lynch, junior vice-president Philip Joyce, senior vice-president Geraldine Clarke, Edward C Hughes, Brian J Sheridan and Fiona Twomey; *(middle row, from left)* Anne Colley, Gerard F Griffin, John G Fish, immediate past president Ward McEllin, James B McCourt, Kevin D O'Higgins, Mr Justice Michael Peart, Thomas Murran, Eamon O'Brien, John E Costello, Owen M Binchy and Angela E Condon; *(back row, from left)* John D Shaw, Donald P Binchy, John O'Connor, past president Anthony H Ensor, Michael Irvine, Stuart J Gilhooly, past president Patrick O'Connor and Simon J Murphy

Irish internationals

In March, the Irish Society of International Law was formed by a group of trainee solicitors. The objective is to promote the study and understanding of international law in Ireland. The inaugural lecture – on the international criminal court and its impact on international law – was given by Professor William Shabas of NUI Galway's Centre for Human Rights. Pictured at the May conference in Blackhall Place are CCBE president John Fish, Law Society Director of Education TP Kennedy, Professor William Shabas, Jonathan Tomkin of the ISIL and solicitor James MacGuill

Charity begins at home

Law Society President Elma Lynch launches the new charity law report produced by the society's Law Reform Committee

Open to negotiation

The Law Society Negotiation Competition was held for the first time in June. Eight trainee solicitors participated in the final, where competitors were required to negotiate the transfer of a football player. Pictured *(from left)* are Jane Moffat, course co-ordinator in the Law Society's Education Centre; competition runner-up Sandra Doyle; the winners of the competition, Jacqueline Lacey and Gerald O'Donoghue; runner-up Linda Ní Chualladh; and student welfare officer Antoinette Moriarty

No glass ceilings

The Irish Women Lawyers' Association was recently formed to promote equality and equal treatment for women lawyers (see p3 of the June issue of the *Gazette*). Pictured at the launch of the association are Miriam Reynolds SC, chairwoman of the association, attorney general Rory Brady, Judge Maureen Harding-Clark, justice minister Michael McDowell and Law Society Council member Anne Colley

Mind your STEP

Adrian Bourke, past president of the Law Society, gives some helpful advice to John O'Connor, incoming chairman of the Society of Trust and Estate Practitioners, at STEP's annual conference in May

Back on track

Law Society President Elma Lynch and Kevin O'Brien, managing partner of Kilroys Solicitors, outside the National Concert Hall at the re-launch of the Kilroys website. The searchable site, *www.kilroys.ie*, includes a wide range of articles and comment on recent legislation and developments in Irish and EU law

It's a long way to Tipperary

Law Society President Elma Lynch and director general Ken Murphy met the committee of the Tipperary Bar Association in Thurles in April. Pictured at the meeting are *(seated, from left)* association president Brendan Hyland, president Elma Lynch, Peter Reilly, Billy Gleeson, Maura Hennessy and director general Ken Murphy; *(standing, from left)* Philip Joyce, Dermot O'Dwyer, Donal Smith, Patricia Gleeson, Mark Hassett, Maura Derivan, Pat McDermott and Donald Binchy

But it's further to Sligo

Pictured at a meeting of the Sligo Bar Association in May are *(front, from left)* association secretary Leonie Hogg, association president Tom Martyn, Elma Lynch, Ken Murphy, Dervilla O'Boyle and Michele O'Boyle; *(middle, from left)* Carol Ballantyne, Eamon Creed, Eoin Armstrong, Garret McDermott, Phil Armstrong, Brendan Johnson, Lorraine Murphy, Michael Mullaney, Peter Martin, Eamon MacGowan and Keenan Johnson; and *(back, from left)* Damien Martyn, Michael Mullaney, Gerard McCanny, David Gallagher and Diarmuid Sheridan

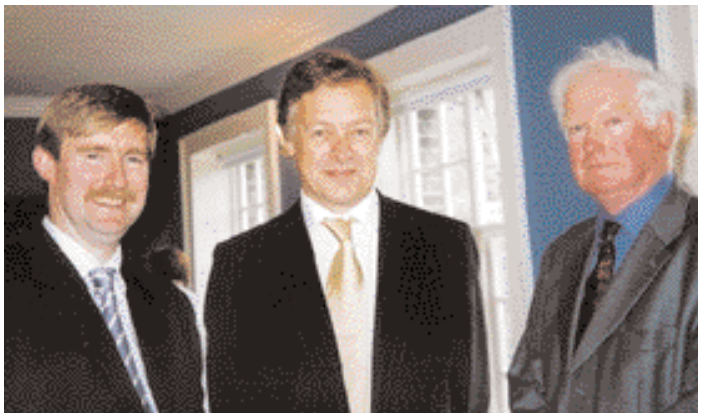
Open day at Blackhall Place

Students at the recent PPC2 open day get information on continuing legal education from Barbara Joyce and Lindsay Bond

Director general Ken Murphy, Education Committee chairman Michael Peart, and president Elma Lynch speak to students

RSI numbers

Pictured at a seminar on work-related upper limb disorders (commonly known as RSI) are *(from left)* Professor Colin MacKay of the health services division of the UK Health and Safety Executive; Lars Skogsberg, design support and ergonomics manager of Atlas Copco in Sweden; solicitor Noel Gallagher of Anderson & Gallagher; Paul Romeril, president of the Association of Consulting Engineers; and Michael Molloy, secretary of the association



I'll be the judge of that

Law Society Director General Ken Murphy with Mr Justice Michael Peart and retired Circuit Court judge John Buckley at a parchment ceremony at Blackhall Place in July

Musical chairs

Solicitor Gordon Holmes has reluctantly resigned from the Law Society Pension Fund Committee due to other commitments. He is currently the chairman of the Commission on Intoxicating Liquor, the Interim Parole Board and the Betting Appeals board. He also served the society on the Superior Courts Rules Committee and the Circuit Court Rules Committee for almost 24 years

Getting an MBA

Pictured at a meeting of the Midland Bar Association on 6 June are *(front, from left)* Joseph Donohue; Derek McVeigh; Dermot Scanlon; Peter Jones, state solicitor for Westmeath; Brian O'Sullivan, president of the Midland Bar Association; Law Society President Elma Lynch; director general Ken Murphy; John Walsh, secretary of the association; Carmel Kinsella-Leavy, Brian Mahon and Helen Reilly; *(middle, from left)* Cliona Kenny, Declan Hannify, Andrew Fay, Tom Farrell, Aidan O'Carroll, Sean McMullin, Bernadette McArdle, Yvonne Hennessy, Marguerite Buckley, Joan White, Mary Ward, Anne Marie Kelleher, Redmond O'Regan and Seamus McConnell; and *(back, from left)* Ronan O'Hehir, Denis Larkin, Marcus Farrell, Donal Farrelly, Seamus Tunney, Fintan O'Reilly, Raymond Mahon, Patrick Martin, Joseph Brophy, Suzanne Stroker, Offaly state solicitor Jim Houlihan, Lucy Harnett and Ciara Farrell

Master of ceremonies
CCBE president, John Fish, addresses a recent parchment ceremony in Blackhall Place

Practise what you preach
In May, over 70 practitioners in two locations, Sligo and Waterford, participated in a video-conference covering four core areas of legal practice: litigation, conveyancing, licensing, and probate and administration. The four speakers, Michael Peart, Robert Potter-Cogan, David Binchy and Paula Fallon, spoke expertly, and each session ended with numerous questions from both venues. In addition to the main topics covered, Michael Treacy and Peter McHugh of the Land Registry gave a presentation on the new electronic access service by means of a live demonstration. Particular thanks is due to the two chairpersons, Michele O'Boyle in Sligo and Paddy Gordon in Waterford, for their support and assistance

Paddy Morrissey, RIP

It was with great sorrow that everyone in the Law Society learned that Paddy Morrissey passed away peacefully on 17 June. He passed quickly, at the relatively young age of 57, having last performed his duties in the society just before Easter.

Paddy was much more than the society's caretaker for 15 years. He met and greeted everyone who passed through the door, and the warmth with which he did so made a very positive and lasting impression on thousands of visitors to Blackhall Place. He was, as he was pleased to be told shortly before his passing, 'an institution within an institution'.

There would be very few people in the society whose passing would touch as many as has Paddy's.

Our thoughts and sympathy are with Anne and the family.

KJM

Class dismissed
Recent recipients of the Law Society's *Diploma in e-commerce* are pictured with *(from left)* TP Kennedy, the society's director of education; Michael Peart, former chairman of the Education Committee; and Senior Vice-President Geraldine Clarke

SADSI
Solicitors Apprentices Debating Society of Ireland

Personal benefits for trainee solicitors

SADSI is committed to seeking out group deals for the benefit of trainee solicitors. There are quite a number of benefits already available to you, in addition to the more obvious perks, such as being entitled to a USIT card and associated benefits throughout the duration of your training and the chance to hone your photocopying skills. On a serious note, we are putting together a comprehensive list of personal benefits that are available to trainees.

Marsh Financial Services offers all members of the Law Society – including trainees – independent, non-tied access to insurance and financial services. Check the SADSI website for a summary of the available services, which include advisory services, protection plans, personal insurance schemes, and healthcare schemes.

We are currently working to formulate a car-insurance group rate and hope to have good news for you in the near future.

Martin Hayes, auditor

SADSI career development day

Career Development Day 2002, generously sponsored by Benson & Associates Legal Recruitment, was held on 5 July. Olwyn Enright, solicitor and TD, made the opening address to a full house and set a high note for the day. Geoffrey Shannon, the Law Society's deputy director of education, chaired the event. The speakers all provided the attendees with a great insight into the wealth of options open to us, both in terms of developing our careers within the profession as well as using our skills outside the profession. The speakers included president Elma Lynch, Liam Herrick from the ICCL, legal recruitment specialist Michael Benson, and Law Society training executive Deirdre O'Donnell. Sylvia McNeece, the Law Society's legal development manager, spoke on practising law abroad; Jonathan Kelly of Philip Lee Solicitors spoke on media and entertainment law; Henry Lappin of McCann Fitzgerald spoke on personal injuries litigation practice; James MacGuill of MacGuill & Co spoke on criminal litigation practice; and Johnnie McCoy, vice-chairman of the Irish branch of the Chartered Institute of Arbitrators, spoke on dispute resolution and arbitration.

The next Law School newsletter will contain greater detail on the day's proceedings and we will be posting information on the SADSI website in due course.

As auditor, I wish to sincerely thank the speakers for taking time from their busy schedules to provide such an informative afternoon, and also the committee for working so hard to bring the day to fruition and making it a wonderful success.

Martin Hayes, auditor

Minimum wage for trainees

A pressing concern that is regularly expressed to SADSI is the issue of the expected increase in the Law Society recommended minimum wage for trainees. The point must be stressed that this is the **minimum** recommended wage, and it is open to trainees to negotiate their pay further. Many offices readily engage in such negotiations. However, in order to act on this concern in a proper and constructive manner, it is necessary to convey to the Law Society a full picture of the current situation facing trainees. To this end, we plan to conduct a brief and to-the-point survey via the SADSI website from 12 August. The survey will also address issues pertaining to the *Working time directive*.

Mid-western front

A well-deserved night out for the hard-working trainees of the Limerick area took place on 21 June. The well-attended event included a sizeable contingent from the West as well as a more modest representation from the Tullamore area. Proceedings began in Schooners on the Quay. A fine selection of food was provided and we were made to feel very welcome, with a very comfortable area being set aside for us. I am extremely appreciative to Breda Kearney in this regard. As the night progressed, a further venue was deemed necessary, and it was decided that we adjourn to the night-club in the Royal George Hotel to be entertained by the musical stylings of William Leahy, DJ. Great crack ensued and I would like to thank the hotel for the manner in which we were accommodated on the night.

Future events are in the pipeline and details will be circulated, so keep an eye on your *campus.ie* account.

Dermot McKeon, Mid-west rep

Eastern promise

The first Eastern regional event took place on 13 June in the Vaults, a most impressive state-of-the-art multi-purpose venue located under Dublin's Connolly Station. The management could not have been more accommodating, and we certainly will be hosting another event there in the Autumn. The night was a great success in a brilliant venue with plenty of food and free drink. All had a most enjoyable evening.

The next Eastern event is scheduled for Thursday 15 August in a venue to be confirmed. Keep an eye on the SADSI website (*www.sadsi.ie*) and check your *campus.ie* account for more details.

Julie Brennan, Eastern rep

The SADSI ball, Southern and Western events

Plans are currently brewing in relation to holding social events in Cork and Galway. The SADSI ball will be held in early November. We look forward to sending you invitations in the near future.

LOST LAND CERTIFICATES

Registration of Title Act, 1964

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

(Register of Titles), Central Office, Land Registry, Chancery Street, Dublin

(Published 2 August 2001)

Regd owner: Michael Dooley (deceased); folio: 2073 (revised to new folio 5057F); lands: Clogrenan and barony of Idrone West; **Co Carlow**

Regd owner: Noel Langtry; folio: 4488F; land: Aghaloory; area: 0.202 hectares; **Co Cavan**

Regd owner: Kevin Hassett (junior); folio: 17873; townland of Carrowmore South and Lisluinahgan and barony of Ibrickan and Moyart; area: 19.199 hectares; **Co Clare**

Regd owner: Séamus Blake; folio: 37L; lands: part of lands of Clonroadbeg in the barony of Islands, in the town of Ennis and county of Clare; **Co Clare**

Regd owner: Denis O'Sullivan; folio: 34644; lands: a plot of ground being part of the townland of Skahabeg South situate in the barony of Cork and the county of Cork; **Co Cork**

Regd owner: Julia Margaret Murphy; folio: 1036L; lands: a plot of ground being part of the townland of Ballinaspig More situate to the west of Merlyn Lawn in the parish of St Finbar's and city of Cork; **Co Cork**

Regd owner: Cork Diocesan Trustees and Rev Donal O'Callaghan; folio: 28287; lands: a plot of ground situate in the townland of Curraghconway and in the barony of Cork in the county of Cork; **Co Cork**

Regd owner: Martin Lydon; folio: 35649; lands: a plot of ground being part of the townland of Dundanion and barony of Cork; **Co Cork**

Regd owner: Martin Lydon; folio: 35672; lands: a plot of ground being part of the townland of Dundanion and barony of Cork; **Co Cork**

Regd owner: Rosaleen Molloy; folio: 33666; lands: Monreagh or Barr of Kilmackilvenny; area: 23.246 acres; **Co Donegal**

Regd owner: Annie McBride; folio: 8700; lands: Doagh; area: 0.563 acres; **Co Donegal**

Regd owner: Nellie Gallagher; folio: 5177F; lands: Dunmore; **Co Donegal**

Regd owner: Gleanoir Kelly; folio: 26490; lands: Dromore; **Co Donegal**

Regd owner: Rachel Ní Chnoic; folio: 12579F; lands: Ballyboe Glencar; **Co Donegal**

Regd owner: Peter Paul Ward and Rita Ward; folio: 3723F; lands: Clougherdiller; area: 0.65255 hectares; **Co Donegal**

Regd owner: David Mahon; folio: 27716 and 29952F; lands: Durnesh; area: 7.929 hectares (folio 27716) and 5.986 hectares (folio: 29952F); **Co Donegal**

Regd owner: Glen Keogh; folio: DN125826F; lands: property situate in the townland of Drishoge and barony of Balrothery West; **Co Dublin**

Regd owner: Mary O'Beirne; folio: DN9132L; lands: property situate in the townland of Butterfield and the barony of Rathdown area; **Co Dublin**

Regd owner: Paula McGrane and Martin Galway; folio: DN32338F; lands: property known as 52 Stephen's Road situate in the parish of St Jude and district of Kilmainham; **Co Dublin**

Regd owner: Roadstone Limited; folio: DN2889; lands: property situate in the townland of Cappoge and barony of Castleknock; **Co Dublin**

Regd owner: Antonia Cafolla; folio: DN5619L; lands: property situate in the townland of Roebuck and barony of Rathdown; **Co Dublin**

Regd owner: Brian and Mary Kate Broggy; folio: DN25593L; lands: property situate on the north side of Watermeadow drive in the town of Tallaght; **Co Dublin**

Regd owner: James Brunkard; folio: DN5446F; lands: property situate in the townland of Commons and barony of Newcastle; **Co Dublin**

Regd owner: the County Council of the county of Dublin; folio: DN2237; lands: property situate in the townland of Buzzardstown and barony of Castleknock; **Co Dublin**

Regd owner: Janice Mayne; folio: DN47077F; lands: property situate to the west side of the road leading from Rush to Skerries in the town of Rush and parish of Lusk; **Co Dublin**

Regd owner: Roadstone Provinces Limited; folio: 19151; lands: property no 1, townland of Auburn and barony of Coolock; property no 2, townland of Drinan and barony of Coolock; property no 3, townland of Auburn and barony of Coolock; **Co Dublin**

Regd owner: Raymond Joyce and Geraldine Joyce; DN62104L; lands: property situate in the townland of Tootenhill and barony of Newcastle; **Co Dublin**

Regd owner: Claire Duggan and Neal Witter; folio: DN128796F; lands: property situate in the townland of Buzzardstown and barony of Castleknock; **Co Dublin**

Regd owner: Thomas Greally; folio: 48929; lands: townland of Cappanabornia and barony of Galway; area: 0.0930 hectares; **Co Galway**

Regd owner: John Joseph Hill and Una Hill; folio: 50088; lands: Treanlaur, 0.300 acres, 10.519 acres at Derry and one undivided 9th part comprising 6.156 acres at Treanlaur situate in the barony of Dunkellin and county of Galway; **Co Galway**

Regd owner: Daniel Martin O'Shea; folio: 32431; lands: townland of Dicksgrove and barony of Trughanacmy; **Co Kerry**

Regd owner: Conn P O'Shea; folio: 30718F; lands: townland of Coarha Beg and barony of Iveragh; **Co Kerry**

Regd owner: Godfrey DB Smith and Rhona HC Smith; folio: 2801F; lands: Inchaloughra and barony of Corkaguiny; **Co Kerry**

Regd owner: Joseph and Jean Cassidy; folio: 28242F; lands: townland of Corbally and barony of Connell; **Co Kildare**

Regd owner: Eugene O'Callaghan; folios: 2005F, 16605F; lands: townlands of Kilgowan and baronies of Kilcullen; **Co Kildare**

Regd owner: Patrick and Bernadette Holton; folio: 23440F; lands: townland of Kilmore and barony of Carbury; **Co Kildare**

Regd owner: Dymphna Dempsey; folio: 3299L; lands: townland of Monasterevin and barony of Offaly West; **Co Kildare**

Regd owner: James Keogh; folio: 1530; lands: townland of Kingsland and barony of Narragh and Reban East; **Co Kildare**

Regd owner: Andrew Brendan Kelleher, Thomas Ambrose O'Neill, John Leenardi Gilmore (deceased) and Denis Callistus Minogue (deceased); folio: 2613F; lands: Clashacollaire and barony of Callan; **Co Kilkenny**

Regd owner: Luke Gaule (deceased); folio: 976; lands: Ballynooney West and barony of Knocktopher; **Co Kilkenny**

Regd owner: Mark Phelan; folio: 14621; lands: Gossbrook and Rossadown and barony Upperwoods; **Co Laois**

Regd owner: John James and Margaret Brady; folio: 15915; lands: Lugasnaghta, Killea; area: 15.2465 hectares and 1.6339 hectares; **Co Leitrim**

Regd owner: John Clarke; folio: 3957; lands: Cloonlaughil; area: 7.00 acres; **Co Leitrim**

Regd owner: Margot Kratz; folio: 1625F; lands: Lisconor; area: 0.006 acres; **Co Leitrim**

Regd owner: John Malone; folio: 8719; lands: Dawson's Demesne; area: 0.65 acres; **Co Louth**

Regd owner: Laurence Cunningham; folio: 1749F; lands: Killineer; area: 1.875 acres; **Co Louth**

Regd owner: Leo Kenny; folio: 7766; lands: Lagavooren; area: 1.911 acres; **Co Louth**

Regd owner: Anthony Markey; folio: 5875F; lands: Sheepgrange; area: 0.931 acres; **Co Louth**

Regd owner: Brendan Faughey; folio:

6919; lands: Killaconner; area: 20.978 acres; **Co Louth**

Regd owner: Thomas Markey and Ethna Markey; folio: 1025F; lands: Rathiddy; area: 0.2175 hectares; **Co Louth**

Regd owner: Nicholas McAuley; folio: 21472; lands: Dunboyne; **Co Meath**

Regd owner: Denis Mulvihill; folio: 27278; lands: Quarryland; area: 0.311 hectares; **Co Meath**

Regd owner: Seosamh and Josephine Geraghty; folio: 7523F; lands: Townparks; **Co Meath**

Regd owner: John Fox and Company Limited; folio: 5644F; lands: Townparks; **Co Meath**

Regd owner: Kevin and Breda Flanagan; folio: 337L; lands: Kells; **Co Meath**

Regd owner: Arthur Brendan Thompson; folio: 399; lands: Kilmore East; area: 2.1903 hectares; **Co Monaghan**

Regd owner: Patrick O'Rourke of Inniskeen, Glebe, Co Monaghan; James Meegan of Kilabola, Innishkeen, Co Monaghan; Joseph Byrne of Culloville, Co Monaghan; Michael Burns of 27 Glenview Heights, Killygoan, Co Monaghan; Micheál O'Feinneadha of Glenfield House, Ballybay, Co Monaghan; folio: 18900; lands: Edenamo; area: 1.976 hectares; **Co Monaghan**

Regd owner: Charles Joseph Rehill; folio: 12570; lands: Skerrick East; area: 4.0468 hectares; **Co Monaghan**

Regd owner: William and Ailbe Allen; folio: 6102; lands: townland of Strogue and barony of Ikerrin; **Co Tipperary**

Regd owner: Joan Cleary; folio: 141; lands: townland of Kilgorteen and barony of Upper Ormond; **Co Tipperary**

Regd owner: Michael and Kathleen Ryan; folio: 3450F; lands: townland of Ballyea North and Roran and barony of Owney and Arra; **Co Tipperary**

Regd owner: James Breen; folio: 3830F; lands: Ballyvelig and barony of Shelburne; **Co Wexford**

Regd owner: Margaret Sinnott; folio: 4607F; lands: Ballynacoolagh and barony of Bantry; **Co Wexford**

Regd owner: Terence Meagher; folio: 1108L; lands: townland of Killarney and barony of Rathdown; **Co Wicklow**

Regd owner: Alexander Stone; folio: 17511F; lands: townland of Ballynacarrig and barony of Arklow; **Co Wicklow**

Regd owner: Roundwood Christmas Trees Limited; folio: 34F, 11662F and 5923; lands: townland of Tomdarragh and barony of Ballinacor North; **Co Wicklow**

WILLS

Breathnach, Risteard, late of 'Radway', 51 Solihull, West Midlands, United Kingdom and formerly of 'Culog', Curraheen Road, Bishopstown, Cork. Would any person having knowledge of a will made by the above named who died on 28 April 2001, please contact O'Flynn Exhams and Partners, Solicitors, 58 South Mall, Cork, tel: 021 427 7788 or fax: 021 427 2117

Byrne, Charles (deceased), late of 58 Beechill Drive, Donnybrook, Dublin 4. Would any person having knowledge of a will made by the above named deceased who died on 31 December 1993, please contact O'Mara Geraghty McCourt Solicitors, 51 Northumberland Road, Dublin 4, tel: 01 660 6543 or fax: 01 660 6911

Carroll (ors O'Carroll) Cornelius Patrick (deceased), late of 15 Castlewood Avenue, Rathmines, Dublin 6 (and formerly of Clashmealcor, Causeway, Co Kerry). Would any person having knowledge of a will made by the above named deceased who died on 15 April 2002, please contact Marshall and Macaulay Solicitors, The Square, Listowel, Co Kerry, tel: 068 21228 or fax: 068 21122; reference: MOC

Cashin, Michael (deceased), late of Killashulan, Barna, Freshford, Co Kilkenny. Would any person having knowledge of a will executed by the above named deceased who died on 21 December 2001, please contact John Lanigan and Nolan, Solicitors, Abbey Bridge, Dean Street, Kilkenny, tel: 056 21040 or fax: 056 65980, reference: EW

Conway, Sean (deceased), late of 6 Tully Heights, Ballinamore, Co Leitrim and previously of Ramor Lodge Hotel, Virginia, Co Cavan. Would any person having knowledge of a will made by the above named deceased who died on 12 November 2000, please contact Patricia Holohan and Company, Solicitors, 5 The Steeples, Timmons Hill, Dublin Road, Navan, Co Meath, tel: 046 72400 or fax: 046 72401

Dumbleton, William Francis (deceased), late of 'Elsbeth', South Lotts Road, Dublin 4. Would any person having knowledge of a will executed by the above named deceased who died in or around 27 May 2002, and which was executed subsequent to 19 October 1992, please contact Patricia McNamara and Company, Solicitors, 60 Upper Grand Canal Street, Dublin 4, tel: 01 668 0005, fax: 01 668 0754, e-mail: info@pmcnamara.com

Finn, Maureen, otherwise Johanna Mary (deceased), late of Newcourt, 177 Harolds Cross Road, Dublin 6. Would any person having knowledge of a will made by the above named deceased who died on 4 April 2002, please contact John O'Connor, Solicitors, 168 Pembroke Road, Ballsbridge, Dublin 4, tel: 01 668 4366, fax: 01 668 4203 and e-mail: info@johnoconnorsolicitors.ie

Flynn, Patrick (deceased), late of Short Corville, Roscrea, Co Tipperary. Would any person having knowledge of a will executed by the above named deceased who died on 15 May 2002, please contact Adrian Greaney and Company, Solicitors, Lisadell House, 8 Catherine Place, Limerick, tel: 061 314 468 or fax: 061 314 469

Gillett, Brendan (deceased), late of 6 Knockroe, Delgany, Co Wicklow and formerly of 128 Heathervue, Greystones, Co Wicklow. Would any person having knowledge of a will made by the above named deceased who died on 3 July 2002, please contact Amorys Solicitors, Merchants House, Merchants Quay, Dublin 8, tel: 01 670 7611 or fax: 01 670 7617

Hickey, Denis (deceased), late of Clontaff Cottage, Union Hall, Co Cork. Would any person having knowledge of a will made by the above named deceased who died on 13 December 2001, please contact Wolfe and Company, Solicitors, Market Street, Skibbereen, Co Cork, reference DOF/3128, tel: 028 21177 or fax: 028 21676

Higgins, Patrick Francis, late of Clooncoose, Annaghamore, Mohill Post Office, Co Leitrim. Would any person having knowledge of a will made by the above named deceased who died on 5 January 2001, please contact Kevin P Kilrane and Company, Solicitors, Mohill, Co Leitrim, reference BG/H207, tel: 078 31170 or fax: 078 31558

Kavanagh (Lewis), Carmel (deceased), late of 131 Beecroft Road, Suite 1408, Toronto, Ontario, Canada, M2N 6G9. Would any person having knowledge of a will made by the above named deceased who died on May 10 2001, please contact Mr Arthur Richman of Richman and Richman, 255 Duncan Mill Road, Suite 404, Don Mills, Ontario, Canada, M3B 3H9, tel: 001 416 510 1575, fax: 001 416 510 1580

Mahony, Janet Elizabeth otherwise Sinéad (deceased), late of 9 Knocklyon Court, Knocklyon, Templeogue, Dublin 16, formerly of 40 Huntstown Court, Clonsilla, Co Dublin. Will any person who holds a will in respect of the above deceased, please contact, as a matter of urgency, Messrs Woodcock and Sons of 28 Molesworth Street, Dublin 2, tel: 01 676 1948 or fax: 01 676 0272 and e-mail: woodcock@iol.ie

Malborough, Fergus (deceased), late of 223 Errigal Road, Drimnagh, Dublin 12. Would any person having knowledge of a will made by the above named deceased who died on 9/10 January 2002, please contact Ms Ann Marlborough, tel: 01 451 9711 (work) or 01 459 7565 (home)

McGarry, Elizabeth (deceased) late of 81 Durrow Road, Kimmage, Dublin 12. Would any person having knowledge of a will executed by the above named deceased who died on 31 December 2001, please contact Geraldine Kelly and Company, Solicitors, 195 Lower Kimmage Road, Dublin 6W, tel: 01 492 1223 or fax: 01 492 1821

McKevitt, Moria (deceased), late of 4 Wainsfort Grove, Terenure, Dublin 6W. Would any person having knowledge of a will made by the above named deceased who died on the 15 October 2001, please contact David Binchy and Company, Solicitors, 12 Adelaide Street, Dun Laoghaire, County Dublin, tel: 01 284 2455 or fax: 01 284 2610

Motherway, Maureen (deceased) late of 40 Dollymount Avenue, Clontarf, Dublin 3 who died on the 28 March 2002. Would any person having knowledge of a will executed by the above named deceased, please contact Sean Gallagher and Company, Solicitors, Merchant's Court, 24 Merchant's Quay, Dublin 8, tel: 01 677 2218 or fax: 01 677 2421

O'Connell, Molly (deceased), late of 99 Errigal Road, Drimnagh, in the city of Dublin. Would any person having knowledge of a will made by the above named deceased who died in the month of August 1956, please contact Bourke and Company, Solicitors, 167/171 Drimnagh Road, Walkinstown, in the city of Dublin, tel: 01 456 1155 or fax: 01 456 1176; reference FOD/LS

O'Connell, Patrick (deceased), late of 99 Errigal Road, Drimnagh, in the city of Dublin. Would any person having knowledge of a will made by the above named deceased who died in the month of April 1956, please contact Bourke and Company, Solicitors, 167/171 Drimnagh Road, Walkinstown, in the city of Dublin, tel: 01 456 1155 or fax: 01 456 1176; reference FOD/LS

O'Dwyer, Nora (deceased), late of No 7, Bank Place, Tipperary, Co Tipperary. Would any person having knowledge of a will made by the above named deceased who died on the 13th day of October 1991, please contact Paul G Kingston and Company, Solicitors, St Michael Street, Tipperary, Co Tipperary, tel: 062 52611 or fax: 062 52932

O'Flanagan, Bridget Philomena (deceased), late of 15 Berystede, Leeson Park, Dublin 6. Would any person having knowledge of a will made by the above named deceased who died on 16 May 2002, please contact Madigans Solicitors of 167 Lower Kimmage Road, Dublin 6W, tel: 01 492 1111 or fax: 01 492 1348

Reid, Frank (deceased), late of Callendar Cottage, Claremont Road, Killiney, County Dublin. Anyone knowing the whereabouts of a will of the above named deceased who died on 2 March 2002 is requested to contact the solicitors of his widow and administratrix elect, Ms Joan Reid. Haughtons Solicitors, Ashton House, 6 Martello Terrace, Dun Laoghaire, Co Dublin, for the attention of Mr Carl Haughton

Wallace, Frank (deceased), late of 15 Rathgoggin Heights, Charleville, Co Cork, also late of Old Limerick Road, Charleville, Co Cork. Would any person having knowledge of a will executed by the above named deceased who died on 19 August 2001, please contact Adrian Greaney and Company, Solicitors, Lisadell House, 8 Catherine Place, Limerick, tel: 061 314 468 or fax: 061 314 469

Woodman, Cecil (deceased), late of 25 St Margaret's Road, Malahide, Co Dublin. Would any solicitor holding a will for the above named deceased who died on 6 May 2002, please contact Joynt and Crawford Solicitors; reference: GHC, 8 Anglesea Street, Dublin 2

EMPLOYMENT

Solicitor with experience in general practice seeks employment in Dungloe, Co Donegal. Please reply to **box no 80**

Solicitor required for general practice in Co Tipperary. Please reply to **box no 81**

Solicitor required for midwest practice, experience in litigation and conveyancing. Must have computer skills and be technology aware. Please reply to **box no 82**

Locum/part-time solicitor available for litigation/family law in Dublin area. Flexible arrangements. Please reply to **box no 83**

Solicitor seeks employment in Galway city or county on a temporary/permanent basis. Please reply to **box no 84**

Solicitor sought for Waterford City firm. Experience in probate, litigation and conveyancing preferred. All replies treated in confidence. Please reply to **box no 85**

Qualified solicitor required for busy Galway city practice. Conveyancing and probate experience essential. Part-time may suit. Immediate start. Tel: 086 852 5457 for more information. Please reply to **box no 86**

Solicitor with over six years' experience in general practice – particularly litigation and conveyancing – seeks part-time position in Dublin city or southside office. Three days per week or five mornings preferred. Please reply to **box no 87**

Innovative Derry practice with offices North and South seeks solicitor qualified in the Republic of Ireland for conveyancing/commercial work. The solicitor will be based in our Derry offices. Excellent prospects

PARTNER DESIGNATE SENIOR SOLICITOR

Progressive legal practice based in a large provincial town, invites interest from experienced senior Solicitors with sound practical experience in Conveyancing, Probate and Commercial Law.

Applications only from suitable persons who seek initially an appointment to a senior position, quickly progressing to Partner level in a successful and thriving practice.

Applications in writing to:
Charles M Carri FCA
John P. Greely & Company
Mill House, Millbrook,
Naas, Co Kildare

E-mail: charlescarri@jpgreely.com
Telephone: 045 879822
Fax: 045 879773

with attractive salary. Please reply to **box no 88**

Ambitious solicitor with approximately two years of high street experience required by new firm to head an office in commuting distance of Dublin. Very early partnership prospects for the right applicant. Please put replies with accompanying CVs in writing to PO box 365, Macclesfield, Cheshire, England, SK11 6WY

Solicitor in North Kildare area, four years PQE in general practice, seeks part-time position. Tel: 045 871456

Book-keeper/administrator, mature professional, experienced in legal accounts available part-time or full-time. Contact 01 662 4454 (daytime), 01 833 3023 (home), 086 354 6926 (mobile), or e-mail: ajmchugh@gofree.ie for CV

Part-time book-keeper required: two to three afternoons per week to assist existing book-keeper. Must have experience in all aspects of accounting procedures. Please send CV to fax: 01 833 5259, Plunkett Kirwan and Company, 175 Howth Road, Killester, Dublin 3

Desmond J Houlihan and Company have a vacancy for an experienced solicitor specialising in conveyancing; excellent remuneration package. Apply to Desmond J Houlihan and Company, Solicitors, Salthouse Lane, Ennis, Co Clare, tel: 065 684 2244 or fax: 065 684 2233. E-mail: desmondjhoulihan@securemail.ie

Insurance liability claims handlers required for loss-adjusting firm. Would suit postgraduate looking for a career change. Work would include handling personal injury claims both pre- and post-litigation for Irish and UK-based insurers. Vacancies in Cork, Dublin and Dundalk. Please reply with CV to HR Department, Miller Farrell Group, Nutley Building, Merrion Centre, Nutley Lane, Dublin 4

Naas firm requires solicitor in the areas of probate/conveyancing with some PQE for their office. CV application by mail to the managing partner at WA Osborne and Company, Solicitors, Naas, Co Kildare, tel: 045 897 805 or fax: 045 897 878

Locum solicitor required for busy Cork city solicitors' office for the period September 2002 to March 2003. Must have three years' post-qualification experience, preferably in the conveyancing and litigation (civil and family law) areas. Excellent pay and conditions for suitable candidate. Fax: 023 435 7070 or e-mail: bwhite@aih.ie

Solicitor – Donegal: experienced solicitor required for busy general practice. Excellent terms and conditions. Apply to Gallagher McCartney, Solicitors, New Row, Donegal Town, Co Donegal, e-mail: mmcc@gmcclaw.ie

IRISH GUARDIAN AD LITEM SERVICES

Providing a nationwide GAL and independent social-work services to the courts in addition to pre-placement assessment in fostering/adoption applications.

Contact: Eugene McCarthy, BSS CQSW, member NAGALRO (UK) BAAF IASW.
1 Corbawn Lawn, Shankill, Co Dublin. Tel/fax 01 272 2831, mobile 086 811 8032, e-mail: GuardianAdLitem@eircom.net

American lawyer is available and permitted to work in the Republic as an independent legal consultant. Experience includes real estate and other transactions, including social housing development and management. Also able to carry out due diligence tasks, research and legal analysis as required. Contact Dorothy Lank on 01 668 8360 or at lank@indigo.ie. CV available on request

MISCELLANEOUS

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

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

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

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

Modern premises to rent; option to purchase. Excellent road frontage at Usher's Island, five minutes walk from the Four Courts, c1,100 sq ft, ready for immediate use. Tel: Peter at 01 628 1040

EYE INJURIES AND OPHTHALMOLOGICAL NEGLIGENCE

Mr Louis Clearkin ChM, FRCS, FRCOphth, DO, MAI, MEWI
Consultant Ophthalmic Surgeon
Experienced expert witness in ophthalmological personal injury, medical negligence and civil litigation

Renuntiabo, 8 Rose Mount, Oxton, Wirral, Merseyside, L43 5SW
secretary: +44 (0) 151 6047047
fax: +44 (0) 151 6047152
e-mail: L.Clearkin@Liv.ac.uk

Office to let; by assignment. Arran Quay, Dublin 7. Adj Four Courts. Circa 135 sq m (1453 sq ft). Excellent fit out, high specification. Long-term lease rent only €35,976 pa. Three car spaces. Break option December 2004. Rates remission and double rent allowance until Dec 2004. Contact Douglas Newman Good Commercial at 01 673 1400

NOTICE

A person posing as a relative of mine, who has no connection and is not in fact a relative, has been visiting members of the legal profession requesting money under false pretences. His hard luck stories vary but his object is the same: to extract money, with the donor believing it will be repaid. This person has no association with me or my family.
Signed: John Dillon-Leetch, Solicitor, Ballyhaunis, Co Mayo

Office in Upper Abbey Street (Capel Street end), near Four Courts. To share, but unusual opportunity in return for taking in files etc: only €280 per month. Would suit one person only, a solicitor, barrister or legal cost accountant. Terms usual one months' deposit and one in advance; tel: 01 287 5604

From Monday 26 August 2002, Tom Collins & Company, Solicitors, 6 Charlemont Street, Dublin 2 are relocating to new offices at 132 Terenure Road North, Terenure, Dublin 6W; tel: 01 490 0121 (five lines), fax: 01 490 0056

TITLE DEEDS

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 Nuala MacKenzie, Nuala MacKenzie and Company, Solicitors, Main Street, Kill, Co Kildare**

Take notice that any person having an interest in the freehold estate of the following property: all that and those that plot or piece of ground situate in the parish of St Mary, Donnybrook, in the barony and city (formerly county) of Dublin with the building erected thereon and known as No 4 Granite Place, Ballsbridge, Dublin 4, held under indenture of lease dated 15 October 1932 and made between the Right Honourable Earl of Pembroke and Montgomery of the first part, the Right Honourable Sidney Charles Herbert of the second part and Elizabeth Josephine Beatty of the third part for a term of 99 years from the 25 March 1932, the subject of the covenants and conditions therein contained.

Take notice that Nuala MacKenzie intends to submit an application to the county registrar in 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 aforementioned premises to the below named within 21 days from the date of this notice.

In default of any such notice being received, Nuala MacKenzie 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 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: 2 August 2002

Signed: Nuala MacKenzie and Company, solicitors for the applicant, Main Street, Kill, County Kildare

In the matter of the *Landlord and Tenant (Ground rents) Acts, 1967-1984* and in the matter of section 15 of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978* and in the matter of sections 4 and 8(3) of the *Landlord and Tenant (Ground Rents) Act, 1967* and in the matter of the purchase of the fee simple estate in the hereditaments and premises situate at Main Street, Foxford, Co Mayo: an application by John O'Malley and Anne O'Malley

Take notice that any person having any interest in the freehold estate as successor in title to Henrietta McHugh Dunn, whose last known address is Peoria, Illinois, USA, or otherwise in the hereditaments and premises situate at Main Street, Foxford, Co Mayo, which hereditaments and premises were formerly let by the said Henrietta McHugh Dunn to John J Johnston at a yearly rent of ten pounds.

Take notice that the applicants, John O'Malley and Anne O'Malley, have made an application to the county registrar for the county of Mayo for the acquisition of the freehold interest in the aforesaid property and that any party asserting that they hold superior interest in the aforesaid property are called upon to furnish evidence of title of the aforementioned property to the below named within 28 days from the date of this notice.

In default of any such notice being received, it is the intention of the county registrar for the county of Dublin to make an order whereby the fee simple title to the aforementioned property will be vested in the said applicants Anne O'Malley and John O'Malley on the basis that the person or persons beneficially entitled to the superior interest, including any freehold reversion in the aforementioned property, are unknown or unascertained.

Date: 28 June 2002

Signed: Burke Carrigg and Loftus, Solicitors, Teeling Street, Ballina, Co Mayo

In the matter of the *Landlord and Tenant (Ground Rents) Act, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978*: an application by John Atkinson and Mary Atkinson

Take notice that any person having any interest in the freehold estate of the following property: all that and those the premises formerly known as No 4 Victoria Villas and now known as No 114 Morehampton Road situate in the parish of Donnybrook formerly in the county but now in the city of Dublin, held with other property formerly known as No 5 Victoria Villas and now known as No 116 Morehampton Road under indenture of lease dated 20 March 1899 and made between Samuel Worthington of the first part, the city and county (Permanent Benefit Building Society) of the second part and William Memery of the third part for a term of 150 years from 25 March 1897, save the last ten days thereof, subject to the yearly rent of £8 and the covenants on the part of the lessee to be performed and conditions therein contained.

Take notice that John Atkinson and Mary Atkinson intend to submit an application to the county registrar of 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 premises (or any of them) 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, the applicant intends to proceed with the application before the county registrar for the county and city of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest, including the freehold reversion in each of the aforesaid premises, are unknown and unascertained.

Date: 17 July 2002

Signed: Gerard O'Shea, Solicitors, Meridian House, 13 Warrington Place, Dublin 2

In the matter of the *Landlord and Tenant (Ground Rents) Acts, 1967-1994*: notice of intention to acquire fee simple

To any person or persons for the time being entitled to having an interest in the freehold estate in the properties known as numbers 1 and 1a Aungier Street and numbers 18, 19 and 20 Lower Stephen Street in the parish of Saint Peter and city of Dublin, being part of the property demised by a lease dated 22 January 1924 and made between Walter Henry Clarke of the one part and Thomas Charles McCormick of the other part for a term of 99 years from 25 March 1924 subject to a yearly rent of £50.

Take notice that David Goss and Anne Goss and Timothy Sullivan, being the persons entitled under sections 8-10 of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978* to purchase the fee simple, intend to submit an application to the county registrar for the county and city of Dublin for the acquisition of the freehold interest in the aforesaid properties and any part asserting that they hold a superior interest in the aforesaid properties (or any of them) are called upon to furnish evidence of title to the aforementioned properties to the below named within 21 days from the date of this notice.

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

Date: 2 August 2002

Signed: Maurice E Veale and Company, solicitors for the applicants, 6 Lower Baggot Street, Dublin 2