Law Society Gazette

Regulars

COVER: The french football team celebrating their World Cup victory in 1998. See cover story, page 8

Cover Story

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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 May 2002: Dermot Kavanagh, 2 Mary Street, New Ross, Co Wexford – €2,539.48; Michael Owens, 5 Lower Main Street, Dundrum, Dublin 14 – €958.52; Michael P McMahon, 5/6 Upper O'Connell Street, Dublin 1 – €1,060.23.

NEW BOOK ON ABUSE OF PROCESS

Electronic legal publisher FirstLaw has just published its first hardcopy book, *Abuse of process: unjust and improper conduct of civil litigation in Ireland*, written by Desmond Shiels, a solicitor in Dublin law firm McCann FitzGerald. Shiels' book costs €50 and claims to be the first published on this unique area of law.

LAW SCHOOL SWITCHBOARD

Members should note that the Law Society's Law School has its own telephone switchboard. Anyone wishing to contact the Law School should not dial the Law Society's main number, but instead call 01 672 4802.

Fewer solicitors in new Dáil

'Meltdown' would be too strong a word for it, but the number of solicitors in the Dáil elected on 17 May is reduced to six from the eight in the Dáil which preceded it, *writes Ken Murphy*.

Three outgoing solicitor deputies lost their seats. The Labour Party finance spokesman Derek McDowell lost his seat to an independent in Dublin North Central and, also in Dublin, Fine Gael's spokesman on justice Alan Shatter was squeezed out by a candidate from the Green Party in Dublin South.

Perhaps the most surprising of all the solicitors to lose their seats was another prominent Fine Gael frontbencher, Charlie Flanagan, in Laois Offaly where Tom Parlon of the Progressive Democrats took a seat. However, there was good news for Fine Gael in the same constituency in that solicitor Olwyn Enright was elected to the Dáil for the first time, replacing her father, the Fine Gael veteran Tom Enright, who is also a solicitor.

Accordingly, the number of solicitors in the Laois Offaly constituency – in which, remarkably, three of the five TDs in the last Dáil were solicitors – is now reduced to two, with poll-topper and Minister for Foreign Affairs Brian Cowen comfortably re-elected as expected.

Enright: continuing a tradition

Power: first time out

The two other solicitors who were ministers in the outgoing government, namely Dermot Ahern in Louth and John O'Donoghue in Kerry South, also topped the polls in the course of being returned for Fianna Fáil in their respective constituencies.

The only solicitor, in addition to Olwyn Enright, elected to the Dáil for the first time is Fianna Fáil's Peter Power in Limerick East.

The Law Society has written to congratulate all the solicitors who were elected to the Dáil and to commiserate with those who were not re-elected.

Gazette LawSociety

Summer publication

As usual, the *Gazette* will be taking a break over the summer, so there will be no issue next month. Normal publication will resume with a joint July/August issue, due out the first week in August.

ONE TO WATCH: NEW LEGISLATION

***EC (Civil and Commercial Judgments) Regulations 2002* (SI 52/02)**

The regulations implement the *Brussels I regulation* on the recognition and enforcement of judgments in civil and commercial matters. The *Brussels I regulation* and the implementing regulations both came into effect on 1 March 2002.

These regulations are based in large measure on the *Jurisdiction of Courts and Enforcement of Judgments Act, 1998*. The *Brussels I regulation* is likewise largely based on the *Brussels I convention 1968*. The main differences between the *Brussels I convention* and the new *Brussels I regulation* are described on p14.

The regulations set out the procedure for the enforcement of judgments. There are no rules of court as yet dealing with the procedure, so the regulations are reasonably detailed to make up for that lack. The regulations are not always sufficient in themselves to master the procedures but need to be read in conjunction with the *Brussels I regulation*:

- Application for an enforcement order is to be made to the master of the High Court, accompanied by an address for service, a copy of the judgment and a certificate issued by the original court in the form prescribed in the regulation, annex V. The regulation provides that the judgment shall be declared immediately enforceable on completion of the formalities and without any review under articles 34 and 35 (unenforceability due to conflict with public policy, breach of the special jurisdiction rules for insurance and consumer contracts and reserved areas). Only after the decision on an enforcement application is made may either party appeal against it, and the only grounds for revocation are those specified in articles 34 and 35, which are somewhat narrower than those set out in article 27 of the original convention
- An enforcement order made by the master has the same force and effect as though made by the High Court
- Maintenance orders are treated somewhat differently to other judgments, and are generally enforceable by the District Court, although the master of the High Court may make enforcement orders in respect of arrears of maintenance and lump sums if this will result in more effective enforcement: for example, if the defendant is not resident in any District Court area but has property in the country. Equitable remedies, if needed, are also available within the High Court's jurisdiction
- Regulation 6 deals with maintenance orders. An enforcement order of a maintenance order may be made by the District Court, even if the amount involved exceeds that court's jurisdiction. The court must take into account any variation by the member state court, and its order lapses if the original

Calcutta Run hits the mark

Over 1,400 runners and walkers, including 700 solicitors and their staff, turned out for the fourth annual Calcutta Run last month. This year's run was the biggest yet, and the organisers are confident that they will reach their fund-raising target of €225,000. The money raised will be split between GOAL's project for street children in Calcutta and Fr Peter McVerry's shelters for homeless youths in Dublin.

The Calcutta Run, which is organised by solicitors and supported by the Law Society, is now the biggest charity fun run in the country and has raised some €625,000 for the charities so far. This year's run was officially started by Law Society President Elma Lynch, who set the runners on their way from the society's Blackhall Place headquarters.

Participants and supporters included musicians Andrea and Caroline Corr, former snooker world champion Ken Doherty and representatives of the Leinster rugby team.

If you have not been approached by a colleague already, it's not too late. You can send donations directly to the Calcutta Run, c/o the Law Society of Ireland. It is worth noting that donations of €250 or over are tax deductible.

Running mates: Law Society President Elma Lynch with *(from left)* Ken Doherty, Fr Peter McVerry, and Caroline and Andrea Corr

New women lawyers' association formed

A new organisation has been formed to promote equality and equal treatment for women lawyers. The Irish Women Lawyers' Association will be a national body made up of solicitors, barristers, academics and in-house lawyers. The association hopes it will also be a social and professional contact point for women lawyers. A steering committee, under the chairmanship of Miriam Reynolds SC, is currently drafting a constitution for the body. Anyone interested in finding out more about the association should contact Pauline Walley at Room 321, 145-151 Church Street, Dublin 7.

INTERNATIONAL CRIMINAL COURT COURSE

The Irish Centre for Human Rights, based in NUI Galway, will be hosting a one-week course on the new International Criminal Court, which is due to come into force on 1 July. The week-long course will run from 20-27 July, and further information can be found on the ICHR's website at *www.nuigalway.ie/humanrights*.

GALWAY LAWYERS GO ON THE RUN

The Galway Bar Association has organised a second charity run, following the success of last year's event which raised £24,000 (€30,4800) for the Crumlin Children's Hospital and Burren Chernobyl Project. This year's fun run starts at 10am on Saturday 6 July from the courthouse in Clifden, ending at the Foster Court Hotel in Galway.

UCG LAW ALUMNI MEET

Law lecturer and author Tom O'Malley will speak on *Reforming the courts system* at the next gathering of UCG law alumni on Thursday 13 June. The lecture will be held in the Members' Lounge of the Law Society and begins at 8pm.

order is revoked. Arrears of maintenance and related costs may be the subject of an enforcement order. Sums payable must be paid to the relevant District Court clerk or a public authority, if authorised, for transmission to the maintenance creditor. If the money is not paid and the maintenance creditor requests this in writing, the District Court clerk is required to make an application for enforcement under section 8 of the *Enforcement of Court Orders Act, 1940* or section 10 of the *Family Law (Maintenance of Spouses and Children) Act, 1976*, which provides for attachment of earnings. The maintenance debtor is obliged to notify the District Court clerk of a change of address, and failure to do so is an offence punishable by a fine of up to €1,300

- Regulation 7 deals with interest and costs. If a judgment provides for payment of interest, the enforcement order should include it. An enforcement order may also include reasonable costs and interest on the costs
- Maintenance is to be paid in the currency of the state, converted from any other currency referred to in the original order
- Regulation 9 provides that a duly authenticated judgment should be accepted without further proof, and a certified translation by a competent person is admissible as evidence of the document translated
- Regulation 10 makes provision for provisional (including protective) measures in accordance with article 31 of the regulation. The High Court may grant provisional measures if it would have jurisdiction to do so, if proceedings are planned or have been commenced in a member state and the proceedings are within the scope of the *Brussels I regulation*. It may refuse to do so if it considers that it does not have jurisdiction and it therefore would be inexpedient for it to grant provisional measures. An application to the master of the High Court may include an application for provisional measures
- Regulation 11 defines domicile for the purposes of the *Brussels I regulation* and these regulations, and regulation 12 provides that domicile questions are to be decided by the Circuit Court
- Regulations 13 and 14 provide for amendment of the *Maintenance Act, 1994* to take account of the substitution of the *Brussels I regulation* for the *Brussels convention*, and the *Jurisdiction of Courts and Enforcement of Judgments Act, 1998* is declared to be superseded by this regulation as between the state and member states, except in relation to territories, notably Denmark, which are excluded from the regulation (article 68 of the regulation). G

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

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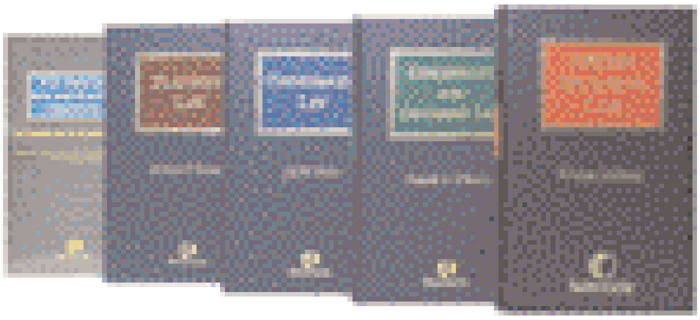

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Butterworths

Enemy at the gates?

A quiet revolution is taking place in the European Community courts, where restrictions on the right of private individuals to challenge EU legislation are being eased, writes Conor Quigley

Students of community law for the last four decades have questioned the correctness of the famous *Plaumann* decision handed down by the European Court of Justice in 1963. That decision strictly limited the scope of *locus standi* for private applicants in judicial review proceedings. Proceedings may be instituted, pursuant to article 230 of the *EC treaty*, against decisions addressed to an individual person. But where the decision is addressed to someone else, or where the measure subject to challenge is a general measure, such as an EC regulation, private parties are permitted the right to challenge only where they can show that the measure is of direct and individual concern. Surmounting this hurdle has proved inordinately difficult.

Plaumann's pickle

In its decision in *Plaumann* ([1963] ECR 95), the ECJ held that a person could be individually concerned by a measure only if he could establish that he was affected by reason of certain attributes which were peculiar to him or by reason of circumstances in which he was differentiated from all other people. The effect of this limitation was that, unless a litigant could show that he was part of a closed and identifiable class of people, general measures were effectively immune from direct challenge in the community courts. The ECJ justified this approach on the ground that litigants could always challenge the measures in national court proceedings, and that it was open to the national court to refer the issue of legality to the ECJ in accordance with article 234 EC.

Over the years, the ECJ and the Court of First Instance have stuck rigidly to this approach, and many actions which raised substantive matters of legality against acts of the council and the commission have been dismissed as inadmissible. Criticism has mounted, however, that recourse to the national courts is inadequate and that legal rights of the individual have been jeopardised. In light of this criticism, a fundamental reappraisal has been taking place in Luxemburg.

In 1999, the Court of First Instance, in *Union de Pequenos Agricultores v Council*, following its usual practice, dismissed as inadmissible an action brought against an agricultural regulation by an association of farmers on the ground that they were not individually concerned. On appeal to the ECJ, a landmark opinion was delivered by Advocate General Jacobs in March of this year. AG Jacobs' opinions are generally regarded as among the best and are nearly always followed by the ECJ. He has urged the court to abandon its past restrictive approach and to declare actions admissible where the applicant can show that, by reason of his particular circumstances, the measure in question has, or is liable to have, a substantial adverse effect on his interests.

Right to a fair trial

In particular, AG Jacobs held that alternative proceedings before a national court may not always provide effective judicial protection for individuals. In justifying this conclusion, he drew upon the rights to a fair trial and to an effective remedy contained in articles 6 and 13 of the *European convention on human rights*. More significantly, perhaps, he also mentioned the *Charter of fundamental rights of the European Union*, which was adopted last year. Article 47 of the charter states that everyone whose rights and freedoms guaranteed by the law of the union are violated has the right to an effective remedy before a tribunal. National court proceedings did not provide an effective remedy, principally because national courts cannot themselves declare EC measures invalid.

Conor Quigley: a fundamental reappraisal has been taking place in Luxemburg

Grasping the nettle

Taking its cue from AG Jacobs and without waiting for the judgment of the ECJ which should be delivered later this year, the CFI, delivering judgment on 3 May in *Jego Quere v Commission* (where annulment was sought of an EC regulation in the fishing sector), has firmly grasped the nettle. The action has been declared admissible on the ground that the criterion of individual concern in the legality of general measures should now apply where the applicant can show the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and the position of other persons who are likewise affected by the measure are of no relevance in this regard.

Back door approach

Although it was stated by the European Council not to be legally binding, it has generally been thought that it was only a matter of time before the community courts invoked rights under the *Charter of fundamental rights*. Critics of the *Nice treaty* will doubtless have a field day in arguing that the community has implemented the charter by the back door. However, in the present context, the principles of the charter are being applied only to community institutions – the ECJ and CFI. This should not necessarily be taken as a precedent for wider application of charter rights in the national courts.

More immediate problems may ensue for the CFI itself. It already has a backlog of some 900 cases and it has a terrible problem in translating judgments into all languages, including English. Opening the doors to a wider class of applicants can only result in a significant increase in its workload. It cannot be long before the CFI calls for a substantial increase in the number of judges. Presumably it will invoke article 47 of the charter in its aid, on the ground that justice deferred is justice denied. G

Conor Quigley is a barrister specialising in European Union law.

Letters

Justice delayed is a waste of everyone's time

From: Conor O'Toole, Coughlan & Co, Naas, Co Kildare

I wish to raise a complaint about the inefficiency of our court system.

I had a medical negligence case which had been specially fixed for hearing in the High Court very recently. The application to list the case had been made several months earlier, and the court was advised that expert witnesses would travel from the UK and that the case would take a week or more.

We spent all day Monday with an expert witness and our client in a consultation, as the case was due to go ahead the following day. We attended the High Court on the Tuesday and were advised that there were no judges available; we waited the entire day in the vain hope that a judge might be assigned to the case. This did not happen. We attended the following day and were again advised that there were no judges available. There were only three possible judges who could ultimately take the case – all of these were involved in long hearings and we would have to wait until one of them became available, which would not be until the following week at the earliest. This we could not do, as the availability of expert witnesses on both sides was limited and the case had been specially fixed for a date to suit all of them. It was necessary to put the case back for six weeks, and we were advised that the court would try to allocate a judge to hear it.

This experience caused enormous distress to my client, who had steeled herself for the hearing some months in advance. She has suffered very serious and life-long injuries, and has waited five years from the time of her operation for the case to come to court. Both she and her family have suffered enormous strain as a result of the proceedings and were looking forward to having the matter disposed of once and for all and the opportunity of being able to get on with their lives afterwards. A considerable amount of effort had been expended by both sides in preparing for the hearing date, and a large number of witnesses had adjusted their work schedules to be available to attend to give evidence. I also had a witness travel from England, who wasted three days in Dublin at considerable expense waiting for a case that never proceeded.

It now seems to me that having a case specially fixed and even first in the list, as this case was, is of no value at all. This inefficiency of our system causes unnecessary hardship on the parties and adds considerably to the cost of running an action, which is expensive to begin with. It was embarrassing to have to explain the delay to our English witness, who pointedly referred to the effectiveness of the English system. He advised that the English courts sit Monday to Friday from 10.30am to 4.30pm and that the parties are specifically assigned not only a date for hearing but a named judge well in advance and the case proceeds on the assigned date. He also explained that

they have a case-management system which includes a meeting of the experts on both sides to agree as many issues as possible in advance. This meeting also has the effect of encouraging settlements and, once it takes place, very few cases actually proceed to hearing.

It is surely not impossible to have an efficient court system where cases proceed on the assigned date. I note that the chief justice is promoting a root-and-branch reform of the courts, and I would hope that this flaw is properly addressed. There is not much point in increasing the jurisdiction of the courts if there are no judges in place to deal with the case load. Much has been said about legal costs and their inflationary effect on insurance premiums, but surely an efficient system would contribute greatly to reducing those costs and eliminating the needless time wasted watching the clock in the Round Hall.

Until this defect is cured, for my client and many others, justice delayed continues to be justice denied.

DUMB AND DUMBER

From: Mark Fitzgerald, Edward Fitzgerald and Son, Ballinrobe, Co Mayo

The following is an excerpt from a recent job application received by this office: 'I am forwarding my CV to you if in the future you have a secretarial/administration vacancy that you may consider me. I hope my CV is surplus to your requirements'.

From: Simon MacMahon BL, Tramore, Co Waterford

Translation software never ceases to surprise. When a gourmet Internet browser went to search for a recipe for Vichyssoise recently, he was furnished with 'Vichyssoise et velouté d'avocats à l'orange et cumin'. When he clicked the 'translate' button to get it in English, to his surprise, the velouté part of the recipe was entitled 'velvety lawyers with orange and cumin', and the ingredients given were '500 ml of orange juice, two quite ripe lawyers, one c with tea of powder poultry bubble, one c with table of ground cumin'.

If you'd like the full recipe, just search Google for the phrase 'duo de potages' and hit 'translate'. Oh, and when you start cooking, don't forget to 'remove the bark and the core of lawyers'.

Mark Fitzgerald wins the bottle of champagne this month.

Unexploited potential in *Competition Acts*

From: Leesha O'Driscoll BL, Luxemburg

I read with interest the *Eurlegal* briefing in the April issue of the *Gazette* on case C-453/99 *Courage v Crehan* and the discussion of its implications in terms of Irish law.

As your readers will have noted, the Court of Appeal of England and Wales referred to the Court of Justice questions concerning the compatibility with community law of a rule of national law which precludes a person, party to an anti-competitive agreement within the meaning of article 81 EC, from recovering damages for loss caused by the performance of the agreement.

The court responded that such a rule was inconsistent with community law where the party is precluded from obtaining damages on the sole ground of participation in the agreement. It added that the rule would not infringe community law where a significant amount of responsibility for the distortion of competition is attributable to the party claiming damages.

As regards the significance of the judgment in Ireland, I believe the importance of section 6 of the Irish *Competition Acts, 1991-1996* should be underlined. Section 6 provides for a right of action for damages for 'any person who is aggrieved' by an agreement which is prohibited under sections 4 or 5. While it may well be that the person envisaged in such instances is usually the aggrieved consumer, an action by a party to an anti-competitive agreement is not precluded by the wording of the section. In this context, it is worth considering the influence of US law on the Irish *Competition Act*. The US equivalent of section 6 is to be found in section 4 of the *Clayton Act* and has been interpreted to allow actions by parties to anti-competitive agreements to recover damages resulting from same. In refusing to allow the doctrine of *in pari delicto* to operate as a bar to such actions, the Supreme Court in *Perma Life Mufflers* (392 US 134 [1968]) was persuaded by the public interest in encouraging private actions in competition law which provide an additional layer of policing of anti-competitive activity. While the question as to the position of a party who has completely and voluntarily participated in an anti-competitive agreement has yet to be decided (see *Bateman Eichler v Berner* [472 US 299]), there is no reason why the same considerations of public interest should not operate in damages actions under section 6, especially where the parties are not *in pari delicto*.

Section 6 actions are rare in Irish law and, although the unequal bargaining positions of the parties can act as a disincentive to taking action against one's stronger business partners, the same inequality could facilitate a successful rebuttal of the *in pari delicto* defence. In this light, the dual influences of US law and the latest edicts of the Court of Justice in *Courage v Crehan* reveal the hitherto unexploited potential of the section.

Putting yourself on the map

From: Anthony F Sheil, Sheil Solicitors, Dublin

It was with great interest that I saw the photograph in the last issue (page 50) of the new District Court map prepared by our colleague Desmond Fitzgerald.

With undue haste, I sent him €70 and received his masterpiece! I actually rang him to congratulate him on the production, to be told that I was only the second one to have bought it.

Des Fitzgerald and his map

I would urge all colleagues, whether litigation is their forte or otherwise, to purchase our colleague's excellent piece of work. Many years ago it was mooted by the DSBA that something of that order should be produced – but there are over 300 statutory instruments since 1961 affecting the various District Courts (and I have no idea how many involve the North).

Besides its usefulness, it looks very well on the wall.

Charitable thoughts

From: Orla Barry Murphy, acting secretary, Commissioners of Charitable Donations and Bequests for Ireland

I should be obliged if you would include a note in the *Gazette* in relation to the recent *Social Welfare (Miscellaneous Provisions) Bill, 2002*, which was passed on 20 March. The bill contains two provisions extending the powers of the Commissioners of Charitable Donations and Bequests for Ireland, and perhaps this could be brought to the attention of practitioners.

There are two amendments. The first is an amendment to section 29 (as amended by section 8 of the *Charities Act, 1973* and section 52 of the *Courts and Court Officers Act, 1995*). The effect is to remove the present monetary limit of £250,000 on the power of the board to frame schemes applying property cy-pres.

The new bill also amends section 34 of the *Charities Act, 1961* (as amended by section 11 of the *Charities Act, 1973*) by extending the definition of a disposition to include a lease.

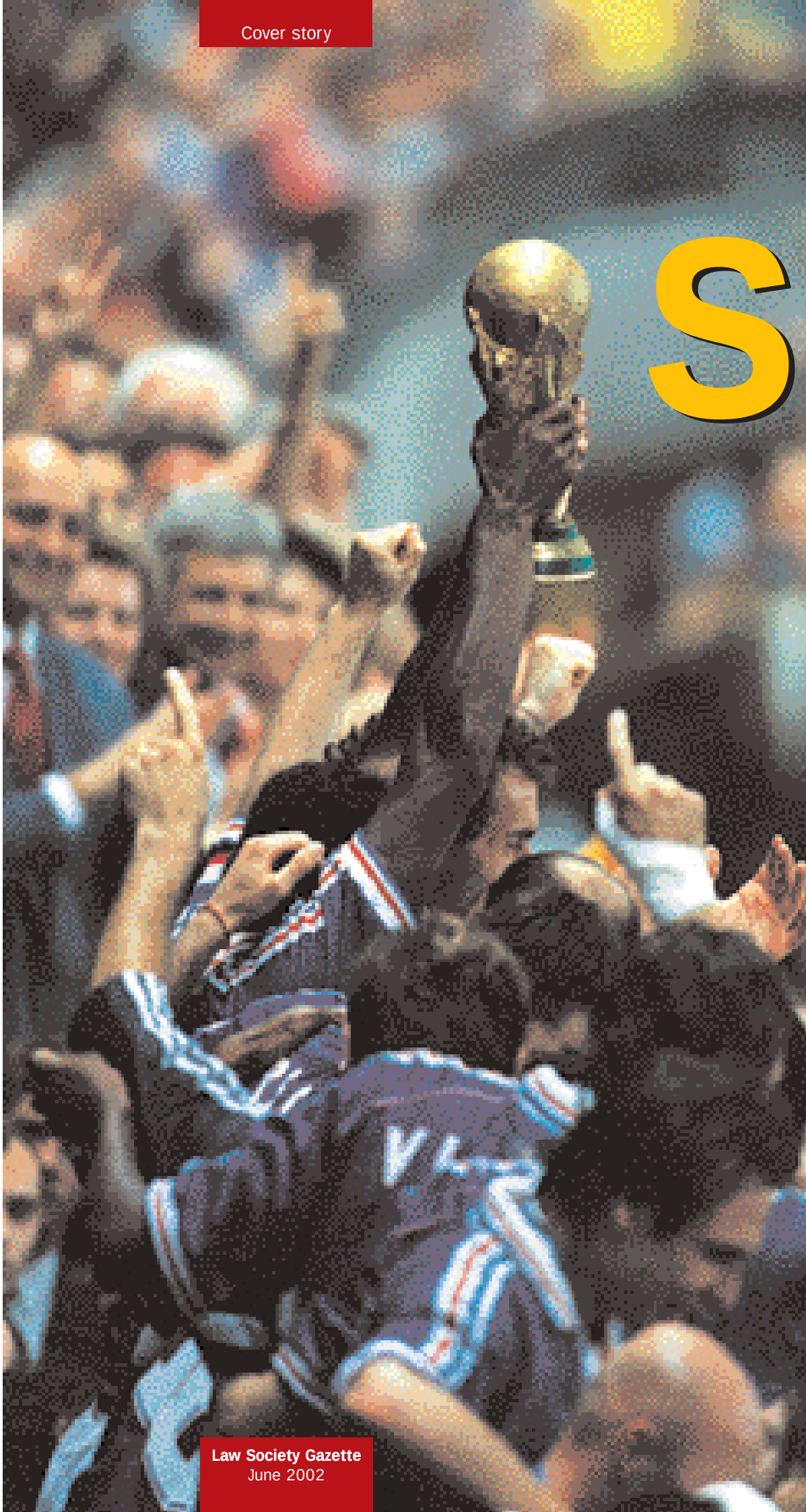
An ironic mnemonic

From: Desmond Rooney, Arthur O'Hagan Solicitors, Dublin

Conveyancing practitioners are all too well aware of the banana skins lurking in even the most 'straightforward' purchase.

Having advised a client on issues arising from the contract (and more recently, the considerable detail elicited from the pre-contract questionnaire), I find it useful to recap on the following non-title fundamentals:

S: Survey
L: Loan
I: Insurance
P: Planning
S: Stamp duty (and costs).

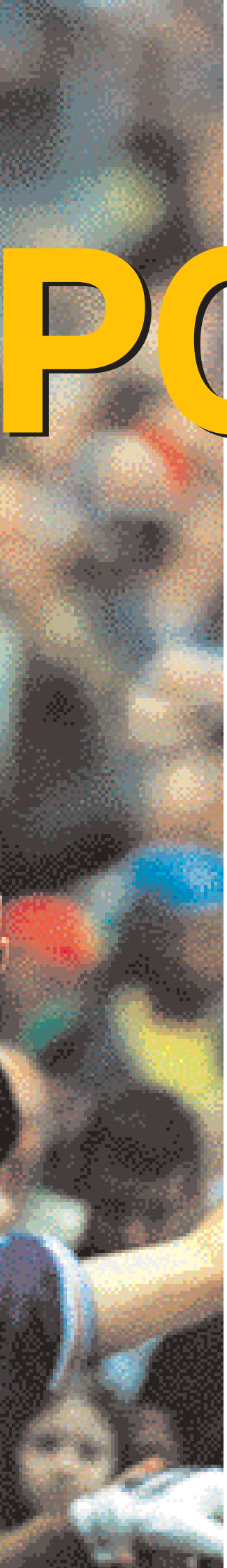


S

As this month's World Cup will show once again, sport has moved from muddy playing fields to corporate boardrooms. Teams are brands, fans are consumer communities and the name of the game is money. But this change means that sports organisations need lawyers on the team. Barry O'Halloran reports

MAIN POINTS

- Sport has evolved into a global industry
- Lawyers are playing a bigger role than ever before
- Financial crisis facing European football



PORTING *chance*

Unless you've been on a different planet for the last ten years, it must be clear at this stage that soccer is no longer about going out, giving 110% and, more importantly, giving your fans something to cheer about from the terraces.

It's not about football and tribal loyalties any longer; it's a business. Just ask Eoin MacNeill of A&L Goodbody, who heads up the law firm's sports division. 'Manchester United no longer sees itself as a club; it sees itself as a global brand', he says. The minute you enter Old Trafford's turnstiles or buy one of its ubiquitous items of merchandise, you are a customer.

Historically, if sports made money at all, it was from takings at the gate, with (if teams were lucky) some ad hoc sponsorship from local businesses. Now they rely on a variety of sources, which could be anything from corporate hospitality to TV rights. The major teams could have five or six revenue centres.

MacNeill says that this approach to sport was born in the United States, where enterprising baseball and American football clubs realised that once fans walked into their grounds they had a large number of captive consumers who could be sold anything from hotdogs to branded merchandise.

Football is the most obvious example of sport mixing it up with Mammon. But sport is big business even in this country, where the amateur-based GAA still commands the loyalty of vast swathes of the population. And if sports people are business people, they are going to need professional advisors such as solicitors.

The field is getting increasingly sophisticated. For example, MacNeill points out that publicly-quoted football clubs like Man U and Celtic need advice on listing and City of London regulations. The *Bosman* ruling, handed down by the European Court of Justice in 1995, means that all sporting organisations involved in hiring athletes from other EU countries need to be aware of the freedom of movement issues raised by that landmark case.

'There is also the franchise area', he says. 'Celtic and Rangers are planning to leave the Scottish league and move to the English Premiership. That will probably require the consent of two leagues. A similar issue could have been raised when Wimbledon threatened to move to this country. Either the Football Association of Ireland (FAI) or the English Premiership could have objected. In that situation, Wimbledon wanted to stay in the same league but wanted to relocate'.

Put them under pressure

The list goes on to include intellectual property (logos, merchandise and websites), property, financing and refinancing, and basically the whole gamut of legal specialisations. 'You are talking about a huge industry', says MacNeill. 'When you get to that level, it's proper that you carry on any activity within the regulations. Sports organisations need legal advice across the board. We regard it as an industry focus rather than a specialised area'.

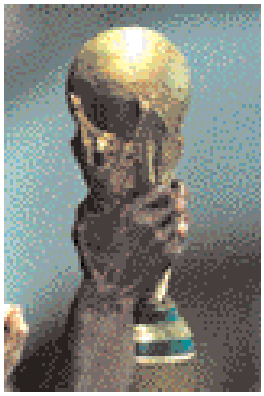
MacNeill's own background is litigation. He and his colleagues in the Dublin firm advise the FAI, Irish Open sponsor Murphy's Brewery and the International Rugby Board (which is headquartered in Dublin), among others.

The sports law business in this country is largely

focused on organisations, teams and sponsorship. The 'private client' end of it, that is, advising individual sportsmen and women is small – although the role played by Roy Keane's solicitor, Michael Kennedy, in the recent pre-World Cup crisis shows that this role can also be pivotal. MacNeill reckons the potential market does not stretch beyond much more than a dozen internationally-recognised golfers, footballers and athletes.

Sponsorship is the most significant area. Dublin-based Amárach Consulting calculates that the Irish sponsorship market is worth around €76 million (or £50 million when it published its report last year). Up to 80% of this could be eaten up by sports events, according to some estimates.

Funding sports events, teams and competitors in this way has changed since the days when the local publican gave a few bob to the senior hurling team. 'What we've seen in the market has been very much an evolution', says MacNeill. 'For years it used to be semi-altruistic and ad hoc – a local businessman did it out of interest or love of sport. Now there has to be a much more tangible benefit for both sides. The relationship is much more of a partnership'.



THE CHANGING FACE OF FOOTBALL

Jean Marc Bosman never looked like he was going to leave an enduring mark on the beautiful game. According to University College Cork lecturer in European and commercial law (and football fan) Declan Walsh, the Belgian was a 'journeyman footballer'.

But in the early 1990s he started a process that was not only to leave a legacy for the game's giants, but for any EU citizen seeking to enforce their right to earn a living in any member state of their choosing. Bosman's contract with his Belgian club, Liege, was up and he was due to transfer to US Dunkerque, a second division French club. Under UEFA-FIFA rules, Liege was entitled to a transfer fee from Dunkerque. However, the asking price was too much; Dunkerque wanted him, but not that badly. At the same time, Bosman wanted to move for the sake of his career. So he sought a declaration from the Belgian courts that the transfer fee rule breached his right to freedom of movement under the *Treaty of Rome*. The national court referred the matter to the European Court of Justice (ECJ). After a long drawn-out battle with Liege, UEFA and FIFA, the court found in his favour and handed down a landmark ruling in 1995.

Walsh states that the court held that Bosman was a worker within the meaning of the treaty, as he played football for remuneration under the direction of another. As his contract was up, his club's attempt to seek payment from Dunkerque was found to be an interference with his right to freedom of movement, as was the federation rule requiring these payments to be made.

The court also ruled that UEFA's rule banning clubs playing in the Champions' League from having more than three foreign players was anti-competitive. This opened the door to the situation we have today where, for example, around 60% of all players in the English Premier League are from outside Britain.

The doomsayers predicted that the transfer market would collapse as a result of *Bosman*. Teams would simply sit back and wait until a desired player's contract was up. However, the pessimists reckoned without the market.

The ECJ handed down its ruling in December 1995. The following summer, Alan Shearer transferred to Newcastle United from Blackburn Rovers for a record stg£15 million (€24 million). In 2001, French international Zinedine Zidane set a new record when he moved from Juventus to Real Madrid for €73.1 million. The average transfer fee between Europe's top football clubs in 1996 was €15.36 million; last year it was €52.32 million – an increase of 340% over five years.

He points to Manchester United's recent switch from kit supplier Umbro to Nike. Umbro is a British brand, but Nike has a global presence, and the club wants to use this to grow its customer/fan base. Similarly, it is looking to main sponsor Vodafone to use its technology to spread the gospel and generate new revenue streams.

United's chief executive puts it bluntly: 'We are looking at ways of getting Old Trafford out there, as opposed to putting a few t-shirts on the wall. It's about a community build. It's about building a supporter base that is connected and transactional'. Not a mention of four-four-two there.

Closer to home, Guinness has become almost indelibly associated with hurling. Its marketing clout has helped to maintain the game's high profile and kept young people interested, despite the challenge posed by international sports. At the same time, it has even spread the gospel of our national game beyond these shores, at least to a certain extent.

Show me the money

There are a number of basic elements in every sponsorship contract. The first is payment. This is straightforward, and the money is generally payable over the life of the contract. MacNeill advises that the rights owner (that is, the team, person or association) should try to have the payments loaded towards the beginning of the contract. Next is the licence, which basically allows the sponsor to promote the association. Current examples of this are World Cup logos on a range of consumer products, or the Guinness All-Ireland Senior Hurling Championship.

Exclusivity, which to a certain extent governs the deal's value, can cause tension. From the sponsors' point of view, exclusivity or a small number of backers offers the best value, as this gives the best possible exposure to the brand. One thing they do not want is to have any competitors involved either directly or indirectly. They will require a clause guaranteeing total or product category exclusivity.

Even with safeguards, sponsors may not be safe from ambush marketing, where a brand uses some kind of leverage to piggyback on an event sponsored by a competitor. MacNeill points out that a recent example of this was the Pepsi ad featuring David Beckham and some sumo wrestlers.

Coke is the World Cup soft drink sponsor; Beckham has a relationship with Pepsi and is the England captain; sumo wrestlers come from Japan, one of the tournament's venues. Pepsi has no direct involvement with the competition and the ad did not feature any World Cup logo, nor any mention of the tournament. But nonetheless, the association was clear, even if the law was not broken.

Keeping up appearances

Another problematic area can be the so-called 'morality clause'. This means that neither party can do anything to bring the other into disrepute. That can be very hard to define. During the pre-World Cup

Keane crisis, there was speculation over the future of his endorsement deal with 7-Up. Similarly, rights owners can be equally jealous of their image, and may reserve the right to scrutinise the sponsor's activities.

WHO ATE ALL THE PIES?

Vast transfer fees combined with high salaries have driven football's costs through the roof. So where have they been getting all the money? In the mid 1990s, clubs like Manchester United and Newcastle went to the City of London and to their loyal supporters, and raised funds from the markets like any other business. The only one that's repaid investor loyalty is Man U, and this rests partly on the global appeal of its brand and not just at the valuable feet of its footballers.

At the same time, many European clubs are facing massive debts. Recently, Real Madrid was forced to sell its training ground for office development to pay off its €272 million debts. Another Spanish club, Deportivo, has debts of €128 million. At the end of June 2001, all 18 clubs in Italy's Serie A recorded an aggregate debt of €720 million. There are fears that Fiorentina will not survive its current crisis. The club has been having difficulty paying its players.

One answer to this cash crisis is obvious – sell off assets to pay the debts. But the clubs' best assets are their players. If they go down this path, the transfer market will collapse. The other is to cut costs, lay off players and reduce salaries in the long term, or link high fees with club and personal performance. Arsenal manager Arsene Wenger has already suggested that clubs will go down this route. Either way, it seems as if Bosman's legacy is double edged.

As for the man himself, his case took so long that his career had reached its natural end before the judgment. But he was not forgotten by the players who have benefited over the last seven years. Two years ago, Europe's top players, including Zidane, held a benefit match for him in Barcelona.

Unfortunately, in a stadium with a capacity of 95,000, just 10,000 fans turned up to pay tribute to the man who brought the free market to football.

On top of these, there are warranties such as those found in most commercial contracts. They will generally include warranties that the parties have the authority to enter into the agreement and to undertake whatever commitments are involved, as well as a flexibility clause.

Individual team members are generally required to wear branded strips, but because footballers traditionally brought their own boots, MacNeill points out that their contracts do not require them to wear specific kinds of footwear. Premiership players can make their own deals with manufacturers.

With the exception of Formula One, sportspeople who wear headgear are less recognisable, and so less attractive to sponsors. This is one of the reasons why a British national hunt jockeys' campaign to get sponsorship failed. American footballers are advised to take off their helmets when celebrating a touch down, or at any point where they are likely to be filmed, to get over this problem.

So, when you settle down on your couch or in your local to watch the boys in green, remember that you are part of a worldwide community of consumers, ideally placed to have every conceivable brand flogged to you. And you thought it was just a game of two halves. G

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

NO REG

The theme of this year's annual conference in Sorrento was *When saying sorry isn't enough*. Conal O'Boyle mops up the tears from the business session

MAIN POINTS

- Insurers' perspective on PII claims
- Origins of the SMDF
- Malpractice prevention checklist

'Love means never having to say you're sorry' romantics used to bleat, but the hard-nosed realists in the insurance business went one step further at the Law Society's recent conference in Sorrento. The theme of the business session was *When saying sorry isn't enough*, and Cyril Forbes of insurers Jardine Lloyd Thompson Ireland had some frank advice for solicitors who find themselves on the wrong end of a professional indemnity insurance claim.

'Admit the mistake, but not the guilt', he told them. 'Agree to fix the problem but never seek to blame'. It was just business, he said, not personal. The proper course of action was to notify the relevant insurer immediately if a potential problem occurred. 'Despite a perception to the contrary', said Forbes, 'insurers are much happier to be advised of all incidents as they arise, to open many files and then to close them as the incidents go away'.

There was also a very practical reason for notifying insurers early, he added, because any fees incurred without the insurance company's prior consent might not be recoverable. 'In my experience', said Forbes, 'clients are not penalised for notifying incidents that do not materialise. I have seen penalties imposed where the insured has failed to notify incidents which subsequently develop into claims. Insurers view these situations as either deliberate non-disclosure or evidence of professional incompetence'.

And in the lexicon of love, there is one phrase guaranteed to break off the engagement between insurance company and solicitor. That phrase is 'statute barred'. Worse than adultery, more unforgivable than insulting your mother-in-law, 'statute barred' will leave you out on the street with your suitcase in your hand. Forbes warned the audience: 'You may rest assured that insurers will hammer any solicitor notifying a statute-barred incident, as they are seen as arising only from gross negligence or carelessness. Insurers here and overseas are taking a very strong line in doubling excesses and premiums, while also imposing expensive risk management audits of the firms involved'.

Dancing at the crossroads

Earlier, Ennis solicitor Michael P Houlihan had charted the growing love affair between the legal profession and the Solicitors' Mutual Defence Fund. In the Ireland that existed before the *Late Late Show*, there was no sex and very little professional indemnity insurance. Solicitors danced with comely maidens at the crossroads and bluffed their way through the insurance market. By the 1970s, innocence was lost and premiums were skyrocketing. Many solicitors had to go to England to get relief, and eventually most PII found its way to London and the various Lloyds syndicates.

According to Houlihan, who was instrumental in

President Elma Lynch with the speakers at this year's annual conference *(from left)*: Michael P Houlihan, Cyril Forbes, EU Commissioner David Byrne and CCBE president John Fish

RETS?

THE MALPRACTICE PREVENTION CHECKLIST

- Do not undertake any task you are not competent to handle
- Avoid representing parties with conflicting interests
- Obtain a clear understanding of the issues and outline in writing to your client exactly what work you are undertaking on his behalf
- Explain to your client the basis of your fees and, where possible, agree a charge and confirm this in writing, complying with statutory obligations
- Maintain proper attendance records and, if possible, time records for all services rendered
- Do not ignore your client. If there are long periods of delay, explain the reason for inactivity. Send copies of pleadings and self-explanatory letters. Return telephone calls
- Give your client something to do
- Keep your client advised of any serious problems that have developed. Do not minimise risks that may be involved in any legal proceedings. Where there are alternative strategies that involve risks, inform your client and give your recommendation. Let him choose the strategy to be pursued
- Take no material action (including settling a case or agreeing to a judgment) which may prejudice your client without his expressed consent
- Be sure to preserve your client's confidence
- Ensure that you have a management system that will require compliance with all deadlines, statutory limitations, court listings, trial dates, motion dates and adjournments
- If you obtain oral instructions of any importance from your client, confirm them in writing
- Do not overstate the strength of your client's case
- If you perceive a breakdown in the relationship with your client, discuss it with him and resolve the differences
- Discuss with your client any referral to counsel or to specialists and obtain his consent and, where possible, nominations
- If there is a tender/lodgment in any case, because of its complexity you should confirm the lodgment procedure and its effect in writing to your client
- Avoid criticising your colleagues or opposing lawyers unless absolutely essential
- You should not reveal that you have PII cover without first obtaining the approval of your insurers and reporting any circumstances that may give rise to a claim
- Do not attempt to defend your own malpractice claims, otherwise you will have a you-know-what for a client.

Delegates at the Saturday morning business session

compiling the first statistics on the relationship between claims and PII costs, the SMDF sprang from an era when the pricing of the premium did not reflect the risk involved. 'We could see there was no voodoo mathematics involved', he said. 'There was a direct relationship between premiums and claims, and the statistical information we had unearthed disclosed that'. And so the Solicitors' Mutual Defence Fund was born. By 1997, PII was mandatory for practitioners.

'We are not, and do not seek to be, a monopoly', said Houlihan, 'but we have been a huge influence for the good of the profession in a market which was previously insurer-driven'. He pointed out that times had changed and that every profession had become more accountable. 'If you make a mistake today, you can expect to pay for it, and therefore you must be insured for the risk'.

Houlihan's figures seemed to suggest that when it came to insurance claims, women were winning the battle of the sexes. Female lawyers, he said, had one-third fewer claims than their male counterparts. And among practitioners, criminal lawyers had the fewest number of claims against them.

After providing an extremely useful malpractice checklist for delegates (see **panel**), Houlihan ended on this reassuring note: 'In my view, you will be a very lucky practitioner if you are not sued in the course of your professional life'.

The other speakers at the business session were CCBE president John Fish, who discussed the work of the CCBE (the European association of law societies and bar associations) and the main items on its agenda, including developments in European company law and the proposed international criminal court, and European Commissioner David Byrne, who described the commission's attempts to resolve the differing approaches to contract law throughout the European Union. G

Recent European legislation has overhauled the way civil and commercial judgments delivered in one EU state are to be enforced here. TP Kennedy explains the main changes contained in the new *Brussels I regulation*

Judgment c

On 22 December 2001, the European Council agreed a new regulation, the *Brussels I regulation* (44/2001, OJL 12/1, 16 January 2001), to replace the *Brussels convention on jurisdiction and enforcement of judgments*. This is part of a package of measures in the area of justice and home affairs. The *Brussels convention* had been undergoing a process of review for the last few years.

On 28 May 1999, the commission put forward a fresh proposal for the replacement of the convention with a regulation to bring the content of the former convention into the main body of EC law. Previously, the European Court of Justice was given the power to rule on questions of interpretation under a protocol annexed to the convention – the *Luxemburg protocol*. This is no longer required for the regulation, as Irish courts are now able to make preliminary references to the ECJ under article 234 of the *EC treaty* (ex-article 177).

The regulation came into force on 1 March 2002. As a regulation, it does not require implementing legislation, though regulations have been made by statutory instrument 52/2002 to set out the procedures necessary in Ireland for the successful working of the regulation (see *One to watch* on p2). Having these rules in the form of a regulation will also make future revisions much easier. Under the *Brussels convention*, every amendment to it or accession of a new state required a separate treaty, which had to be implemented by its signatories.

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

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

General jurisdictional rules

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

Domicile

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

Contract

Article 5(1) of the convention provides that in matters relating to a contract, a plaintiff can sue the defendant in the place of performance of the obligation in question or the domicile of the

defendant. This is the most heavily litigated provision of the convention and has given rise to a great deal of uncertainty. Some commentators had advocated its complete deletion on the basis that it had not been successful.

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

MAIN POINTS

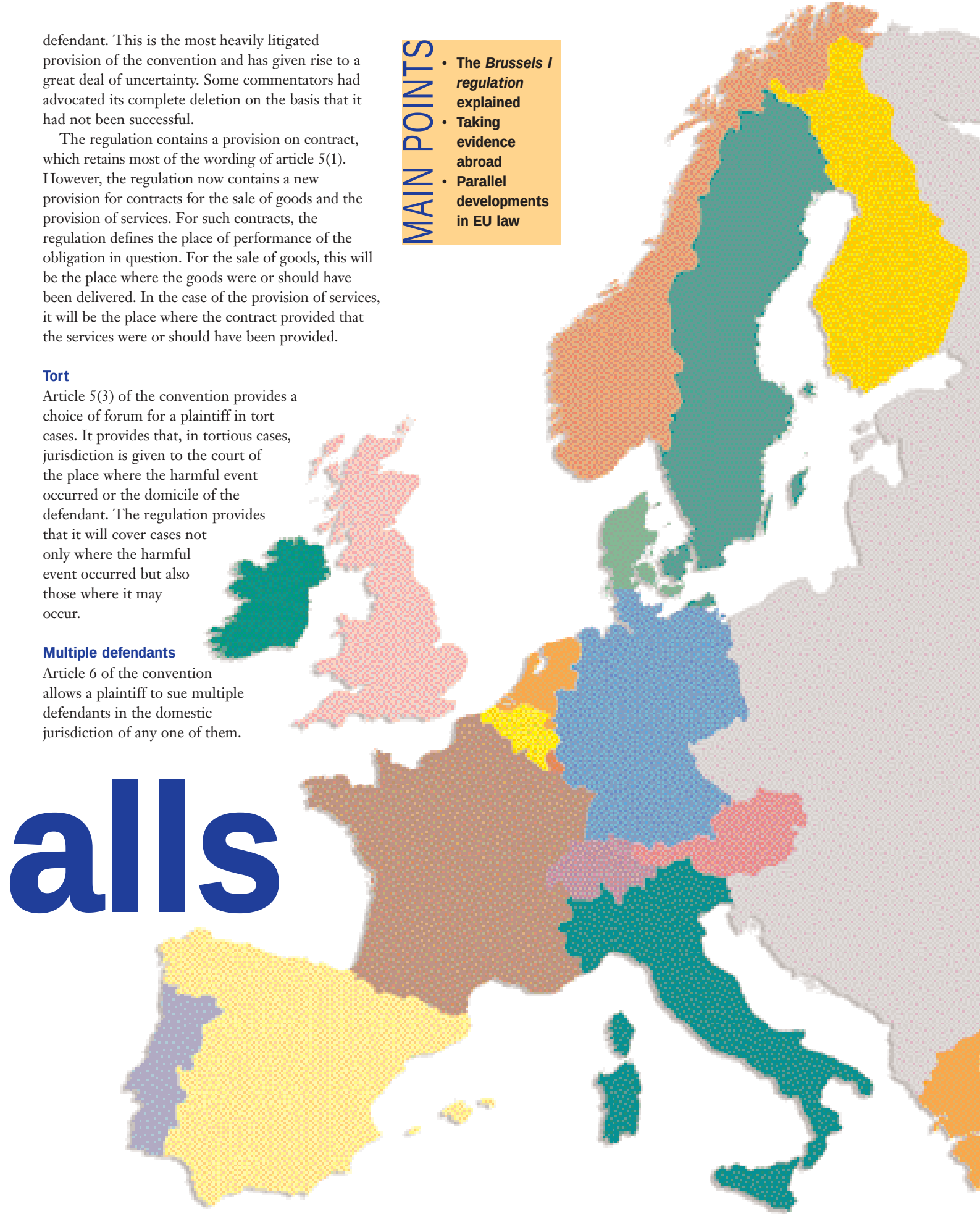
- The *Brussels I regulation* explained
- Taking evidence abroad
- Parallel developments in EU law

Tort

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

Multiple defendants

Article 6 of the convention allows a plaintiff to sue multiple defendants in the domestic jurisdiction of any one of them.



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The European Court of Justice in Luxemburg

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

'The regulation makes the recognition and enforcement mechanisms for foreign judgments faster'

Insurance contracts

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

Consumer contracts

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

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

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

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

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

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

There is of course a third view, which I will mention for sake of completeness. This is to the effect that the new article 15 does not make a radical change. The contractual provision now provides that, for contracts for the sale of goods, the correct

OTHER DEVELOPMENTS IN THE EU

There have been a number of other developments parallel to this regulation. The EU has been introducing a range of measures in the area of co-operation in civil and judicial matters. In family law cases, the *Brussels II regulation* (council regulation (EC) no 1347/2000) sets out similar rules on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses. A new *Insolvency regulation* (1346/2000) likewise sets out jurisdictional rules in transnational insolvency cases. Neither of these regulations applies to Denmark. Negotiations are continuing over the recasting of the *Rome convention* on choice of law in contractual matters in the form of a regulation.

Service of judicial documents

The *Regulation on the service of judicial and extrajudicial documents in civil or commercial matters* (council regulation (EC) no 1348/2000) applies within the EU and within it will prevail over any other service convention, such as the *Hague convention*. Denmark is not a party to this regulation. The *Hague convention* will continue to apply to service of judicial documents outside the EU.

The regulation asks states to designate public officers, authorities or other persons as 'transmitting agencies' and 'receiving agencies'. As their names suggest, these agencies will be competent for transmitting judicial documents to be served in another state or for receipt of judicial documents from another state for service in their own state. Ireland has designated county registrars for this role. Documents are to be transmitted through these agencies and are to be accompanied by a standard form set out in the annex to the regulation. No other legal formalities are necessary.

Service by the receiving agency is to take place as soon as possible. The document to be served must be in the language of the place of service or in a language the addressee knows. The receiving agency is to confirm receipt of the documents to the transmitting agency. It will serve the document itself or arrange to have it served. When served, a standard certificate of completion (in a form set out in an annex to the regulation) is sent to the transmitting agency. The applicant bears the cost of a summons server or the use of a particular method of service.

The regulation also provides for a central authority. This is primarily to be a source of information. In Ireland, the master of the High Court will act in this capacity.

Taking of evidence abroad

In June 2001, a regulation was adopted on co-operation between national courts in the taking of evidence in civil and commercial proceedings (council regulation (EC) 1206/2001). This will come into effect from 1 July 2004 and will apply between all the member states of the EU with the exception of Denmark.

It will allow a civil court in one state to request a court in another state to take evidence in its state. Such a request is to be the in official language of the place where the evidence is to be taken and in a prescribed form. Any appropriate means can be used for the transmission of these requests. The requested court is to acknowledge the request and is given 90 days to execute the request. Article 10 provides that a videoconference or teleconference can be requested. There are a number of grounds for refusing a request: where a person claims the right to refuse to give evidence or is prohibited from doing so by the law of the requested state or where the request falls outside the scope of the regulation.

Article 17 allows a court in one state to take evidence directly in another state on request to the central body in the state concerned. The parties to the proceedings may be requested to bear the fees of experts and interpreters and other specified costs.

To ensure proper implementation of the regulation, the commission is required to prepare and maintain a manual setting out:

- The courts on a state-by-state basis which will undertake the execution of such requests
- The central body in each state responsible for supplying information, resolving difficulties and dealing with applications under article 17
- The technical means available by courts for receiving requests under the regulation
- The languages in which requests may be accepted in various states, and
- Any bilateral arrangements facilitating the taking of evidence which are compatible with the regulation.

As between member states, the regulation supersedes any other bilateral or multilateral agreement between these states relating to the subject matter of the regulation.

jurisdiction is that of the place of delivery. This is invariably the place of the consumer's domicile. US courts are also becoming more sympathetic to consumers asserting jurisdiction in their home states. Thus, on this analysis, the new consumer provisions will be something of a paper tiger.

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

Employment contracts

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

Jurisdiction agreements

As with the convention, the regulation allows the parties to choose the jurisdiction of a certain court and then gives that court exclusive jurisdiction. The convention requires such a jurisdiction clause to be in writing, evidenced in writing, in a form that accords with international trade or commerce practices or in a form which is consistent with practices developed between the two parties. The regulation takes account of electronic commerce and provides that 'any communication by electronic means which can provide a durable record of the agreement shall be deemed to be in writing'.

Lis pendens

The convention provides that where two courts are

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

Recognition and enforcement of judgments

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

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

Defences to recognition and enforcement

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

Renumbering

As a consequence of some deletions and additions, there is some renumbering in the regulation. This is most significant in the recognition and enforcement provisions. G

TP Kennedy is the Law Society's director of education.

Friendly PER

Conciliation creates an intermediate tier in the dispute resolution chain and offers the parties an opportunity to amicably resolve the dispute before formal proceedings become necessary. Denis O'Driscoll outlines the process that operates in the construction industry

MAIN POINTS

- Alternative dispute resolution in the construction industry
- How conciliation works
- RIAI and IEI conciliation rules

Traditionally, the choice of dispute resolution mechanism in construction contracts was stark. If a dispute could not be resolved through negotiation, the only weapon left in the contractor's arsenal was the threat of arbitration. Many of the large clients in Ireland are repeat players in the construction market, with strategic rolling plans for future investment in the industry. The issuing of formal court proceedings will be an act of last resort for any contractor because, by implication, it means that the relationship with the client has broken down irretrievably. Faced with such a zero-sum game, what is a contractor to do?

A new process has been sweeping across all common-law jurisdictions – alternative dispute resolution (ADR). Conciliation is a member of the ADR family and is now incorporated as a dispute resolution mechanism into the conditions of contract of both the Royal Institute of Architects of Ireland (building works) and the Institution of Engineers of Ireland (civil engineering works).

The art of compromise

It must be clearly understood that the conciliator's role is not synonymous with that of an arbitrator. His role is not necessarily to dispense justice but to assist the parties in reaching a mutually acceptable compromise. A skilled conciliator can inject much-needed objectivity into a dispute and issues can be constructively explored in a civil manner, which is the antithesis to the short, heated exchanges that sometimes prevail in the site portacabin.

The conciliator has discretion to adopt the procedure he deems most appropriate for the hearing, and strict rules of evidence do not apply. The hearing usually starts with a joint session where, typically, both parties set out their respective positions in a robust fashion. This is followed by individual sessions (known as a 'caucus') between the conciliator and each of the parties in turn. Obviously, settlement would be impossible if both parties adhered to their opening positions, and the conciliator's skill is to quickly

SUASION

seek common ground in order to narrow the issues in dispute.

During the caucus, he will talk confidentially and frankly to each party, exploring the strengths and weaknesses of their positions. He may also need to subtly challenge the parties by identifying issues of fact or law that might adversely affect the cogency of their case. If both parties are less certain about the strength of their respective positions, then they are more likely to seek a settlement.

WHY CONCILIATION FAILS

There are a number of reasons why conciliations fail. Among them are:

- **A poor quality conciliator.** A conciliator should be a mutually respected construction professional, ideally with a legal qualification. A well-intentioned construction professional without legal skills may well be able to broker a deal, but some difficult disputes can hinge on fundamental principles of contract law, such as causation and mitigation. If these issues are not addressed at the conciliation, then an opportunity may have been missed. Although he is not obliged to do so, the parties should consider asking the conciliator to provide the reasons on which his recommendation is based. The parties would be wise to seriously reflect on a reasoned recommendation, as this may substantially replicate an arbitrator's award in subsequent proceedings
- **Decision-makers are not in attendance.** A representative with the authority to sign a settlement agreement should attend the conciliation hearing on both sides
- **The dispute has not been sufficiently particularised.** The written submissions served prior to the hearing should be particularised with regard to liability and *quantum* so that each issue can be analysed in some depth, particularly with regard to time extensions and loss and expense claims
- **Cooling off following a break in proceedings.** Ideally, conciliation should be restricted to a duration of one day, bearing in mind that a day has 24 hours. Many agreements are reached at the 11th hour, when fatigue has perhaps set in. If proceedings are carried forward to another day, gains painfully made can quickly be lost
- **Ego/loss of face.** The construction industry attracts its fair share of arrogant and abrasive personalities. Unfortunately, many construction disputes are personality driven.

PROVISION OF LEGAL ADVISE FOR THE GARDA SÍOCHÁNA COMPLAINTS BOARD

The Garda Síochána Complaints Board has a requirement for on-going legal advise to assist the Board in carrying out its functions under the *Garda Síochána (Complaints) Act, 1986.*

Any firm of solicitors interested in undertaking this business should write to the office of the Board at: **Block 1, Irish Life Centre, Lower Abbey Street, Dublin 1**, by 31 July 2002 supplying details of experience and expertise in the area of administrative law and quoting relevant fees on an hourly basis, inclusive of VAT.

Further information may be obtained by contacting the Chief Executive of the Board, telephone 8728666 (fax 8746249).

THE RIAI AND IEI'S CONCILIATION RULES

Both the RIAI and IEI publish conciliation rules applicable to their own contracts. Reference should be made to these rules for their specific import, but a general comparison of the main provisions is as follows:

	RIAI CONCILIATION PROCEDURE (1996 ed, issue 3)	IEI CONCILIATION PROCEDURE (2000 [9/2000])
COMMENCEMENT	By notice served on the other party specifying the matters in dispute	By written notice served on the other party specifying the matters in dispute and the relief sought
PERIOD TO CONCUR IN THE APPOINTMENT OF A CONCILIATOR	Ten working days from the notice	14 days from service of the notice
APPOINTING BODY IN DEFAULT OF AGREEMENT	President of the Royal Institute of Architects of Ireland	President of the Institution of Engineers of Ireland
PROCEDURE	• Serve brief written submission with relevant documentation • Procedure conducted at the conciliator's discretion but on a 'without prejudice' basis	• Serve written submission • Procedure conducted at the conciliator's discretion but on a 'without prejudice' basis
SETTLEMENT/RECOMMENDATION	• If agreement is reached, it should be set down in writing and signed • If no agreement, the conciliator shall issue his recommendation within ten working days of the hearing • He shall not be required to give reasons	• If agreement is reached, it should be set down in writing and signed • If no agreement reached, the conciliator shall issue his recommendation within two weeks • He shall not be required to give reasons, but should he choose to do so, these should be issued within seven days of the recommendation
EFFECT OF RECOMMENDATION	If neither party rejects it within ten working days of its issue, it shall be final and binding	If neither party rejects it in writing within two weeks of receipt, it shall be final and binding
COSTS	• Each party to bear their own costs • Both parties jointly and severally liable for the conciliator's costs, to be paid in equal shares, unless he decides otherwise	• Each party to bear their own costs • Both parties jointly and severally liable for the conciliator's costs, to be paid in equal shares within seven days of receipt of the conciliator's notice of costs

During the course of the proceedings, the conciliator moves back and forth between the parties using the skills of shuttle diplomacy. If all goes well, by the end of the proceedings a figure is nervously scratched on a sheet of paper and a deal is done. It is not uncommon that agreement cannot be reached on the day, but will follow later when the parties have had an opportunity for critical reflection. Conciliation at its best is a 'win-win' situation.

However, if the parties cannot compromise, the conciliator will issue a written recommendation after the proceedings. The conciliator need not give the reasons on which the recommendation is based. If neither party rejects the recommendation within a prescribed period, it becomes final, binding and determinative of the matter. If rejected by either party, the recommendation has no effect and the aggrieved party is once again left with the stark choice of whether to begin formal proceedings. As conciliation is conducted on a 'without prejudice' basis, concessions made during the process are inadmissible and the conciliator can have no role in any subsequent proceedings either as an arbitrator or as a witness of fact. G

Denis O'Driscoll is principal of the Cork law firm Denis O'Driscoll & Associates.

Parallel u

The European Court of Justice has clarified and extended its case law relating to the repackaging and relabelling of pharmaceutical products in some recent judgments. Dorit McCann explains

MAIN POINTS

- Parallel import of repackaged products
- Trademark protection
- Recent ECJ judgments

On 23 April 2002, European Court of Justice judgments in *Boehringer* (case C-143/00) and *Merck, Sharp & Dohme* (case C-443/99) clarified the extent to which manufacturers may rely on their trademarks in challenging the parallel import of repackaged or relabelled pharmaceutical products.

In *Boehringer*, several pharmaceutical companies, including Boehringer, Glaxo, SmithKline, Wellcome and Eli Lilly, objected to the relabelling and repackaging of their products. The manner in which the different products were repackaged varied, but it largely consisted of attaching a label in the English language to the package or of repackaging the products in boxes designed by the parallel importer. In *Merck, Sharp & Dohme*, the parallel importer replaced the original packaging with new packaging designed by himself and added descriptions in German. The trademark proprietor requested that the importer restrict himself to relabelling by means of self-adhesive stickers.

The pharmaceutical companies argued that the repackaging and relabelling of their products constituted an unlawful interference with their trademark rights. Both cases arose from references to the ECJ by national courts in the UK and Austria respectively.

The need for repackaging

In *Boehringer* and in *Merck, Sharp & Dohme*, the ECJ was asked to consider the circumstances in which the repackaging of trademarked products, rather than the application of a new label to the existing packaging, might be considered necessary. In particular, the ECJ considered whether it is lawful for the trademark owner to refuse repackaging where, although the repackaging is not necessary for the product to be marketed in the importing state, the marketability of the product would be jeopardised because a significant proportion of the consumers in that state are suspicious of pharmaceutical products clearly

niverse

intended for another state's market (as was reported to be the case in Austria).

In line with its previous case law, the ECJ stated that the circumstances prevailing at the time of marketing the product in the importing state, including national rules or practices relating to packaging or insurance rules, must be taken into account to determine whether they make repackaging objectively necessary. It went on to say that, while resistance to relabelled pharmaceutical products by consumers does not always constitute an impediment to effective market access so as to make replacement packaging necessary, there may be 'such strong resistance from a significant proportion of consumers to relabelled pharmaceutical products that there must be held to be a hindrance to effective market access. In those circumstances, repackaging of the pharmaceutical products would not be explicable solely by the attempt to secure a commercial advantage. The purpose would be to achieve effective market access'.

Whether or not this is the case is a matter to be determined by the national court.

Advance notice of repackaging

The ECJ also confirmed its previous case law on the need for the parallel importer to provide the trademark owner with advance notice of his intention to repackage a trademarked pharmaceutical product. At the request of the trademark owner, the importer must also supply it with a sample of the repackaged product before it goes on sale.

In *Boehringer*, the national court queried whether such notice must necessarily be given by the importer himself or whether it is sufficient for the trademark owner to receive such notice, from whatever source. The ECJ held that it is incumbent on the parallel importer to give notice to the trademark owner of the intended repackaging and that it is not sufficient that the owner be notified by other sources. It also confirmed that notice must be given, whether or not the intended repackaging prejudices the specific subject matter of the mark or not.

In responding to the national court's query as to what length of notice must be given to the trademark owner by the parallel importer, the ECJ

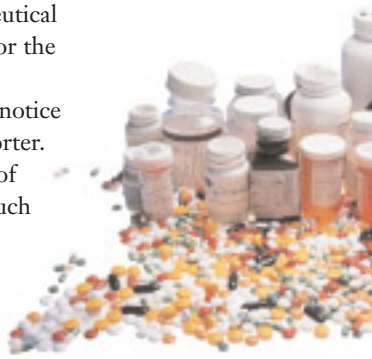
PREVIOUS ECJ CASE LAW

In *Hoffmann-La Roche v Centrafarm* (case 102/77, [1978] ECR 1139), the ECJ held that derogations from the fundamental principle of the free movement of goods between member states, contained in article 28 of the *EC treaty*, are allowed to the extent that they are justified in order to safeguard the rights that constitute the specific subject matter of the industrial property concerned. By stating that the guarantee of origin of a trademark is part of the specific subject matter of a trademark, the ECJ recognised the right of a trademark owner to prevent the marketing of a repackaged product to which the trademark has been affixed by a parallel importer.

However, the ECJ also held that such prevention of marketing by the trademark owner will constitute a disguised restriction on trade between member states where it will contribute to the artificial partitioning of the markets between member states and where the repackaging is done in such a way that the legitimate interests of the owner are respected. In particular, the repackaging must not adversely affect the original condition of the product and must not harm the reputation of the mark. In addition, the trademark owner must receive prior notice of the marketing of the repackaged product and the new packaging must identify by whom the product has been repackaged.

In subsequent cases, in particular *Bristol-Myers Squibb* (joined cases C-472/93, C-429/93, and C-436/93 [1996] ECR I-3457) and *Upjohn* (case C-379/97 [2000] 1 CMLR 51), the ECJ has clarified what may constitute artificial partitioning of the markets between member states. It stated that, in certain circumstances where repackaging is necessary to allow the imported product to be marketed in the importing state, opposition by the trademark owner to the repackaging of its products constitutes an artificial partitioning of markets. Therefore, the trademark owner's opposition to the repackaging of the product by the parallel importer is not justified if it hinders effective access of the imported product to the market of that state, provided that the presentation of the repackaged product does not damage the reputation of the trademark. Conversely, the ECJ held that the trademark owner may oppose the repackaging if it is based solely on the parallel importer's attempt to secure a commercial advantage or where the parallel importer is able to reuse the original packaging by affixing labels to that packaging.

held that 'a reasonable time period' must be allowed to enable the owner to react to the intended repackaging, and bearing in mind the parallel importer's interest in marketing the pharmaceutical product as soon as possible. It held that it is for the national court to assess, in the light of all the relevant circumstances, whether a reasonable notice period has been provided by the parallel importer. The ECJ did, however, suggest that a period of 15 working days seemed likely to constitute such a reasonable time where the parallel importer has also supplied the trademark owner with a sample of the repackaged pharmaceutical product.



Striking a balance

The ECJ has confirmed the approach set out in its earlier judgments that the repackaging of a pharmaceutical product poses a risk to the guarantee of origin of a product, which forms part of the specific subject matter of a trademark right. By doing so, it confirms the right of a trademark owner to prevent the use of its trademark on repackaged goods unless the repackaging is necessary in order to enable the marketing of the product and provided that the interests of the owner are safeguarded.

In delivering its two judgments, the ECJ is once again attempting to strike a balance between the fundamental principle of the free movement of goods between member states and the right of trademark owners to protect their marks. However, just as it did in its judgments in *Silhouette* (case C-355/96) and *Davidoff/Levi* (joined cases C-414/99 and C-415/99), where it ruled that trademark owners have an unfettered right to control the import of goods bearing their trademarks into the EU, it has come down again in favour of protecting the rights of trademark owners rather than those of parallel importers. It remains to be seen what circumstances have to prevail for it to be considered necessary to repackage a pharmaceutical product in order to effectively access a market. G

Dorit McCann is a solicitor with the Dublin law firm A&L Goodbody.

Tech trends

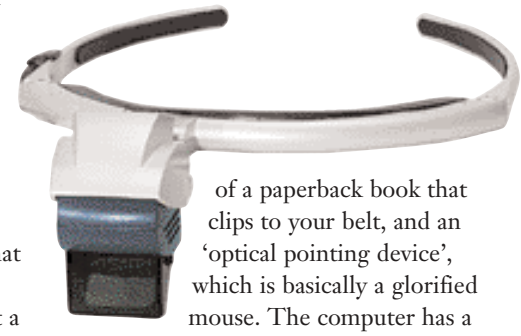
Ringing the changes

Do you remember when mobile phones used to be just mobile phones? Motorola obviously doesn't and continues to find ways to reinvent its products so that they become 'indispensable lifestyle accessories'. This summer, it will be launching a range of new mobiles, of which the most interesting will be the A388 and the V70. The A388 combines a phone with a PDA (personal digital assistant), and also includes Internet, computer and digital camera connectivity, as well as downloadable games. The new V70, on the other hand, includes an FM radio headset and a portable speakerphone. The V70 also looks different, with its 360-degrees swivelling cover and futuristic shape. Luckily, Motorola remembered that the V70 still has to function as a phone, so it includes all the trimmings, such as voice-activated dialling, vibration alert, 100-name phone book and an assortment of games. The phone is expected to cost around €375 when it goes on sale shortly and the company says it is designed for 'the culturally hip, the sophisticated, the bold and the elegant'. So that rules you out, then.

Available from the usual mobile phone retail outlets in June.

Seeing is believing

If it's true that 'you are what you wear', then the new Poma from US hi-tech company Xybernaut will identify you as a computer geek with more money than sense. Poma stands for 'personal optical mobile assistant' and it looks like it came straight out of *Star wars*. It's a featherweight computer with a head-mounted visual display unit that is designed to deliver instant access to e-mail, the Internet, music, videos, games and the usual business tools you find in a handheld PDA. The one-inch, full-colour screen weighs three ounces and sits just below your eye. Xybernaut claims that the viewing area is similar to looking at a desktop monitor two feet away. There are three elements to the Poma: the headset, a Hitachi-built computer the size of a paperback book that clips to your belt, and an 'optical pointing device', which is basically a glorified mouse. The computer has a 128 MHz processor, 32MB of RAM and runs Microsoft's Windows CE operating system (about the same level of functionality as a pocket PC). Like other Windows CE devices, the Poma comes with scaled-down versions of Microsoft Word, Windows Media Player and Internet Explorer. Not surprisingly, the Poma recently won the Editor's Choice Award from *Popular mechanics* magazine. At the moment, the device is only available in the United States, where it costs just under $1,500 – but if it catches on, it won't be long before we see it over here. At a time when people routinely walk around with a mobile phone in one hand and a pocket PC in the other, the idea of a computer you wear doesn't seem that bizarre at all. *For further information, see* www.xybernautonline.com/poma.



Just the thing to light up your life

If making presentations is a part of your job, then you might be interested in the new range of multimedia projectors from Canon. The Canon LV7340 uses the manufa… own 'turbo bright systen… which claims to make projections 25% brighte… conventional LCD proje… (up to 1,500 ANSI lume… with a contrast ratio of 350:1, if you're intereste… This means that it can b… used in even the most w… rooms.

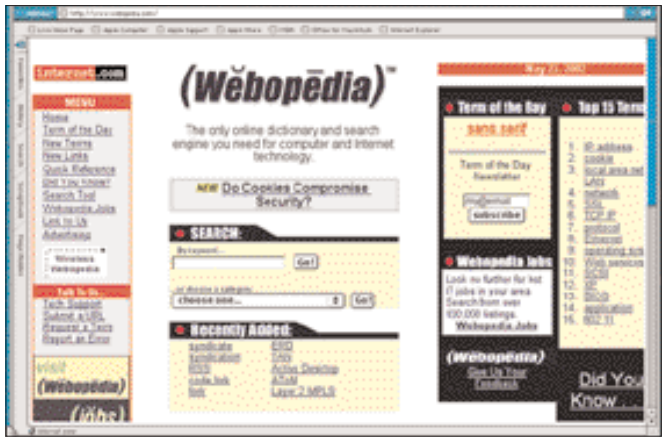
The LV7340 weighs i… around four kilos, which… it ideal for both mobile … desktop presentations. A… added bonus is that you can dispense with the PC or laptop if you buy the optional Media Card Imager kit which can be used to project data and files … including Microsoft PowerPoint, JPEGs and BMPs. *Available for around €6,750 from computer outlets and from Canon (tel: 01 205 2400,* …

Colour me beautiful

Colour printing from your PC is often the technological equivalent of watching paint dry. Whole civilisations can rise and fall before you get one usable colour printout, and even then it rarely bears any resemblance to the colours on your screen. This could all change with the new Magicolor 3100 laser printer from Minolta-QMS, which claims to be the first colour laser printer that can spew out colour or black and white prints at the same speed – 16 pages a minute. The Magicolor 3100 uses 'crown control technology', which basically means that instead of layering four colours on top of each other to achieve the desired effect, the colours are printed simultaneously, resulting in prints that are several times faster than the conventional colour printing method. The unique toner cartridge uses smaller particles, leading to sharper colours and graphics and cheaper page cost. This is good news for anyone who needs to generate colour reports. The bad news is that it costs just under €4,000. *Available from Minolta-QMS (tel: 041 988 7160) and from computer outlets (see also* www.minolta-qms.ie*).*

Sites to see

Cartoon library *(www.cartoonstock.com)*. You can tart up your in-house newsletter or client brochure by visiting this searchable library of thousands of new cartoons from many of the world's best cartoonists. Catalogued by keywords, category and artist, the cartoons on offer can be bought for use in any number of publications.



Technobabble dictionary *(www.webopedia.com)*. If terms like RAM and PDA have left you baffled while reading about the gadgets described above, help is at hand. This website will explain it all in plain English, even those tricky acronyms like WAP and SCSI, which sound like they should be personal insults but aren't really.

Predict your own death *(www.thespark.com)*. A light-hearted website questionnaire that claims to be able to predict the precise date and method of your demise. Unfortunately, we look set to be 'abducted by aliens', but there are worse ways to go. Among the other questionnaires on this site, you can test your IQ – assuming you're still alive.

Daily horoscopes *(www.astrology.msn.com)*. Throw away your crystals and shove your feng shui. You can get your daily dose of superstitious nonsense from this site, which gives you a daily horoscope, Chinese readings (whatever they are) and numerology. You can even get readings for your pets. Or you can just get a life.

Will the summer bring sunshine?

You don't need a weatherman to know which way the wind blows, argues Alan Murphy, who explores four issues that may affect global markets over the coming months

Davy STOCKBROKERS

Alan Murphy: 'Be prepared for some mixed weather'

Sailing enthusiasts would describe recent market movements as 'choppy', car enthusiasts might call it 'bumpy' and those fond of aeronautical pursuits may even tag it 'turbulent'. One thing for sure is that markets have been volatile over the course of the first part of this year. As we go to print, the ISEQ is down 7.9%, the S&P 500 is off 4.5%, the NASDAQ has fallen another 11.6% and the narrower Dow Jones has managed a 2.4% gain.

When looking to the US for direction, the economy seems to be showing signs of recovery, yet the recent first quarter earnings were very much a mixed bag. Crucially, US corporates are still vague in guiding on future profitability.

So what's next for the markets? Should investors break out the sunglasses and lotion? Or are we in for a typically Irish summer forecast, promising lots and always disappointing.

The US economy

Current conditions: sunny. On 17 May, the US consumer confidence figures were again better than expected and retail sales figures beat Wall Street estimates. Productivity and gross domestic product (GDP) also soared and the manufacturing sector, one of the hardest-hit areas during the downturn in 2001, reported its third straight month of expansion. These indicators are increasing optimism for a sustained recovery and casting further doubts over the much mentioned double-dip recession – a quarter or two of recovery before another downturn in the economy.

The US Federal Reserve, while moving its interest rate policy to 'neutral', seems prepared to hold off on raising interest rates in the short term. This will leave the cost of raising capital at a 40-year low and may well provide further fuel to a sunny period.

Corporate earnings

Current conditions: partly cloudy. According to First Call, the global research network, earnings for the S&P 500 are expected to increase on a year-on-year basis for the first time since the fourth quarter of 2000. First Call is predicting broad earnings to increase by 6.6%.

Mid-May's modestly bullish results from Cisco and Dell recently sent telecommunications and technology stocks surging. Consensus earning forecasts (profits) in the US for the financial sector are expected to be up 22%, while technology and consumer cyclicals are both expected to report earnings up by similar figures.

So that may be good news. However, we must take into account that the growth in earnings is from dramatically lowered base levels than previous years. There is also no margin for error in the current market for companies falling short of expectations.

What is also troubling is that many sectors are still struggling. Communications, energy and transportation, to name a few, are all expected to post year-on-year earnings declines in the second quarter.

Company valuations

Current conditions: partly cloudy with a touch of fog. Based on earnings estimates for 2002, the S&P 500 has an average price/earnings (P/E) ratio of 20. However, the Dow Jones Technology Index is trading at more than 40 times 2002 earnings estimates, with many big name technology companies with P/Es reaching past the 100 level. In other words, some investors are willing to pay ('P') 100 times this year's earnings ('E') to pick up a company.

What does this mean? Simply put, it means certain sectors are still looking very expensive. It is hard to justify a concerted investment strategy to include companies that are trading twice the multiple (P/E) of the overall US market, particularly when earnings are not growing at the rate they were in the late 1990s.

Strong earnings growth will be needed to sustain such lofty valuations. Until the earnings outlook (that is, future earnings) improves, or indeed becomes at least more visible, many high-valuation sectors will continue to come under pressure if they disappoint.

The great intangibles

Current conditions: very stormy. While numbers, of course, are vital to managing expectations and evaluating the market, the many intangible variables that surround the market can also play a very unpredictable role in investing your money. 'Enronitis' has played much more than a bit part in market volatility this year. Accounting issues, in particular complex accounting and financial structures, have played havoc with companies such as Tyco, IBM, GE, WorldCom and many other blue-chip names across the globe.

Combine stock-specific risk with other outside variables – such as continued tension in the Middle East, the possibility of US military activity in Iraq and the further possibility of rising energy costs with oil prices tightening – and the markets will remain under pressure in 2002.

While an improving economy should help boost earnings and make high valuations a little more digestible, uncertainty about accounting issues, terrorism and the unstable political environment in the Middle East will continue to persist. Some good advice would be to pack both the sun lotion and the umbrella and be well prepared for some mixed weather.

In the next issue, I will discuss a number of options to guard against these conditions and help guide you through a difficult trading environment. G

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

Report of Law Society Council meeting held on 22 March 2002

NOVA case

The Council considered the recent decision by the European Court of Justice in the *NOVA* case that 'an international regulation such as the 1993 regulation [prohibiting MDPs between lawyers and accountants] adopted by a body such as the bar of the Netherlands does not infringe article 85(1) of the treaty, since that body could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the member state concerned'. The Council noted that this represented an objective endorsement of the importance of the core values of the profession.

John Fish said that the CCBE had been a party to the case, in support of the Dutch bar. It was a matter of great satisfaction that the legal profession now had an authoritative statement of law in support of prohibitions or restrictions on MDPs. He noted that another aspect of the judgment was that bars and law societies could be regarded as an 'association of undertakings' for competition purposes.

'Tesco legal services'

The director general outlined the proposal by the Law Society of England & Wales to amend its rules so as to permit solicitors employed in commercial organisations to act for clients of their employer. The law societies of Ireland, Northern Ireland and Scotland had each communicated their view that the delivery of legal services via non-private practice firms constituted a surrender of the core values of independence, confidentiality and the avoidance of conflicts of interest and was contrary to the public interest. Nonetheless, on the previous day the council of the Law Society of England & Wales had adopted a stance in support of this 'Tesco legal services' concept.

Meeting with neighbouring law societies

The president and director general reported on a meeting of the presidents, vice-presidents and secretaries of the law societies of Ireland, Northern Ireland, Scotland and England & Wales, which had been held in Dublin on 28 February and 1 March, 2002. The meeting had dealt with a wide range of issues, including MDPs, 'Tesco legal', the *Establishment directive*, the PIAB, competition law, legal aid, legal expenses insurance, the CCBE and e-commerce. Each of the societies faced many of the same issues, with similar approaches being adopted in each of the jurisdictions, save for England & Wales which displayed a significantly different stance on many matters. Work had been commenced on a draft joint declaration of the core values of the profession, which would be considered further at the next meeting of the four societies.

Courts and Court Officers Bill, 2001

The director general reported that, uniquely, the president and he had attended and addressed the Dáil Select Committee on Justice, Equality, Defence and Women's Rights on the previous day. The committee had sought the views of the Law Society and of the Bar Council on a proposed amendment to the *Courts and Court Officers Bill* to the effect that a solicitor or solicitors could appear and act together with a barrister or barristers as advocates in any proceedings. The society had supported the proposal. The Bar Council had objected to it, on the basis that it was unnecessary as there was no rule against solicitors and barristers acting together as advocates and the Bar Council had no difficulties with the joint exercise of rights of audience.

The director general also reported that it appeared likely that the special additional role envisaged for the attorney general in relation to judicial appointments would be deleted from the bill and that the introduction of the ministerial order required to give effect to the increases in court jurisdictions might not be introduced for a considerable period of time.

Task force on proposed PIAB

Ward McEllin briefed the Council in relation to correspondence with the PIAB Implementation Group and noted that the society had sought details of the group's proposals in advance of a proposed meeting with the group. The society's task force continued to work on proposals for reform of the personal injuries litigation system, which would be brought to the Council for consideration at its next meeting.

Solicitors' accounts regulations

Simon Murphy reported that seminars on the *Solicitors' accounts regulations* had now been held in Dublin (twice), Cork, Sligo and Kilkenny and a further seminar would be held in Limerick during the following week. To date, over 1,000 solicitors or their book-keepers had attended the seminars and very positive feedback had been received by the committee. He recorded his thanks and appreciation to Charles Russell for his excellent presentations on the detail of the regulations.

International Criminal Bar

The Council approved the appointment of James MacGuill as the society's representative on a preparatory committee for the creation of an International Criminal Bar, a development being considered in the context of the International Criminal Court.

Competition Authority study

The Council reconvened in the afternoon to consider the society's draft response to the 74-part questionnaire received from the Competition Authority. Following a lengthy discussion, the response was approved by the Council, subject to a number of amendments. G

POSTCARD FROM THE PAST

At its meeting held on Wednesday 18 February 1885, the Council considered the following letter received from a Mr M Murphy, Church Street, Listowel:

'Sir,
Would you kindly let me have prospectus required by a party seeking to become a Solicitor's Apprentice, and whether the wife of an Apprentice having means of her own could trade or carry on business without prejudice to her husband continuing his Apprenticeship.
Yours obediently,
M Murphy'

The Council ordered that a reply should issue '*that the Council consider the wife of an Apprentice having means of her own can carry on business on her own account during the Apprenticeship of her husband'.*

Extracted from the *'Minute Book of The Incorporated Law Society of Ireland'* – 1879-1885

LEGISLATION UPDATE: 18 APRIL – 20 MAY 2002

ACTS PASSED

Communications Regulation Act, 2002
Number: 20/2002
Contents note: Establishes a Commission for Communications Regulation, dissolves the Office of the Director of Telecommunications Regulation and transfers its functions to the commission. Makes provision in respect of the opening of public roads for electronic communications infrastructure and provides for related matters
Date enacted: 27/4/2002
Commencement date: 27/4/2002; establishment day order to be made for the purposes of the act

Hepatitis C Compensation Tribunal (Amendment) Act, 2002
Number: 21/2002
Contents note: Amends and extends the *Hepatitis C Compensation Tribunal Act, 1997* to enable the tribunal to award compensation to certain persons who contracted HIV within the state from certain blood products and to provide for related matters
Date enacted: 29/4/2002
Commencement date: Commencement order/s to be made (per s11 of the act)

Ombudsman for Children Act, 2002
Number: 22/2002
Contents note: Provides for the appointment and functions of an ombudsman for children
Date enacted: 1/5/2002
Commencement date: Commencement order/s to be made to appoint a day or days not later than two years after the passing of the act (that is, not later than 1/5/2004) for the coming into operation of the act (per s1(2) of the act)

Twenty-third Amendment of the Constitution Act, 2001
Contents note: Adds a new section 9 to article 29 of the constitution enabling the state to ratify the *Rome statute of the International Criminal Court* done at Rome on 17/7/1998
Date enacted: 27/3/202
Commencement date: 27/3/2002

SELECTED STATUTORY INSTRUMENTS

Children Act, 2001 *(Commencement) Order 2002*
Number: SI 151/2002
Contents note: Appoints 1/5/2002 as the commencement date for certain provisions of the *Children Act, 2001* for which the minister for justice, equality and law reform has responsibility; also repeals provisions of the *Children Act 1908* and other legislative provisions which are now obsolete (see SI for details)

Courts and Court Officers Act, 2002 *(Section 29) (Commencement) Order 2002*
Number: SI 176/2002
Contents note: Appoints 29/4/2002 as the commencement date for section 29 of the act (length of service of a High Court judge in a specified case)

Criminal Justice (United Nations Convention against Torture) Act, 2000 *(Commencement) Order 2002*
Number: 166/2002
Contents note: Appoints 11/5/2002 as the commencement date for section 11 of the act (privileges and immunities of the committee against torture and the conciliation commission established under the convention)

European Communities and Swiss Confederation Act, 2001 *(Commencement) Order 2002*
Number: SI 195/2002
Contents note: Appoints 1/6/2002 as the commencement date for the whole act

European Communities (Data Protection and Privacy in Telecommunications) Regulations 2002
Number: SI 192/2002
Contents note: Give effect to directive 1997/66/EC on the processing of personal data and the protection of privacy in the telecommunications sector
Commencement date: 8/5/2002

Finance Act, 2002 *(Section 93) (Commencement) Order 2002*
Number: SI 177/2002
Contents note: Appoints 1/5/2002 as the commencement date for section 93 of chapter 2 of part 2 of the act, which extends the scope of the partial relief from mineral oil tax for certain passenger road services to certain coach tours. Section 93 also provides for extended claim periods and time limits for repayments and a tax clearance requirement

Gas (Interim) (Regulation) Act, 2002 *(Appointed Day) Order 2002*
Number: SI 146/2002
Contents note: Appoints 30/4/2002 as the appointed day for the purposes of the act

Housing (Miscellaneous Provisions) Act, 2002 *(Commencement) Order 2002*
Number: SI 163/2002
Contents note: Appoints 25/4/2002 as the commencement date for section 17(c) of the act, which provides for an increase in the borrowing limit of the Housing Finance Agency Ltd from £1.5 billion to €6 billion

District Court (Company Law Enforcement) Rules 2002
Number: SI 207/2002
Contents note: Amend order 34, rule 7 of the *District Court Rules 1997* (SI 93/1997) and substitute new forms 34.15 and 34.16 to provide for the position of the director of corporate enforcement under section 20(1) of the *Companies Act, 1990* (as substituted by section 30 of the *Company Law Enforcement Act, 2001*)
Commencement date: 13/6/2002

District Court (Sex Offenders) Rules 2002
Number: SI 206/2002
Contents note: Amend order 38 of the *District Court Rules 1997* (SI 93/1997 and add new forms 38.4 and 38.5 to provide for the notification of convictions for sex offenders
Commencement date: 13/6/2002

Rules of the Superior Courts (No 1) (Remuneration of Committees of Wards of Court) 2002
Number: SI 208/2002
Contents note: Substitute a new rule 65 for order 67, rule 65 of the *Rules of the Superior Courts* in order to remove the requirement that special circumstances or special cause should exist before remuneration would be allowed to a committee of the person or estate of a ward of court
Commencement date: 13/6/2002

Irish Nationality and Citizenship Act, 2001 *(Commencement) Order 2002*
Number: SI 128/2002
Contents note: Appoints 30/11/2002 as the commencement date for all sections of the act, other than sections 2(a)(iii), 2(d) and 3 which were deemed to have come into operation on 2/12/1999, per s9(3) of the act

Irish Nationality and Citizenship (Declaration of Citizenship) Regulations 2002
Number: SI 196/2002
Contents note: Prescribe the forms to be used by a person born in Ireland who wishes to make a declaration that he or she is an Irish citizen as provided for in section 6 of the *Irish Nationality and Citizenship Act, 1956* (as amended by section 3 of the *Irish Nationality and Citizenship Act, 2001*)
Commencement: 29/4/2002

Medical Practitioners (Amendment) Act, 2002 *(Commencement) Order 2002*
Number: SI 159/2002
Contents note: Appoints 1/5/2002 as the commencement date for the whole act

Planning and Development (No 2) Regulations 2002
Number: SI 149/2002
Contents note: Amend part 1 of schedule 12 of the *Planning and Development Regulations 2001* (SI 600/2001) to prescribe a fee for licenses for fingerpost direction signs for tourist accommodation
Commencement date: 22/4/2002

Radiological Protection (Amendment) Act, 2002 *(Commencement) Order 2002*
Number: SI 133/2002
Contents note: Appoints 8/4/2002 as the commencement date for the whole act

Tribunals of Inquiry (Evidence) Act, 1921 *(Establishment of Tribunal) Instrument 2002*
Number: SI 175/2002
Contents note: Provides for the establishment of a tribunal of inquiry into certain garda activities in Donegal
Commencement date: 24/4/2002. G

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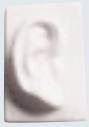

Practice notes

VHI UNDERTAKINGS

For many years past, the Law Society and VHI Healthcare ('VHI') have operated a protocol which the society believes fairly protected the interests of VHI, solicitors, and solicitors' clients. Regrettably, recent negotiations in regard to the fee payable broke down when VHI sought to impose conditions which are not only unworkable in the society's view but, in very many cases, contrary to clients' interests. In particular, VHI states that it will henceforward seek an undertaking that the solicitor will pay the full amount of the benefit received from VHI where the amount recovered for damages equals or exceeds the benefits received from VHI. Thus, in a case where only part of the full value of the claim has been recovered, the client might have to pay not only any amount that he had recovered in respect of VHI benefits, but could also have to pay, ***out of the damages*** recovered, any balance due to VHI. Thus, in many cases, clients would be deprived of some or all of their damages and would be engaging in litigation effectively for the benefit of VHI at no cost to VHI.

In the Law Society/VHI protocol hitherto applicable, it had been agreed that the VHI would accept from the undertaking solicitor the sum that that solicitor stated he had recovered for VHI. The solicitor would provide a clear explanation and his word would be accepted. This was important because many settlements are 'round figure settlements' and it was essential that the undertaking solicitor should be the arbiter of the issue of how much of the damages recovered were recovered for VHI.

In future, practitioners will have to conclude their own agreement with VHI. The following advice is offered:

1) There is no obligation whatever to give an undertaking to VHI. If an undertaking is refused, however, VHI may refuse, pursuant to rule 9(f)(ii) of its rules, to pay benefits for treatment for injury caused through the fault of some other person or body. The society considers the rule to be an unreasonable one as it stipulates, *inter alia*, that the member will 'do everything we ask to recover those benefits and repay them to us'. VHI contends that this entitles it to direct its members to direct their solicitors to give undertakings that VHI requires. There is no such obligation
2) If a practitioner decides, after due consideration and discussion with his client, that he/she will provide an undertaking, it is essential that what is undertaken for is the repayment only of not more than such monies as have been recovered in the litigation
3) Each practitioner must decide what is a reasonable fee to charge for the important service provided. By providing an undertaking, the practitioner is delivering a service of substantial value to VHI, in which he incurs a personal responsibility, and that should be reflected in the fee charged to the VHI. In the recent negotiations with VHI, the society had proposed a fee of €400 which was in respect of undertakings in the form that had been agreed hitherfore.

Litigation Committee

RE: VAT CHANGES – DISPOSAL OF REVERSIONARY INTEREST

Where a freehold owner develops property and lets it out on a 35-year lease to a taxable business, the lease becomes the VATable interest from then on. The freehold owner can sell the property subject to and with the benefit of the lease and there is no VAT payable; an assignment of the lease is taxable in the usual way. An anomaly arises, however, where after the granting of the lease, the tenant further develops the property. Even though such development would be regarded as the tenant's improvements and will not therefore necessarily add anything to the value of the lessor's interest, a sale of the freehold following such development will now be regarded by the Revenue as taxable and the VAT will be irrecoverable. If the freehold owner sold to B and special condition 3 in the contract were to stand, B would suffer irrecoverable VAT on the full sale price; if B later took a surrender of the 35-year lease, VAT would again be payable on the unexpired residue of that lease (if that residue were, say, 30 years, this would usually equate with the value of the freehold). If the landlord was not going to re-let the property to another taxable business, he will again suffer irrecoverable VAT. The end result, therefore, is that B suffers irrecoverable VAT on up to 200% of the market value of the property!

Changes in the *Finance Act, 2002*

A new VAT trap has been introduced affecting the creation, assignment or surrender of a lease. Unless the VAT value of such lease, assignment or surrender is greater than the acquisition and development costs of the property for VAT purposes, irrecoverable VAT will become chargeable on the creation, assignment or surrender as the case may be. It does not matter that the lessee is a taxable person and normally entitled therefore to recover the VAT. For VAT purposes, the value of a 20-year lease is the capitalised value of the right to collect rent for 20 years, and if this falls short of acquisition and development costs, this will result in an irrecoverable VAT hit which (depending on the contract) will be borne by either the lessor or the lessee; and this throws up interesting questions where, for instance, a lease is forfeited or a tenant does not exercise an option to extend. It is not possible to anticipate all of the situations where this could impact, but possible circumstances would be:

a) Development of hotels where the capital allowances are geared towards facilitating low rental values
b) Buildings where rental values are inherently low: hospitals, educational institutions and so on
c) Acquisition of a lease of, say, a fabric business with payment of a premium for goodwill. As a result of falling turnover, the premises is assigned to another lessee for little or no key money. Unless the taxpayer can prove to the Revenue that the value of the property has dropped due to an unforeseen change in 'market conditions affecting the value of the property', irrecoverable VAT will be due. It is open to the Revenue to argue that the value of the property has not changed – only the goodwill of the business.

The Probate, Administration and Taxation Committee, through its involvement on TALC (Tax Administration Liaison Committee), is pressing the Revenue to review the foregoing, and we understand the Revenue is in the process of preparing a practice note.

Probate, Administration and Taxation Committee

Personal injury judgments

Car accident – neck and chest injuries that cleared up quickly – dispute over significance of MRI scan and extent of injury in High Court – award of damages – appeal to the Supreme Court – whether award of damages inadequate – whether case should be remitted to the High Court

CASE

***Collette Meehan v Anthony Clerkin*, Supreme Court (Denham, Murray and McGuinness JJ), judgment of Denham J for the court of 1 February 2002.**

THE FACTS

On 30 January 1997, Collette Meehan, a 34-year-old secretary working in Redsale Frozen Food in Clogherhead, was involved in a car accident. She suffered certain injuries around her chest, neck and lower back. The neck and chest injuries cleared up fairly quickly but she complained of symptoms in her back. She did receive some sessions of physiotherapy. High Court proceedings were issued against Anthony Clerkin.

JUDGMENT OF THE HIGH COURT

The case was heard before Mr Justice Kearns of the High Court, who delivered judgment on 31 May 2001. Kearns J noted that the CT scan had been normal and lumbar x-rays were normal. An MRI scan had also been carried out. The judge noted that the level of complaint by Ms Meehan seemed to increase rather than decrease after the MRI scan. The judge stated he was left in the unsatisfactory position at the end of the case of having some difficulty in accepting that the plaintiff had given a completely fair and accurate account of her injuries. She had been able to continue at work and had some good days and bad days. The judge referred to the MRI scan which did show some early degeneration of the L4/5 disc with moderate central and left-sided herniation.

Kearns J stated that, overall, while there was some degree of irritation in the lower back, it was nothing like as serious as Ms Meehan believed it was. He considered that the injury was not more than moderate and that, with proper management and minding in the future, Ms Meehan would be well able to cope.

HIGH COURT AWARD

Kearns J awarded:

- General damages to date of trial: £20,000
- General damages in the future: £10,000
- Special damages, past and future: £5,000

Total: £35,000

SUPREME COURT

Ms Meehan appealed to the Supreme Court on the basis that the High Court failed to take proper account of, have due regard for, and give appropriate weight to the evidence called on her behalf in measuring damages for pain and suffering to the date of the trial and pain and suffering in the future, and that the sums awarded were disproportionately low and were unjust.

As required by the practice direction of the chief justice, written submissions were filed on behalf of the parties and oral submissions were made to the Supreme Court.

Denham J delivered an *ex tempore* judgment on 1 February 2002. Having referred to the facts, she stated that the High Court judge doubted the full extent of the injuries of which Ms Meehan complained. She stated that this was a matter for the trial judge. However, there was a conflict in the findings of the trial judge as to the significance of an MRI scan and the extent of Ms Meehan's injury. There was also a conflict on the medical evidence. The conflict on the medical evidence, according to Denham J, was not resolved by the High Court. This created a dilemma for the Supreme Court. She noted that counsel took opposing approaches to the matter, but that the Supreme Court could not resolve the conflict.

Denham J concluded that while the court was concerned about the adequacy of a portion of the High Court judge's award, on one view of the evidence, and in view of the unresolved conflicts of evidence, the Supreme Court was not in a position to determine the matter other than to allow the appeal and return the matter to the High Court.

The court accordingly allowed the appeal and remitted the matter to the High Court.

Traffic accident – cow jumped out in front of car – driver hit cow and stopped – driver left scene to drive to local house to notify the gardaí – subsequently a second car hit the cow – *Animals Act, 1985* – obligation of owner of field in relation to fencing – defence of *novus actus interveniens* – whether owners of the cow should be liable

CASE

***Syl Murray v Marvyn Millar, Pamela Millar and Paul Brady,* Roscommon Circuit Court, judgment of Judge Bryan McMahon of 14 November 2001.**

THE FACTS

On 14 January 2000, Paul Brady, an employee of the Department of Agriculture, was driving home on the main road from Roscommon to Lanesboro when he was suddenly confronted by a black pedigree Aengus cow which jumped out in front of his car on his left-hand side of the road. Mr Brady braked immediately but failed to avoid the collision. After hitting the cow, he pulled into his own side of the road, turned his lights to dims, put on his hazard lights and went back to see what he had hit.

Mr Brady saw the animal lying on the grass verge off the road and, as he saw no movement from the animal, he concluded that the cow was dead. Aware of the hazard that this represented, he attempted to flag down the passing cars; several cars passed without stopping. Mr Brady became concerned, as the traffic was increasing and the evening was getting darker. Eventually, a small car pulled up and, with some trepidation, an elderly lady rolled down the window. Mr Brady enquired if she would phone the gardaí, but she said she did not have a mobile phone. The lady was somewhat reluctant to become involved. She did indicate, however, that there was a house some 400 hundred yards further up the road from which Mr Brady could make a telephone call. She then drove off.

Mr Brady was in something of a predicament: he waited for a further period and decided that he would leave the scene and drive up to the house to telephone for help. When he returned some ten minutes later, having made the phone call to the garda station, he learned that Syl Murray (the plaintiff in the case) had collided with the animal when he was away.

Syl Murray was very familiar with the main road from Roscommon to Lanesboro. At approximately 5.37pm on 14 January 2000, his vehicle suddenly collided with a cow on the road. The left side of his car jumped up in the air and it continued for some distance before he succeeded in stopping. He had been driving at approximately 60 miles an hour at that time, but as he entered that part of the road, he began to slow to 50 miles an hour and dipped his lights for an oncoming car.

Syl Murray issued proceedings in the Circuit Court against Marvyn Millar and Pamela Millar, owners of the cow, and against Paul Brady, who had already collided with the cow some minutes prior to Mr Murray's accident but who had left the scene to summon help.

Marvyn Millar acknowledged that his wife owned the cow and that the animal was being kept in a field which Mr Millar rented for a number of years and which at that time held only two animals. He stated that he had never had any previous trouble with the fencing of the field and that he used to keep horses there at one time, but not at the time of the incident. The field in which the animals were kept did not immediately adjoin the road; there was one field further back from the highway. Mr Millar did admit that since the animal ended up on the road, the cow must have broken out from his field into his neighbour's field and then onto the road.

THE JUDGMENT

Judge Bryan McMahon gave judgment on 14 November 2001 at Roscommon Circuit Court. Having considered the facts as set out above, he stated that Mr Brady was a credible witness and he accepted in general his version of events. However, in one instance, Mr Brady was in error. When Mr Brady concluded that the cow was dead after his collision, he was mistaken. Syl Murray had given evidence, which the judge believed, that when he collided with the animal some short time after the first collision the animal was some way out on the roadway. Further, the garda who was called to the scene testified that when he arrived immediately after the second collision, the cow was some way out on the road and still alive. The garda had to send for a vet to have the animal put down. On the balance of probabilities on this issue, Judge McMahon held that the cow had moved forward onto the road when Mr Brady left the scene to summon help.

It was noted by the judge that there had been no evidence that the field rented by Mr Millar was stockproof; neither did Mr Millar offer any photographic evidence of the fences or any engineering evidence. However, the judge noted that Mr Millar understood that the field was very safe and the animal was in a secure holding.

Animals Act, 1985

Judge McMahon referred to section 2 of the *Animals Act, 1985*, which amended certain common-law rules in relation to straying animals. The judge noted that the effect of this statutory provision was that reasonable care must now be taken to ensure that animals do not stray onto the highway and cause damage. This normally translates into an obligation to ensure that the land was stockproofed and that the fencing was sufficient to prevent animals from breaking out. The judge noted that case law indicated that the onus of proof that the land was properly fenced was now on the landowner or the owner of the animal who sought to evade liability. The judge referred to *O'Reilly v Lavelle* ([1990] 2 IR 372) and to *O'Shea v Anhold and Horse Holiday Farm Ltd* (unreported, Supreme Court, 23 October 1996). He noted that the courts in this jurisdiction have clearly accepted that the principle of *res ipsa loquitur* applies to these situations. Accordingly, the judge noted that, in order to escape liability, the Millars must provide the evidence to show that they took reasonable care in the management of the land to ensure that the fencing was secure. Noting that the Millars tendered no significant evidence in this regard, the judge

had little hesitation in holding them liable for the damage which their straying animal caused to Mr Murray.

Novus actus interveniens

Counsel for the Millars argued that the conduct of Paul Brady (who first hit the cow) relieved them of any liability they may have had for their initial negligence in failing to stockproof the fields. They argued that the force of their negligence was spent and had become irrelevant because of the subsequent conduct of Paul Brady. They argued that the sole cause of Mr Murray's injury was Mr Brady's conduct in leaving unguarded the injured animal which was a hazard to other traffic and in particular to Mr Murray.

Judge McMahon considered this defence of *novus actus interveniens*. The judge explained this defence as meaning that in some circumstances the causal link between the original negligence (of the Millars in this case) and the injury of Mr Murray was broken by an intervening act of a third party (Paul Brady in this case).

The judge noted it was not every intervening act, however, that would have the effect in law of rupturing the chain that links the initial negligence with the ulterior injury. Only some kinds of acts have this legal effect. Judge McMahon noted that the efforts of the courts to define the nature and quality of the intervening act had not been a total success.

The judge noted that the Latin phrase *novus actus interveniens* was an insufficient abbreviation. He said that the phrase might more meaningfully translate as 'an intervening act which is of such a kind that it attracts sole liability for the plaintiff's injury or is of such a kind that it becomes the sole legal cause of the plaintiff's injuries'.

Judge McMahon noted that if the intervening act was predictable and inevitable, the original actor could not shrug off responsibility since he had practically programmed the intervention. Similarly, if the original actor intended the intervention, he would be responsible. In this context, reference may be made to the case of *O'Rourke v An Post* (unreported decision of Judge Brian McMahon, Circuit Court, Dublin, 19 July 2000). In that case, An Post, having conducted a certain investigation into thefts from its premises, reported its conclusions rather speedily to the gardaí, who then arrested the plaintiff. It subsequently transpired that the plaintiff was innocent.

The argument put forward by An Post was that the intervention by the gardaí constituted a *novus actus interveniens*. This was dismissed by the court. It was held that it was reasonable and foreseeable that the gardaí, having been furnished with a report from An Post's investigative department, would rely on it. Indeed, it could be said that the gardaí, having a legal duty to act in the matter, were primed to act.

In examining the circumstances where the intervening act would have the effect of relieving the original perpetrator, two factors featured in the judiciary's approach. First, whether and to what extent the intervening act was foreseeable by the original actor; second, the extent to which one was to characterise the attitude of the subsequent intervenor: was he careless, negligent, grossly negligent, reckless or did he intend to do damage? Here, reference was made to McMahon and Binchy's *Law of torts* (3rd edition, 2000, pp69-70).

The judge also noted that the greater the delay between the original conduct and the intervening act, the more likely that the intervening act was to be considered as the sole operative cause. If, on the other hand, the intervening act was close in time to the original act, the courts were more inclined to hold that the original conduct still possessed a causative relevance.

In this case, the judge considered that the cause of the initial collision was the failure of the Millars to keep the animal safely corralled. Undoubtedly, on the evidence before the court, the judge stated that the Millars would be liable to Paul Brady for his injuries suffered in the first collision. The liability to Mr Brady, however, was not in issue in the proceedings before the court and because of that no evidence was adduced that Mr Brady had in any way contributed to his own injury. The sole concern of the court was to determine if the conduct of Mr Brady relieved the Millars of their liability to Mr Murray.

When Mr Brady hit the cow, he pulled into his own side of the road, put on his dims and hazard lights and walked back to the point of impact. The judge noted that the animal was motionless and Mr Brady wrongly concluded that the animal was dead. Mr Brady appreciated the danger and began to flag down the passing traffic. He had little success. The one car that did stop was not too helpful. He began to consider his options. Having considered the matter further, he decided to go for help to a house which was no more than 400 yards away. If he took the car, he would only be gone for a few minutes.

In the circumstances, the judge posed the question: was Mr Brady's conduct negligent, grossly negligent or reckless? Was it of such a kind that it relieved the original wrongdoers? Further, in considering the matter, it must be relevant to acknowledge that the predicament in which Mr Brady found himself was caused by the very people who wanted to place liability on him.

The judge noted that the Millars must have foreseen that if their cow escaped onto the road, it was likely to cause an accident and that more than one vehicle might eventually become involved. In general, therefore, the Millars should be liable for all the reasonable foreseeable consequences of their initial negligence. The judge stated that, in his opinion, the conduct of Paul Brady did not in the present circumstances possess such defective qualities as to wrest responsibility entirely from the original perpetrators. The judge stated that the conduct of Paul Brady, given the emergency the other defendants had created for him, was certainly not criminal or subjectively reckless, as the law seemed to demand if it was to amount to a *novus actus interveniens* which broke the link back to the other defendants.

That a car might collide with a straying cow in the dark was foreseeable and that a further collision might occur when the first party injured was seeking assistance was also foreseeable. In the judge's view, the general sequence of events was reasonably foreseeable by a reasonably prudent person and the conduct of the intervenor, Paul Brady, was not so unreasonable or of such a nature as to hijack the causative aspect of the second collision.

The Millars must compensate Syl Murray for his loss and, based on the facts, the judge had no hesitation in holding that the straying animal was the sole cause of the accident. G

THE AWARD

- Judge McMahon awarded £7,500 to Syl Murray against the Millars only, together with costs.
- Paul Brady was awarded his costs against Syl Murray, with an order over and against the Millars.

These judgments were summarised by solicitor Dr Eamonn Hall, chief legal officer of Eircom plc.

First Law Update

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Compiled by Robert Forde BL for FirstLaw

ARBITRATION

Company law, practice and procedure

Oppression of shareholders – arbitration – practice and procedure – interpretation of shareholders' agreement – contract – conflict of laws – abuse of process – whether petition should be dismissed – whether petitioners had necessary locus standi– Arbitration Act, 1980 – Companies Act, 1963, *section 205*

The respondents and the appellants were shareholders in Via Net Works Limited. The respondents had brought a section 205 petition to the High Court alleging that the affairs of the company were being conducted by the appellants in a manner oppressive to them. The appellants had purchased shares in the company from the respondents representing 60% of the issued share capital. The appellants sought to have the respondents' petition dismissed on the grounds of abuse of process or alternatively staying the petition pending a referral to arbitration. Mr Justice Lavan refused the orders sought and the appellants appealed the judgment to the Supreme Court. It was submitted that the respondents did not have the necessary *locus standi* to bring a section 205 petition as they were obliged to transfer all their shares under the shareholders' agreement. In addition, it was contended that the issues raised were governed by the law of the State of New York and that the proceedings should be referred to arbitration as the matter was within the scope of a valid arbitration clause.

The Supreme Court (Keane CJ delivering judgment; Murphy J and McGuinness J agreeing) allowed the appeal, holding that people such as the respondents, who had voluntarily disposed of their entire shareholding in a company, could not conceivably have been contemplated by the legislature as people who would be entitled to relief under section 205. Under the terms of the agreement, the respondents were contractually bound under the law of New York to divest themselves of their rights as shareholders. The proceedings should either have been struck out by the High Court as disclosing no cause of action or as constituting an abuse of process. In addition, the dispute that had arisen was manifestly encompassed by the terms of the arbitration clause and the proceedings should therefore have been stayed.

***In the matter of Via Net Works Limited*, Supreme Court, 23/4/2002** [FL5215]

BANKING

Litigation, summary judgment

Property – practice and procedure – summary judgment – res judicata – *estoppel – multiplicity of actions – rule in* Henderson's case – *order of possession already issued – whether claim already litigated* – Rules of the Superior Courts 1986, *order 2, rule 1, orders 3, 37, 38*

The plaintiff bank had obtained an order for possession against the defendants a number of years previously which had not been enforced. In these proceedings, the plaintiff sought summary judgment against the defendants. The defendants claimed that the present proceedings were substantially the same as those previously litigated and that, accordingly, the plaintiff was estopped from maintaining the present proceedings. In the High Court, Ó Caoimh J held that the proceedings in question were not substantially the same as the previous proceedings and accordingly there was no rule which prevented the plaintiff from maintaining the present proceedings.

The Supreme Court (Keane CJ delivering judgment; McGuinness J and Geoghegan J agreeing) dismissed the appeal, holding that there was no question but that the plaintiff was entitled to proceed by way of special summons when seeking the order for possession and to proceed by summary summons in relation to the liquidated sum. The rules of the superior courts clearly envisaged that proceedings in which a mortgagee sought an order for possession were properly brought by a special summons, and those in which relief was sought in the form of a judgment for a liquidated sum were properly brought by way of summary summons. There was no reason why a mortgagee seeking an order for possession should seek to join with it an order which was properly brought by way of a summary summons in the case of a claim for liquidated sum. This was not a case of action estoppel because the cause of action in the two sets of proceedings was entirely different: one, a cause of action based on the right of a mortgagee to possession; the second, the right of a creditor to recover the money owed by a debtor.

***Ulster Bank v Lyons*, Supreme Court, 11/3/2002** [FL5137]

COMPANY

Directors' duties, liquidation

Duty of care – duty of liquidators – nature of Revenue debt – failure by liquidator to maintain records of company – whether disqualification order should issue – Companies Act , 1990, *sections 159, 160*

The applicant brought a motion pursuant to section 160 of the *Companies Act, 1990* seeking to have the respondent disqualified from acting as a liquidator. Mr Justice Smyth was satisfied that the respondent had failed to act in an impartial manner, destroyed the books and records of the company and failed to act in the interests of the creditors of the company and, in particular, of the Revenue. The respondent was unfit to be concerned with the management of a company. The respondent would be disqualified for seven years from being concerned in the management of a company as liquidator, receiver or examiner. In addition, conditions were imposed on the respondent in relation to acting as an auditor, director or secretary of a company. The respondent appealed against the judgment.

The Supreme Court (Murphy J delivering judgment; Murray J and McGuinness J agreeing) dismissed the appeal. The respondent had destroyed the documents in question in order to deprive the official liquidator of access to them. The respondent had showed a completely mistaken view as to the duties of a liquidator. While it was accepted that the respondent had not acted maliciously, the decision to permit the destruction of the books and records

was a very serious wrong. The High Court was entitled to disqualify the respondent from filling certain offices and to impose other stipulated conditions.

***Cahill v Grimes*, Supreme Court, 1/3/2002** [FL5185]

CONSTITUTIONAL

European law, fishing and fisheries

Fisheries and marine law – administrative law – European law – delegation of legislation – ministerial powers – statutory instrument – use of drift nets – whether regulation ultra vires *– whether passing of regulations necessitated by membership of European Union* – Sea Fisheries (Drift Nets) Order 1998 – Fisheries (Consolidation) Act, 1959 – Bunreacht na hÉireann 1937

The applicant initiated proceedings seeking to challenge the validity of certain regulations dealing with the use of drift nets. The applicant's vessel had been boarded by members of the Naval Service and subsequently detained on suspicion of having committed an offence under the *Fisheries (Consolidation) Act, 1959*. The applicant claimed that the relevant regulation was *ultra vires* the powers of the third-named respondent, contrary to the *European Communities Act, 1972* and contrary to section 5 of the *Fisheries (Amendment) Act, 1983*. The applicant also claimed the regulation was *ultra vires* the *Fisheries (Consolidation) Act, 1959* and was repugnant to the constitution.

Kearns J granted the declarations sought. A fundamental principle of the rule of law was the principle of legality whereby every executive or administrative act which affected legal rights, interests or legitimate expectations must be legally justified. The minister had not demonstrated that the measure in question met the principles and policies test and had not shown that he had such legal authority by reference to the wording of the *Fisheries Acts* to make SI 267/98 and accordingly had acted *ultra vires* as to the mode of implementation of the EC regulation. The purported transposition was *ultra vires* in that SI 267/98 infringed the exclusive law-making power conferred on the Oireachtas by article 15.2.1 of the constitution.

***Browne v Attorney General and Others*, High Court, Mr Justice Kearns, 6/3/2002** [FL5121]

CONTRACT

Landlord and tenant

Land law – conveyancing – contract – breach of terms of lease – specific performance – service charges – misrepresentation – planning – right of access – whether defendants entitled to reside in property – whether defendants entitled to alter terms of contract – whether defendants obliged to provide residential nursing facilities – whether terms in brochure could override terms of care contract – Companies Act, 1990, *section 12(2)* – Registration of Title Act, 1964, *section 72*

The plaintiffs were residents of a retirement home complex. The complex had run into difficulties and had been taken over by the defendants. The defendants sought to manage the complex and instituted a number of changes to the original care contract. The plaintiffs brought proceedings claiming that the defendants had failed to honour their obligations as set out in the care contract. In addition, the plaintiffs contended that terms set out in an advertising brochure had not been adhered to. The plaintiffs sought decrees of specific performance. The court rejected the claim of the plaintiffs, holding that the defendants were not obliged to provide residential nursing facilities. The defendants were entitled to vary the terms of the care contract. The plaintiffs could not be said to possess property rights to the main house of the complex and, as such, only had rights to receive care facilities in the main house. Accordingly, the claim was dismissed. The plaintiffs appealed against the judgment.

The Supreme Court (Fennelly J delivering judgment; Denham J and Murray J agreeing) dismissed the appeal, holding that the terms of the brochure could not be relied on as being included in the terms of the leases. The terms of the leases of the residents did not include an implied right of access to the main house of the complex. The trial judge had found that the defendants had discharged the burden of proof of showing that the variation of the care contract was in the interests of the retirement village as a whole. The defendants had formed this opinion in a *bona fide* manner.

***Honiball and Others v McGrath and Others*, Supreme Court, 24/4/2002** [FL5318]

COSTS

Litigation, practice and procedure

Recovery of costs – whether lay litigants entitled to recover costs – whether determinations of taxing master correct – whether refusal to allow costs unjust

The plaintiffs were insurance brokers who were successful in their proceedings against the defendants. The plaintiffs were awarded costs of the action and had appeared at their case as lay litigants. In the High Court, Kelly J declined to award the plaintiffs the costs of the preparatory work done by them on the basis that they had conducted the litigation in person. In addition, the High Court had set aside fees awarded to a firm of solicitors who had advised the plaintiffs but were not on record for them. The plaintiffs appealed these determinations.

The Supreme Court (Keane CJ delivering judgment; Murphy J and Hardiman J agreeing) dismissed the appeal, holding that it might be thought unjust that a lay litigant was unable to recover costs, but that was a matter for the legislature. Only legal costs that a court could measure were allowed. The High Court judge had correctly disallowed the costs awarded in respect of the solicitors who had advised the plaintiffs but were not on record for them.

***Dawson and Others v Irish Brokers Association*, Supreme Court, 8/5/2002** [FL5337]

CREDIT AND SECURITY

Practice and procedure

Summary judgment – credit and security – guarantee – construction of guarantee – whether sums claimed due and owing – whether defendants had real or bona fide *defence*

The plaintiff sought summary judgment for the sum of £211,134 which, it was claimed, was owed by the defendants on foot of a guarantee entered into by the defendants. The defendants sought leave to defend the proceedings, claiming that the guarantee should be construed strictly and crystallised on the date of the first default. It was further contended that the guarantee document was ambiguous in relation to the guarantor's liability and must be treated as null, void and of no effect. The defendants claimed that there was an obligation on the part of the plaintiffs to inform the guarantor of the default and to pursue the customer for payment. Instead, it was alleged that the default was ignored and additional sums were added on. The defendants contended that at no time did they consent to the amendment of the guarantee. In the High Court, Mr Justice O'Neill held that there was no basis for the contention that the guarantee crystallised upon the first default. The construction of the guarantee put forward by the defendants would render it vir-

tually meaningless. The extensions of time granted under the guarantee were permissible under the terms of the guarantee and did not represent a departure from the terms of the guarantee. It could not be said that there was a fair or reasonable probability of the defendants having a *bona fide* defence. Liberty would be granted to the plaintiff to enter final judgment for the sum claimed. The defendants appealed against the judgment.

The Supreme Court (Geoghegan J delivering judgment; Murphy J and Hardiman J agreeing) dismissed the appeal. The submissions of the defendants were entirely misconceived. To have continued trading with a customer who was in breach of terms binding upon him was an indulgence. Mere forbearance to sue was not sufficient to release a surety.

***Allied Distributive Merchants Limited v Kavanagh and Kavanagh*, Supreme Court, 10/5/2002** [FL5336]

CRIMINAL

Extradition, judicial review

Drugs offences – delay – whether failure by state authorities to abide by fair procedures – whether it would be oppressive to proceed with extradition – Extradition Act, 1965, *sections 47, 50* – Misuse of Drugs Act, 1977

The applicant issued proceedings seeking to challenge his extradition to the UK authorities. It was alleged that the applicant had committed drugs offences. The applicant alleged that he had been denied access to relevant documents, that he had been denied the opportunity to cross-examine certain persons and that there had been a failure to vindicate his constitutional rights. In addition, it was contended that the offence in question did not correspond to an offence known to Irish law. It was also contended that given the lapse of time that had occurred, it would be oppressive to proceed with the extradition.

Mr Justice Ó Caoimh dismissed the proceedings. The applicant had been afforded the opportunity to cross-examine the police officer in question and had not availed of it. There had been a lack of reasonable expedition on the part of the UK authorities which had not been explained. However, it would not be unjust, oppressive or invidious to order up the delivery of the plaintiff. The offence set forth in the extradition warrant was an offence known to Irish law. Accordingly, the relief sought by the applicant would be refused.

***Armstrong v Judge Smithwick and the Attorney General*, High Court, Mr Justice Ó Caoimh, 18/1/2002** [FL5191]

Fair procedures, judicial review

Garda Síochána – certiorari – *fair procedures – order of prohibition sought – whether conviction should be quashed – whether trial judge had taken irrelevant considerations into account in determining sentence – whether unlawful interference in applicant's rights – whether applicant received fair trial – whether judicial review available on* quia timet *basis.*

The applicant had been charged in the District Court with public order offences. The applicant had contended that a garda had assaulted him at the time and was considering bringing a complaint in this regard. A solicitor appearing on behalf of the accused had suggested that rather than record a conviction, the District Court judge might consider requiring the payment of money into the poor box. The District Court judge indicated that proceedings would be struck out if the applicant withdrew his complaint against the garda. The District Court judge found the applicant guilty and then adjourned the matter before any sentence had been passed. The applicant changed his mind about giving an undertaking and sought an order of *certiorari* to quash the conviction and an order of prohibition restraining any further prosecution. The applicant contended that his decision whether or not to pursue complaints against the gardaí had an improper bearing on the nature of the sentence to be imposed. Ms Justice Carroll held that the trial judge had acted within jurisdiction when finding the applicant guilty. If the applicant was dissatisfied with the guilty verdict, the appropriate remedy was to appeal. Judicial review did not lie on a *quia timet* basis. The applicant appealed against the decision.

The Supreme Court (Hardiman J delivering judgment; Murphy J and Geoghegan J agreeing) dismissed the appeal, holding that the question of whether the applicant intended to sue for assault was wholly irrelevant to the question of the appropriate sentence to be handed down in the District Court. It was unfortunate that the matter was mentioned at all. However, the words of the district judge would not justify granting the relief sought by way of judicial review. The matter should be remitted to the District Court and there proceed in accordance with law.

***Mellett v District Judge and the DPP*, Supreme Court, 26/4/2002** [FL5245]

DELAY

Dismissal of proceedings

Practice and procedure – delay – litigation – motion for judgment – compensation for interference with property rights – whether plaintiff had proceeded with undue delay in the case – whether court should extend time for delivery of statement of claim

The plaintiff had vacated his premises as a result of a notice

issued by the defendant pursuant to the provisions of the *Local Government's Sanitary Services Act, 1964*. The plaintiff sought to recover damages from the defendant and issued a plenary summons. However, a considerable delay elapsed in the issuing of the statement of claim. The plaintiff brought a motion to extend time for the service of the statement of claim and also for judgment in default of defence. Mr Justice Morris was satisfied that the plaintiff's motion should be refused and also that there should be a refusal to extend the time to deliver the statement of claim on the grounds that the plaintiff had been guilty of inordinate and inexcusable delay. Furthermore, if an application had been brought by the defendants to strike out the plaintiff's case on the grounds of this delay, it would have been granted. The plaintiff appealed against the judgment.

The Supreme Court (Keane CJ delivering judgment; Hardiman J and Fennelly J agreeing) dismissed the appeal. The case as pleaded was one in which the plaintiff was essentially claiming that the defendants failed to exercise in his favour the statutory power to make a grant of compensation to him, having regard to the fact that he had to leave the premises as a result of their dangerous and dilapidated state. Making every assumption in favour of the plaintiff, the fact remained that this was a purely discretionary power, a power which the corporation enjoyed but was not a power which it had to exercise in favour of any person. None of the documents exhibited gave any indication that the corporation had misconceived or misapplied its powers or that they had exercised them in a manner which disregarded any constitutional rights of the plaintiff. The court was satisfied that the president of the High Court was perfectly correct in holding that the delay was inordinate and inexcusable and, secondly, that there was no requirement of justice which required that the inordinate and inexcusable delay should be overlooked.

***Daly v Limerick Corporation*, Supreme Court, 7/3/2002** [FL5163]

Garda Síochána, judicial review

Judicial review – delay – complaints board – fair procedures – whether tribunal acted ultra vires *– whether specific breaches of discipline alleged bore relation to original complaint – whether failure by respondents to act with reasonable expedition* – Garda Síochána (Complaints) Act, 1986

The applicants were members of An Garda Síochána who were the subject of complaints in relation to the arrest of a member of the public. The applicants sought to challenge the actions of the Garda Síochána Complaints Board on the grounds that the chief executive of the board had acted *ultra vires* in formulating the alleged breaches of discipline and referring these to the Garda Síochána Complaints Tribunal. In addition, the applicants sought to impugn the proceedings before the tribunal on the grounds of delay. In the High Court, Mr Justice Smyth refused the reliefs sought and the applicants appealed.

The Supreme Court (Murray J and Geoghegan J delivering judgments; Keane CJ, Murphy J and McGuinness J agreeing) allowed the appeal. Murray J held that the applicants were erroneous in their view of what could constitute a relationship with an original complaint. The breaches of discipline alleged against the applicants were related to the original complaint and were not so unrelated as to render the actions of the board *ultra vires*. On this ground, the appeal would fail. However, referring to the issue of delay (as contained in the judgment of Geoghegan J), the appeal would be allowed. Geoghegan J held that a disciplinary complaint against a member of An Garda Síochána was a serious matter and under any reasonable interpretation of the legislation it would have been intended that expedition was also in the interests of those members. Given the gross and unlawful delay that had occurred, the appeal would be allowed.

***McCarthy and Dennedy v Garda Síochána Complaints Tribunal and Others*, Supreme Court, 15/3/2002** [FL5294]

Practice and procedure

Delay – preliminary issue – mining – prospecting licenses – whether plaintiffs' action should be stayed – registration of minerals – application granted in respect of one area – right to work minerals in other areas rejected – proceedings not issued until ten-and-a-half years after cause of action arose – whether delay in prosecuting claim inordinate and inexcusable – whether valid excuse for delay existed – balance of justice – whether claim statute barred – Minerals Development Act, 1979, *section 15(4)*

The applicants had made an application to the High Court pursuant to section 15(4) of the *Minerals Development Act, 1979*. However, as a preliminary issue, it fell to be decided whether the applicants' action should be stayed due to the alleged delay in instituting proceedings. In the High Court, Carroll J held that the passage of time in not issuing proceedings until ten-and-a-half years after the cause of action arose was such that the delay could be described as inordinate. The reason given by the applicants, that no rules of court had been made regulating the right of appeal, was not a valid excuse as an appeal could have been brought at any time by plenary summons. The court could foresee unfairness for the respondents in not being able to find a witness due to the lapse of time. This placed an inexcusable and unfair burden on the respondents. The application would be stayed. The applicants appealed to the Supreme Court.

The Supreme Court (Keane CJ delivering judgment; Murphy J and Hardiman J agreeing) dismissed the appeal. The trial judge was entirely correct in treating the delay as inordinate and inexcusable. The balance of justice was clearly in favour of striking out proceedings. The order of the High Court was affirmed.

***Robert McGregor & Sons v Mining Board and Others*, Supreme Court, 26/4/2002** [FL5313]

EVIDENCE

Liability, personal injuries

Negligence – liability – traffic accident – fatal injuries – claim by widow of deceased driver – circumstantial evidence – whether defendant contributed to accident – whether impact occurred solely on deceased's side of road – whether speed of deceased's vehicle major contributing factor to accident

The plaintiff claimed damages arising out of the death of her husband whose car was in collision with a left-hand drive camper van driven by the defendant. The deceased was accompanied by two colleagues from the Defence Forces who were seriously injured and had no recollection of the accident. The defendant's van had been stopped at an angle in the centre of the road preparing to turn onto a road when it was struck at speed by the deceased's car. Damages had been agreed at £247,000 and the court was asked to decide the question of liability. Ó Caoimh J held that the deceased's car was being driven at an excessive speed and this was a major contributing factor to the accident. The essential liability for the accident must rest with the deceased. The defendant was 20% negligent for failing to have his vehicle in the correct position on the road at the time of the impact. The plaintiff appealed against the judgment.

The Supreme Court (Hardiman J delivering judgment; Murphy J and Geoghegan J agreeing) held that the trial judge's findings in relation to excessive speed were rationally open to him on the evidence. However, there had been an important dispute between the engineers called by both parties in relation to the point of impact of the vehicles which had not been considered. The matter would therefore be remitted to the High Court for retrial.

***Furey v Suckau*, Supreme Court, 26/4/2002** [FL5259]

PERSONAL INJURIES

Medical negligence

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

The proceedings were brought by a widow of the deceased. The deceased had suffered from a rare form of abdominal tumour known as a phaeo. It was common case that the primary cause of death was the tumour. The plaintiff claimed that the defendants ought to have diagnosed the condition and treated the deceased accordingly and were negligent for not having done so. Barr J was satisfied that there was a failure to investigate fully the symptoms of the deceased. In particular, it was found that the 'panic attacks' experienced by the deceased ought to have been investigated but were not. Negligence had been established. The defendants appealed to the Supreme Court against the findings of the High Court.

The Supreme Court (Fennelly J delivering judgment; Murray J agreeing and Geoghegan J dissenting) allowed the appeal. Mr Justice Fennelly held that once the trial judge had held that the defendants were not negligent in failing to diagnose the phaeo it was difficult to justify his finding of negligence regarding the 'panic attacks'. The trial judge had no basis for concluding that the defendants were negligent in failing to carry abdominal tests in order to investigate the panic attacks. The appeal of the defendants was allowed. Mr Justice Geoghegan, dissenting, held that there had been a duty of care to investigate the panic attacks and there had been a failure to carry this out. The appeal should be dismissed.

***Wolfe v St James Hospital and Others*, Supreme Court, 20/2/2002** [FL5122] G

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Eurlegal

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

Procurement law as it applies to public/private partnerships

Many readers will be familiar with the much-heralded introduction of public/private partnerships (PPPs) in Ireland. PPPs are seen as a potential spur to the economy. Many large-scale infrastructure contracts are being put out to tender by the Irish government, such as the Luas line and the Metro in Dublin, educational infrastructure projects and the bypass roads and motorways that are currently under construction throughout the country.

But what of the legal procedures for practitioners involved in the PPP tendering process and the influence of European law on such procedures? This is governed by a well-established European legal framework in respect of procurement of public contracts, which has been fully implemented in Ireland. Many practitioners, whether advising public utility bodies or suppliers who submit tenders for the PPP process, should have a working knowledge of the EU public procurement rules.

The purpose of 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 more competitive and wider range of bids. Transparency and equality of treatment are two important elements in the European public procurement process.

The EU regime provides for a regulated tendering exercise within strict timetable constraints preceded by formal advertisement throughout the EU. Slightly different rules apply for each of the different types of procurement (works, supplies and services) and further differences occur due to the availability of three different contract-award procedures (the open, restricted and negotiated procedures: see below).

The foundation of European Community law relating to public procurement rules can be found in the 1957 *Treaty of Rome*, notably in those provisions that: guarantee the free movement of goods, services and capital; establish fundamental principles (equality of treatment, transparency and mutual recognition); and prohibit discrimination on the grounds of nationality (article 12, article 28 and those following, article 43 and those following, and article 49 and those following). In addition, article 163 guarantees that the community supports co-operation among undertakings, research centres and universities, among other things, to exploit the internal market 'in particular through the opening-up of national public contracts'.

Much of this article looks at the application of the public procurement rules to the PPP process. PPPs can be defined as 'arrangements between the public and private sector for the delivery by the private sector of certain public infrastructure and/or public services, which traditionally would have been provided by the public sector' (*State Authorities (Public Private Partnership Arrangements) Bill, 2001*, explanatory memorandum).

PPPs involve a genuine transfer of risk from the public sector to the private sector and allow state authorities to draw upon economic resources which otherwise would not have been available to them. As increased deregulation becomes more common in Ireland and European funding of services is set to decrease, public/private partnerships are a cost-effective method of offering high-quality products and services to the public while simultaneously providing a more flexible approach to the support of capital investment in economic and social infrastructure.

EU public procurement directives

The treaty provisions were rendered more effective by a series of detailed secondary legislation in the form of European directives. Ireland does not have any binding domestic public procurement code and, as such, it relies upon the implementation of these directives by way of corresponding statutory instruments:

- The *Public services contracts directive* – council directive 92/50/EEC (applicable to services contracts). Implemented in Ireland by the *European Communities (Award of Public Services Contracts) Regulations 1993* (SI 173 of 1993)
- The *Public supplies directive* – council directive 93/36/EEC (covering contracts for the purchase or hire of equipment and goods). Implemented in Ireland by the *European Communities (Award of Public Supply Contracts) (Amendment) Regulations 1994* (SI 292 of 1994)
- The *Public works directive* – council directive 93/37/EEC (covering construction and engineering works). Implemented in Ireland by the *European Communities (Award of Public Works Contracts) (Amendment) Regulations 1994* (SI 293 of 1994)
- The *Utilities directive* – council directive 93/38/EEC (applies to 'utility' companies operating in the water, energy, telecommunications and transport sectors). Implemented in Ireland by the *European Communities (Award of Contracts by Entities Operating in the Water, Energy, Transport and Telecommunications Sectors) Regulations 1995* (SI 51 of 1995), and
- The *Remedies directive* – council directive 89/665/EEC (covers review procedures of procurement notes). Implemented in Ireland by the *European Communities (Review Procedures for the Award of Public Supply and Public Works Contracts) Regulations 1995* (SI 104 of 1993).

A further public procurement directive 97/52/EC was adopted by the European Parliament and the Council of the European Union on 13 October 1997. This was implemented in Ireland by the

European Communities (Award of Public Services Contracts) Regulations 1998 (SI 378 of 1998), the *European Communities (Award of Public Supply Contracts) (Amendment) Regulations 1998* (SI 379 of 1998), and the *European Communities (Award of Public Works Contracts) (Amendment) Regulations 1998*. This directive amended in different ways the *Services directive* (92/50/EEC), the *Supplies directive* (93/36/EEC), and the *Works directive* (93/37/EEC). The most relevant amendments were made in respect of procedures concerning the award notices, discrimination, debriefing requirements, disclosure, withholding information, and time limits.

Utilities directive

The *Utilities directive* covers contracts involving water, energy, transport and telecommunications and is concerned with those contracting authorities operating in these four sectors. Contracting authorities in these sectors largely operate in a commercial or quasi-commercial manner. In Ireland, the main bodies whose contracts are covered are the semi-state organisations and local authorities operating in these four sectors. Provisions in the *Utilities directive* resemble those of the main directives, but they do allow for more flexible procedures as a result of the commercial nature of the bodies in question.

Remedies directive

The *Remedies directive* covers review procedures of procurement rules and is aimed at ensuring that review procedures are made available to any potential or actual tenderer for a contract who has been, or risks being, harmed by any infringement. These powers of review have been translated into statutory instruments in Ireland. For example, according to regulation SI 104 of 1993 implementing the *Remedies directive*, the High Court has the power to review the award of a contract and does have the power to award certain remedies, including (a) declaring that a contract is void, (b) ordering that the contract be varied, and/or (c) awarding damages to any person who is harmed by an infringement of the public procurement rules. The European Commission also has the power to request an explanation from a member state on any contract procedure in which it considers there has been a breach of community procurement rules. The member state has 21 calendar days in which to confirm that the breach has been either corrected, or give reasons why it has not been, or inform the commission that the award of the contract has been suspended.

Public services, supplies and works directives

The *Public services contracts directive* covers contracts for public services, which means contracts in writing between a service provider and a contracting authority for the provision of a public service.

The *Public supplies directive* covers contracts in writing for the supply of public products involving the purchase, lease, rental or hire purchase, with or without the option to buy, of products between a service provider and a contracting authority.

The *Public works directive* covers public works contracts, which are defined under article 1 of the directive as contracts that are concluded in writing which have as their object 'either the execution, or both the execution and design, of works related to one of the activities referred to in annex II as a work'. A work is defined as the outcome of building or engineering works taken as a whole that is sufficient in itself to fulfil an economic and technical function.

Supplies, services or works?

It is not always easy to say which of these three directives apply to a particular contract. Many PPPs may involve contracts that may be multi-faceted, incorporating elements of public works, supplies and services. For example, if the contract involves an operational element, such as a contract for the construction of a public transport system that involves the operation of the service after its construction, it could invariably be classified as both a services and supplies contract. As a result, this renders the procedure less than clear.

For a supply and services contract, the 'relative value' of each element is the determinant. Therefore one should apportion the value of the contract between the different elements and the element with the highest value will indicate which of the supplies or services directives will apply.

The works and services directives do not give any indication in such circumstances which of the directives should apply. For example, a PPP project for the construction of a clubhouse for a municipal golf course would involve elements of works (for the building) and services (involving the maintenance and running of the clubhouse). In this instance it is necessary to examine the main object of the overall contract as decided in case C-311/92 *Hotelera International* (19 April 1994).

It is possible that a PPP could be structured as a service contract and still be classified as a works or supplies contract. It is important to note, however, that the procedural requirements for works, supplies or services contracts under the directives are quite similar, and so the categorisation of a contract is not necessarily as critical as one might think.

Contracting authorities subject to the public sector directives

Each of the *Services directive*, the *Supplies directive* and the *Works directive* apply to 'contracting authorities', which are defined in article 1(b) of the *Services directive* as 'the state, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law'.

The regulations apply to contracts awarded by the public sector in a wide sense. They apply not only to central government departments and local authorities but also to 'bodies governed by public law'. The latter includes any organisation which is established to meet the 'needs in the general interest', has legal personality and which is principally financed, supervised and appointed by the state or other public authorities. There is a non-exhaustive list of such bodies in Ireland set out in annex 1 to the *Works directive*.

The definition of contracting authorities has been considered by the ECJ (case 31/87 *Gebroeders Beentjes BV v Netherlands*, [1988] ECR 4635; case C-44/96 *Mannesmann Anlagenbau Austria v Strohal Rotationsdruck GmbH*, [1998] ECR 1-73; and case C-306/907 *Connemara Machine Turf Co Ltd v Coillte Teoranta*, [1998] ECR 1-8761). In the *Coillte* case, a dispute arose as to whether the Irish Forestry Board, which failed to tender the award of two public supply contracts, came within the meaning of a contracting authority. Coillte was established by the *Forestry Act, 1988* and is a private undertaking subject to the *Companies Acts*. Its day-to-day business was managed independently of the state and the state had very little influence in the award of public contracts. The ECJ referred to its decision in *Beentjes* and determined that the term 'contracting authorities' should be interpreted in functional terms. It emphasised that there was no provision expressly to the effect that the state control was to extend to the awarding of public supply contracts by Coillte, and that the state might exercise

such control at least indirectly. It held that Coillte was entrusted to provide a service of managing the national forests and also providing certain facilities in the public interest. It held that the state had the power to appoint the head officers of the company and could exercise control over its economic activity. As a result, it decided that Coillte did come within the meaning of a 'public authority whose public supply contracts are subject to group control by the state' (point VI of annex I to the directive 77/62/EEC). Although this decision has been criticised and the dissenting opinion of Advocate General Alber is considered to be preferable, it is an indication that the court may adopt a wide interpretation of the term 'contracting authority'.

Thresholds

Before the award of contracts is affected by the procurement directives, the value of the contracts must exceed the following thresholds, effective from 1 July 2002:

- €6,242,028 for works contracts awarded by government departments and offices, local and regional authorities and other public authorities
- €162,293 for supplies and services contracts applying to government departments and offices
- €249,681 for supplies and services contracts applying to local and regional authorities and public bodies outside the utilities sector.

The procedural requirements

Types of service contracts. There are two types of services listed in the directives that apply to contracting authorities. Part A services are considered as priority services capable of leading to cross-border competition and are subject to the full set of procurement rules. Part B services are the services that are subject only to the rules on technical specifications and post-award notices but are exempt from other procedural requirements. PPP projects may be a combination of part A (for example, sewage/refuse disposal) and part B (for example, recreational, cultural and sporting services). In this instance, the full set of procurement rules will apply if the part A services' relative value is more than the part B services portion of the arrangement.

The categories of services to which the regulations apply are set out in schedule 1 of the directive, which is divided into two parts: part A and part B. The regulations provide that if the contract is a part B services contract, then, although technical specifications must be drawn up in terms of European specifications as far as possible and an award notice must be published, there is no requirement to use the open, restricted or negotiated procedures set out in the regulations.

Tendering procedures. The directives established a framework whereby the tendering of certain projects could be carried out. The EU directives recognise three tendering procedures:

- Open – everyone considered
- Restricted – a short-list made out of all interested parties
- Negotiated – the contracting authority negotiates with the suppliers of its choice.

Under the open and restricted procedures, the authority must choose among bidders on the sole basis of the written tenders that are submitted. The contracting authority discusses the tenders received from all the bidders (see the statement concerning article 7(4) of council directive 93/37/EEC of 14 June 1993, OJ [1994] L 111/114). In the case of PPP projects, detailed discussions and negotiations with bidders are necessary before deciding on one particular bidder. As a result, awarding authorities should be advised to opt for the negotiated procedure.

Awarding authorities can always choose to opt for the open or restricted procedures, whereas a negotiated procedure may only be used in certain circumstances as laid out in the directives (see below).

The negotiated procedure therefore is more suitable for PPP projects. There are two types of negotiated procedure:

- Negotiated procedure without prior publication (non-competitive negotiated procedure), capable of use in exceptional circumstances as set out in the directives, and
- Negotiated procedure with prior publication (competitive negotiated procedure), capable of use in certain circumstances.

Contracting authorities involved in PPPs should be advised that the ECJ interprets the grounds for use of the negotiated procedure very narrowly.

In an opinion on 13 September 2000, the European Commission reprimanded the British government for breaking the procurement rules over the use of the negotiated procedure in tendering for the PFI (the UK equivalent of PPPs) deal for the redevelopment of the Pimlico School. The commission stated that the contract did not, as determined by the British government, satisfy the criteria for use of the negotiated procedure, which should be used for a contract of an exceptional nature which, when considering the risks attaching to it, did not permit prior overall pricing. The commission found that the use of the negotiated procedure should be limited to situations where the existence of any of the three contingencies under the directives enabling the use of the negotiated procedure are concrete and can be proved by the awarding authority. These three contingencies under the directives being:

- In exceptional cases, when the nature of the works or services or the risks involved do not permit prior overall pricing
- In the event of irregular tenders in response to an open or restricted procedure
- When the nature of the service being contracted for, especially in the case of intellectual or financial services, is such that contract specifications cannot be established with sufficient precision to permit a contract to be awarded under the open or restricted procedures.

The commission went on to point out that the procedure cannot merely cover the situations that involve risks that will normally be implied in any procurement contract. The commission also decided that the type of works that may fall into this category includes highly

EXAMPLES OF PART A AND PART B SERVICES

Part A services

- Land transport
- Maintenance and repair
- Telecom services
- Financial services
- Computer (IT) services
- Architectural and engineering services
- Management consultancy
- Advertising services management
- Building-cleaning/property
- Sewage/refuse disposal.

Part B services

- Rail transport
- Water transport
- Security services
- Legal services
- Education services
- Health and social services
- Recreational, cultural and sporting services
- Other services.

innovative and complex works and where there is a possibility of finding archaeological vestiges at the site or where the geological character of the area is particularly unusual. In such cases, the authority would be justified in opting for a negotiated procedure. The commission stated that these circumstances did not apply in the Pimlico School's case and, as such, it concluded that the negotiated procedure was not permitted.

Following this opinion, the use of the most appropriate procedure for PPP projects, being the negotiated procedure, may be subject to doubts.

Time limits. Minimum time limits are set down for the receipt of tenders in response to the different tendering procedures. The time limit for receipt of tenders for an open tendering procedure is not less than 36 days (as amended by council directive 97/52/EEC) or 22 days if a PIN (prior information notice, also known as prior indicative notice) containing all available information is dispatched at least 52 days and not more than 12 months before the call for competition is dispatched.

The time limit is 40 days for receipt of tenders in response to the restricted or negotiated procedures. This time limit may be reduced to 26 days if a PIN is dispatched at least 52 days and not more than 12 months before the call for competition was dispatched.

Advertisement of public contracts. There are three types of notices that the contracting authority is obliged to publish in relation to the procurement procedures on public contracts:

- The PIN, or prior information notice
- The contract notice
- The award notice.

These notices appear in the *Tenders electronic daily* (TED) database, located at *http://www.echo.lu/ted.*

PIN. Contracting authorities involved in works contracts are obliged to publish in the *Official journal* an annual notice, called a prior information notice, setting out what the contracting authority proposes to purchase in the forthcoming year. For works contracts, contracting authorities are required to publish prior information notices of their procurement plans if these entail expenditures of €6,242,028 in any particular works category. For supplies and services contracts, contracting authorities are required to publish prior information notices of their procurement plans if these entail expenditure of €750,000.

In the event that the contracting authority does not publish a PIN including a project, which may arise at a later date and is not included in the original prior information notice, then the contracting authority may still proceed with the PPP contract. The advantage to having advertised proposed projects in the PIN arises in relation to time limits for the receipt of tenders, which are reduced when a PIN is published.

Contract notice. Where the contracting authority makes it known that it wishes to award a particular contract and invites bids. The notices must be set out according to the models in the directives.

Award notice. This post-award notice makes known the name of the person to whom the contracting authority has awarded the contract. Information on the award of a contract must be notified to the commission not more than 48 calendar days after the award of the contract. These notices are made available to unsuccessful candidates upon request.

Contracting authorities should note that, when advertising in the *Official journal*, the provisions of the directives, including the format in the model notices, must be strictly followed in all cases. It is important to draft the notice properly and it should not exceed 650 words. Therefore, although detail should be given in respect of the contract, there is a limit as to what can be included. These notices are set out in the annexes to the directives. Any advertising of the contract in a national publication prior to its publication in the *Official journal* is not permitted.

Technical specifications. All of the directives contain similar provisions in relation to technical specifications. The requirement is to use European standards whenever possible and, in their absence, there is a hierarchy of other standards that may be used. These are international, national and, lastly, company standards if no others exist.

LAW SCHOOL ANNOUNCES NEW *DIPLOMA IN APPLIED FINANCE LAW*

The Law School of the Law Society is pleased to announce the introduction of a new *Diploma in applied finance law.* This diploma will commence later this year. The course is designed to acquaint students with the law in relation to the provision of financial services. It will examine the regulation of the financial services industry, wholesale banking, derivatives, aspects of corporate finance and the funds industry. The course will be provided in the Education Centre in the Law Society on Tuesday evenings over 15 weeks between 6.30pm and 9.45pm.

A slightly revised *Diploma in e-commerce* is scheduled to begin in November of this year. Further details will be released in the coming weeks.

The next *Diploma in legal French* certified by the Chambre de Commerce de Paris will run from early October 2002 to June 2003. Classes will take place in the Law Society on Wednesday evenings and every fourth Saturday. Full details are available from Louise Stirling at the Alliance Française, 1 Kildare Street, Dublin 2, tel: 676 1732, ext 205, or e-mail: lstirling@alliance-francaise.ie.

The next *Certificate in legal German* is scheduled to start in October of this year. This course is specifically designed for lawyers and other interested people with a good level of German. Some of the topics covered are German legal structure, civil code, commercial law and European law.

The timetables and syllabi for these courses will be finalised in the coming months. If you would like to receive this information in due course, please e-mail us giving details of your name, address and area of interest at lawschool@lawsociety.ie.

The tenders/negotiations stage. After candidates have indicated their interest in bidding, the contracting authority can proceed to vet the interested parties. The directives provide that such testing may be carried out on a review of criteria for qualitative selection. Bidders can be treated as ineligible if they do not satisfy minimum standards of economic or financial standing and technical capacity. The short-listed candidates are then sent invitations to tender. The information in the invitation to tender is similar to that which would be used in the notice for the open procedure. In the case of the restricted procedure, the preferred bidder is chosen from the written tenders submitted and, as with the open procedure, there can be no meaningful negotiations between the parties after the tenders are received.

In the case of the competitive negotiated procedure, the directives do not specify what form negotiations are to take. However, these will include lengthy discussions and correspondence between the awarding authority and the bidders.

Criteria for awarding contracts. Procurement rules require that contracting authorities must state whether they will accept a bid on the basis of the lowest price only, or on the basis of the most economically advantageous tender (using various criteria such as price, period for completion, quality, after-sales service and other things).

If the contracting authority proposes to apply the latter basis when considering a bid, it must state in the contract documents, or in the notices, which of the criteria it intends to apply to the award and the order of their importance.

It is important to note that these requirements must be followed precisely, as a breach of procurement rules is not looked upon lightly by the ECJ. For example, in the *Harman* case, which concerned the House of Commons' Public Works Department appointment of a contractor to supply the windows for the new parliamentary office building above Westminster underground station, a UK contractor was accepted for the contract despite a lower bid being submitted by another company, Harman CFEM Facades (UK) Limited. Harman sued for wasted tendering costs, loss of profit that it claimed it would have made on the contract, and aggravated and exemplary damages. The court held that, for 100% of the profits to be recoverable, the tenderer must show to a high degree of certainty that it would have won the contract. However, in this instance the tenderer had to show that there was a 90% chance of winning the contract. The court ruled in favour of Harman and awarded them all loss of profits.

Public works concessions. Certain PPP projects fall under the scope of public works concessions and they are treated as separate contracts by the commission. These types of contracts are dealt with exclusively in the *Works directive*. A concession consists of, or includes, a grant by a contracting authority of a right to exploit the work or works to be carried out under a contract. An example of a public works concession is a contract to construct a toll bridge or road such as the second Westlink bridge in Dublin.

There was certain ambiguity surrounding the issue of whether the public procurement rules applied to public works concessions. This issue was clarified in a communication from the commission in April 2000, entitled *Interpretive communication on concessions under community law*, in that such projects are subject to the public procurement rules and principles and thus should be followed accordingly. G

Philip Daly is a partner in the Dublin law firm LK Shields. The final part of this article will appear in the next issue's Eurlegal.

Recent developments in European law

EMPLOYMENT

Case C-133/00 *JR Bowden, JL Chapman, JJ Doyle v Tuffnells Parcels Express Ltd*, 4 October 2001. Bowden, Chapman and Doyle were part-time clerical workers of Tuffnells, a parcel delivery service. They brought proceedings over their employer's refusal to grant them paid annual leave. The UK Employment Appeals Tribunal made a reference to the ECJ under article 234 on the interpretation of directive 93/104/EC on the organisation of working time. Regulation 13 of the directive provides for an entitlement to annual leave for those workers covered by the directive. However, regulation 18 excluded workers in the road transport sector from the scope of regulation 13. The applicants worked in offices and under their contacts could not be asked to work in actual transport operations. When the implementing regulations in the UK entered into force, they asked for paid annual leave. This was refused, as Tuffnells said that they were not entitled to it under regulation 18. The UK Employment Appeals Tribunal made a reference to the ECJ. The ECJ held that the directive does not apply to the transport sector and the exclusion extends to all workers in the sector.

FREE MOVEMENT OF GOODS

Case C-1/00 *Commission v France*, 13 December 2001. In 1996, the commission imposed a complete ban on imports of all forms of bovine products from the UK. From June 1998, there was a gradual lifting of the ban. The date for the final lifting of the ban was set as 1 August 1999. France refused to open its market to UK imports, relying on the opinion of the French food safety agency. The commission brought an action against France, arguing that it was in breach of its EU law obligations. The ECJ held that the French refusal to lift the ban on correctly marked imports of British beef and veal from 30 December 1999 was unlawful. However, it did stress the importance of a reliable tracing system for protecting public health.

CONSUMER LAW

Joined cases C-541/99 and C-542/99 *Cape Snc v Idealservice Srl* and *Idealservice MN RE Sas v OMAI Srl*, 22 November 2001. In both cases, Idealservice entered into a contract for the supply of automatic drink dispensers installed on its premises and intended to be used by its staff. The contracts contained a jurisdiction clause which conferred jurisdiction on the magistrate of Vidana. The applicants argued that this was an unfair clause and was unenforceable. Idealservice argued that the applicants could not be regarded as 'consumers' and thus could not avail of directive 93/13 on unfair terms in consumer contracts concluded between a seller or supplier and a consumer. The Italian court asked the ECJ to rule whether the term 'consumer', as defined in the directive, applied only to natural persons. The ECJ held that the term 'consumer' in the directive refers only to natural persons, whereas the term 'seller or supplier' includes both natural and legal persons.

TELECOMMUNICATIONS

Case C-79/00 *Telefónica de España v Administración General del Estado*, 13 December 2001. EU telecommunications legislation consists of a number of liberalising and harmonising directives. The latter concern the harmonisation of the conditions under which public telecommunications networks and public telecommunications services many be openly and effectively accessed and used. The dispute in this case concerned Spanish implementation of one such directive. Telefónica challenged the manner of implementation, arguing that the Spanish government was acting *ultra vires* its regulatory competence. The Spanish Supreme Court made a reference to the ECJ, asking whether member states can impose on dominant operators the obligation to provide access to the subscriber loop and to offer interconnection at local and higher-level switching centres. It said that the purpose of the directive was to ensure interconnection of networks and the provision of a universal service. To achieve this, the directive relies primarily on negotiations between operators. However, it also permits member states to limit the freedom of operators to decide to enter into such agreements. The ECJ held that the Spanish legislation was in conformity with EU law. G

Courting success

Pictured at the commissioning of the newly-refurbished courthouse in Sligo were *(above, from left)* Niamh McGovern, Paula Daly, Ann Martin and Tom Martin, president of the Sligo Bar Association, and *(below, from left)* Judge Keenan Johnson, Claire Walsh, Derry O'Donovan, Helen Johnson, Kathleen Henry, Aideen Collard, Therese Johnson and Brendan Johnson

The magnificent building in all its glory

Wisdom in evidence
Dr Paul Anthony McDermott addressing a recent workshop on evidence, which is a vital component of the *Advanced advocacy for solicitors* course, in the Law Society's Education Centre

Grab your partners
Eugene F Collins Solicitors has appointed two new partners, Lisa McManus and Ronan O'Neill *(pictured above with David Cantrell, managing partner, on left)*. McManus, who has been a member of the Law Society's Conveyancing Committee for over five years and an active member of the DSBA Conveyancing Committee, specialises in property law, particularly commercial property. O'Neill specialises in litigation, specifically trademark and copyright infringement cases

Discriminating tastes
Pictured at the recent CLE seminar on disability discrimination were *(from left)* Eilis Barry BL, legal advisor at the Equality Authority; Ciaran O'Mara of O'Mara Geraghty McCourt Solicitors; Terence McCrann of McCann FitzGerald; Madeleine Reid, legal advisor at the Office of the Director of Equality Investigations; and the Law Society's CLE executive Barbara Joyce

And they're off...
Law Society President Elma Lynch officially starts the Calcutta Run (see *News*, p3)

Keano and McGrath, together again
Deputy Director General Mary Keane does a creditable man-marking job on soccer star Paul McGrath, who was in Blackhall Place recently to promote *Healthy eating week*

Twice as nice
Here at the *Gazette,* we can't get enough of the Corrs, or even near them, so here's another picture of them with Law Society President Elma Lynch

SADSI
Solicitors Apprentices Debating Society of Ireland

A game of two halves, unfortunately

The traditional post-exams challenge match between the PPC1 novices and the PPC2 veterans kicked off in glorious sunshine at 5pm on 25 April, to the cheers of a significant number of supporters.

Despite the hour – considering the exams finished at 1pm and the availability of reduced-price beer tickets in the afternoon – the PPC1 boys mustered a sizable squad. Whether this was motivated by a desire to be photographed at the unveiling of the new SADSI football kit or an urge to buck the recent trend of PPC2 victories is unknown, but everybody seemed up for the game.

Despite their best efforts, the PPC1 team got off to a sluggish start. This was understandable, considering that most of the players had been up all night trying desperately to understand unfair dismissals law while, it is said, the PPC2 team were safely tucked up in their beds. The PPC2 team came out all fired-up, and before the PPC1 team knew what hit them they were 2-0 down. Worse was to come, with the injury of their great white hope for the game, Owen Kelly. The PPC1 lads were in danger of getting annihilated at this point, but, with some frantic reorganising, they began to come back and even managed to get the score to 2-1 before going in at half time 3-1 down.

The PPC1 team *(above)* and the victorious PPC2 team

What was said at half time will remain confidential, but the PPC1 team came out like a team possessed. For a ten-minute period, shots were raining down on the PPC2 goal. There was, however, more to this PPC2 team than met the eye, and they soaked up all the pressure that was thrown at them, calmly despatching a fourth goal. That was the signal for the game to open up, with both sides creating but missing chances. At this point, Cormac McCarthy took the game by the scruff of the neck and threatened to win it single-handedly with some surging runs and a well-taken goal.

Alas, it was not to be, and the PPC2 team were the deserved winners, by a score of 5-3. All rivalries were forgotten as the teams retired to the bar, where a spirited discussion took place on the effect of the exams on the outcome.

Once again, I must sincerely thank Frank Ryan & Son, without whose generosity we would not have a SADSI kit.

Noel Devins, sports liaison officer

CAREERS DAY 2002

Benson and Associates is delighted to be involved, once again, with the SADSI Careers Day. Last year's event was both informative and enjoyable and we look forward to a further success this year.

Benson and Associates is a niche consultancy, specialising in the recruitment of high-calibre lawyers for private practice, commerce and industry, from newly-qualified to partner level. Our clients include pre-eminent legal practices in Ireland and the UK who are seeking the best talent. From our Dublin base, our Belfast office and our associated office in London, we are well-placed to fulfil these requirements. Our principal, Michael Benson, will be a guest speaker on the day and will be offering advice on topics such as CV and interview preparation, employment opportunities and salary scales. He will also be assessing the current market and trends in recruitment.

Our experience suggests that, over the past year, employers have been inclined to adopt a reactive rather than an aggressively proactive approach to recruitment. The emphasis has been on retaining staff and filling vacancies as they arise, rather than boosting numbers. Many are adopting a wait-and-see policy, but few are passing up the chance to recruit talented, experienced candidates in certain areas, especially PPP, banking and financial services, and taxation.

At the newly-qualified level, there has been a noticeable change in the past nine months. This year's qualifiers are not necessarily guaranteed their placement of choice, and not all newly-qualifieds are being retained. This can probably be accounted for by the elevated intake of trainees in previous years and cost-trimming measures. In any event, the balance of power is back in favour of the employer, and newly-qualified solicitors will need to work that bit harder to impress. That said, there has been a recent increase in activity and there is a cautious optimism in the market.

We look forward to seeing you on 5 July, when we can discuss these and other topics in more detail. G

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 7 June 2002)

Regd owner: James Reilly; folio: 3448; lands: Kilnaglare; area: 3.937 acres; **Co Cavan**

Regd owner: Michael Mulqueen; folio: 10190; lands: townland and Dooras (parts); area: 45 acres 3 roods 36 perches; **Co Clare**

Regd owner: Laurence Duggan; folio: 10750 entry no 15; lands: known as the townland of Killalough situate in the barony of Barrymore, and the county of Cork; **Co Cork**

Regd owner: Jeremiah Murray; folio: 47253; lands: a plot of ground being part of the townland of Lahardane situate in the barony of Cork and the county of Cork; **Co Cork**

Regd owner: Achaean Enterprises; folio: 15422F; lands: a plot of ground being part of the townland of Lehenagh Beg situate in the barony of Cork and the county of Cork; **Co Cork**

Regd owner: Eamon O'Flynn; folio: 42438F; lands: a plot of ground being part of the townland of Lavally Lower situate in the barony of Fermoy and the county of Cork; **Co Cork**

Regd owner: Thomas Gallon; folio: 6313; lands: Lismullyduff; area: 57.4375 acres; **Co Donegal**

Regd owner: Bertie McCormack; folio: 9903F; lands: Doonalt; area: 0.338 acres; **Co Donegal**

Regd owner: Shane O'Brien; folio: DN108825F; lands: property known as 12 Pinewood Grove in the parish of Glasnevin and district of Glasnevin North; **Co Dublin**

Regd owner: Orla Walsh; folio: DN59072F; lands: property known as 2 The Orchard, Woodfarm Acres, Palmerstown; **Co Dublin**

Regd owner: Chandrakant M Vyas and Aruna C Vyas; folio: DN18898L; lands: property situate to the south of the Skerries-Dublin road in the town of Skerries; **Co Dublin**

Regd owner: John and Nora McCaul; folio: DN34750L; lands: property situate in the townland of Tymon South and barony of Uppercross; **Co Dublin**

Regd owner: Michael and Mary Lasinski; folio: DN62263F; lands: property known as 9 Lally road, situate in the parish of St Jude and district of Kilmainham; **Co Dublin**

Regd owner: Noel Whyte; folio: DN102917F; lands: property known as 6 Verbena Lawn situate in the parish of Kilbarrack and district of Howth; **Co Dublin**

Regd owner: Paul and Ann Marie Doyle; folio: DN13725L; lands: property situate in the townland of Carrickhill and barony of Coolock; **Co Dublin**

Regd owner: Patrick J O'Brien; folio: DN19499; lands: property situate in the townland of Spricklestown and barony of Castleknock; **Co Dublin**

Regd owner: Thomas J Duffy; folio: DN5862F; lands: property situate in the townland of Rowlestown East and barony of Nethercross; **Co Dublin**

Regd owner: John Kilmartin; folio: DN6665F; lands: property situate on the south side of the Dublin road in the town of Lucan; **Co Dublin**

Regd owner: John and Anne Byrne; folio: DN21581L; lands: property situate to the north side of the North Road in the parish of Kilbarrack, district of Raheny; **Co Dublin**

Regd owner: Neil McGrory, Hugh Gallagher and John Aloysius Mone; folio: DN9591F; lands: a plot of ground known as 234 Moyville, situate in the townland of Edmondstown and barony of Rathdown; **Co Dublin**

Regd owner: Thomas and Mary Bridget Ryan; folio: 25252F; lands: townland of Carnmore West and barony of Dunkellin; area: 0.1922 hectares; **Co Galway**

Regd owner: John Maguire; folio: 7102; lands: Drumderg; area: 20.625 acres; **Co Leitrim**

Regd owner: Matthew Riordan; folio: 4218; lands: townland of Thomastown and barony of Coshlea; **Co Limerick**

Regd owner: Thomas Johnson; folio: 17054; lands: townland of Teer and barony of Corkaguiny; **Co Kerry**

Regd owner: Margaret Mary Kearney; folio: 572F; lands: townland of Reavaun and barony of Magunihy; **Co Kerry**

Regd owner: Liam Power; folio: 268R; lands: Clogga and barony of Iverk; **Co Kilkenny**

Regd owner: John Hegarty; folio: 10119; lands: townland of Ardagh and barony of Tirawley; area: 20 acres 1 rood 31 perches; **Co Mayo**

Regd owner: David Jordan; folio: 705L; lands: Killengland; area: 0.04375 acres; **Co Meath**

Regd owner: Thomas Eugene McDonnell; folio: 17936; lands: Coolskeagh, Gorteens; area: 10.625 acres and 4.562 acres; **Co Monaghan**

Regd owner: James Murphy; folio: 7317; lands: Dromore; area: 25.468 acres; **Co Monaghan**

Regd owner: Margaret (Madge) O'Doherty; folio: 7583F; lands: situate on the south side of Mass road in the parish of Carrick and barony of urban district of Carrick-on-Suir; **Co Tipperary**

Regd owner: Geoffrey Manners (deceased); folio: 37209; lands: Lehinch and barony of Ormond Lower; **Co Tipperary**

Regd owner: Graham Davies; folio: 33608; lands: part of the land of Modeshill (Sankey) with the cottage thereon situate in the barony of Slievardagh shown as plan 14 edged red on the registry map of the townland (OS 63/4) (from folio 19596) Eragh; **Co Tipperary**

Regd owner: Michael Scally; folio: 945F; lands: Mayne; area: 3.375 acres; **Co Westmeath**

Regd owner: Rose Cunneen; folio: 6175F; lands: Clonmellon; **Co Westmeath**

Regd owner: Seamus McCormack; folio: 14040; lands: Caddagh, & Caddagh; area: 61.681 acres & 20.681 acres; **Co Westmeath**

Regd owner: William and Mary Burke; folio: 2160F; lands: townland of Kilcoole and barony of Newcastle; **Co Wicklow**

WILLS

Burke, Anthony (deceased), late of 14N, Pearse House, off Pearse Street. Would any person having knowledge of a will made by the above named deceased who died on 6 April 2002, please contact Bryan F Fox and Co, Solicitors, 46 North Circular Road, Dublin 7, tel: 01 838 6175 or fax: 01 838 7088

Clarke, Patrick (deceased), late of 16 Albert College Court, Dublin 9 and formerly of 27 Dunsink Gardens, Finglas, Dublin 11. Would any person having knowledge of a will executed by the above named deceased who died on 21 November 2001, please contact James Fagan and Co, Solicitors, 57 Parnell Square West, Dublin 1, tel: 01 872 7655 or fax: 01 873 4026

Cronin, Donal (deceased), late of 47 Knockfree Avenue, Fairhill, Cork. Would any person having knowledge of a will made by the above named deceased who died on 19 December 2001, please contact Messrs Kieran Riordan and Co, Solicitors, 14 Princes Street, Cork; reference MM/CH, tel: 021 4273651 or fax: 021 4275716

Dolan, Michael (deceased), late of 154 Mulvey Park, Dundrum, Dublin 14. Would any person having knowledge of a will made by the above named deceased, who died on 23 January 2002, please contact Anderson and Gallagher, Solicitors, 29 Westmoreland Street, Dublin 2, tel: 01 677 6066 or fax: 01 679 8494

McCaffery, Agnes (deceased), late of Huntington Castle, Clonegal, Co Wexford. Would any person having knowledge of a will made by the above named deceased who died on 25 January 2001 please contact Ensor O'Connor Solicitors, 4 Court Street, Enniscorthy, Co Wexford, tel: 054 35611 or fax: 054 35234

McFarlan, Diana Mary (deceased), late of Stonewall, Bailieboro, Co Cavan and also Fairways Nursing Home, Rathfarnham, Dublin 16. Would any person having knowledge of a will made by the above named deceased who died on 7 April 2000, please contact O'Rafferty Powderly, Solicitors, 18 Merrion Row, Dublin 2, tel: 01 676 4638 and fax: 01 661 2020

McGill, Ellen (deceased) late of Neary's Hotel, 76/78 Parnell Street, Dublin 1. Would any person having knowledge of a will executed by the above named deceased who died on 1 April 2002, please contact James Fagan and Co, Solicitors, 57 Parnell Square West, Dublin 1, tel: 01 872 7655 or fax: 01 873 4026

O'Neill, John Howard (deceased), late of 2 Caravan, Labour in Vain, Horsehay, near Wellington, County Salop, England. Would any person having knowledge of the whereabouts of the will of the above named deceased who died on 1 August 1978, please contact Niamh Kelly, O'Donoghue Solicitors, 11 Fairview, Dublin 3, tel: 01 833 2204 or fax: 01 833 6941

Quinn, Patrick, late of Oghill Nursing home, Monasterevin, Co Kildare and formerly of 29 Haddon Road, Clontarf, Dublin 13. Would any person having knowledge of a will made by the above named deceased who died on 12 December 2001, please contact FB Taaffe and Co, Solicitors, Edmund Rice Square, Athy, Co Kildare, tel: 0507 38181 and 38166, fax: 0507 38459, e-mail: fbtaaffe@indigo.ie

EMPLOYMENT

Experienced solicitor capable of working on his/her own initiative required for busy practice 25 miles from Dublin. Litigation, conveyancing, probate experience desirable. Apply to **box no 60**

Kerry – assistant solicitor required for busy Tralee practice with experience in conveyancing, litigation and probate. Minimum of two years' experience required. Reply in confidence to **box no 61**

Solicitor required for busy general practice, experience in probate and conveyancing essential. District Court experience desirable. Apply to Branigan and Matthews, 33 Laurence Street, Drogheda. Fax: 041/0937049

Recently qualified (one to two years) solicitor required with experience in litigation and general practice. Attractive salary for suitable candidate. Send CV to Ken J Byrne & Co, Main Street, Blackrock, Co Dublin; e-mail: kjbsol@eircom.net

Locum solicitor required. September to December inclusive. Please apply with CV to Mr Jim Houlihan, Desmond A Houlihan & Son, Solicitors, Birr, **Co Offaly**

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

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

Solicitor required for busy general practice. Some experience preferable. Conveyancing, probate and general practice. Extensive experience and responsibility promised. Great opportunity with long-term possibilities for the successful candidate. Please reply to Kieran McCarthy, McCarthy & Associates, Oakview, Brewery Road, Tralee, Co Kerry, or e-mail: traleelaw@eircom.net

Locum solicitor required for six months commencing on 1 August 2002. Experience in dealing primarily with conveyancing and probate required. Messrs Crean O'Cleirigh and O'Dwyer, Solicitors, Ballyhaunis, Co Mayo

Join one of the world's largest insurance groups: Eagle Star requires a **qualified solicitor** with experience in personal injury defence litigation to join our legal team. This important position demands a highly motivated, responsible individual who will report directly to our managing solicitor. A competitive remuneration package commensurate with the position will be offered to the successful candidate. Applications, including CV, should be sent to Irene Wixted, personnel officer, Eagle Star Insurance Company (Ireland) Ltd, Ballsbridge Park, Dublin 4; e-mail: Irene.Wixted@Eaglestar.ie

IRISH GUARDIAN AD LITEM SERVICES

Providing a nationwide GAL and independent social work services to the courts in addition to preplacement 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

MISCELLANEOUS

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

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

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

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

Personal injury claims, employment, family, criminal and property law specialists in England and Wales. Offices in London (Wood Green, Camden Town and Stratford), Birmingham and Cardiff. 'No win, no fee' available for accident and employment claims, legal aid for family and criminal cases. Contact Levenes Solicitors at Ashley House,

235-239 High Road, Wood Green, London N22 8HF, tel: 0044 20 8881 7777. Alternatively e-mail us on info@levenes.co.uk or visit our website at www.levenes.co.uk

Publican's ordinary seven day licence for sale. Please contact Denis A Linehan and Company, Solicitors, Main Street, Charleville, Co Cork. Ref: DL. Tel: 063 89667

Office premises available, Dublin 2. Might suit solicitor/secretary/apprentice. Car space; tel: 01 668 4366

TITLE DEEDS

Olive Lynch de Loewe, (otherwise Olive Lynch Creaven). Would any solicitors holding any deeds to the premises at 23 Wainsfort Road, Terenure, Dublin 6, acquired by the above named by assignment dated 18 May 1971, please contact Robert Ryan and Associates, Solicitors, 23 Ballsbridge Terrace, Dublin 4, tel: 01 667 4255 or fax: 01 667 4050

Foy, Peter (deceased), late of 9 Windele Road, Drumcondra, Dublin 9. Would any person having knowledge of the whereabouts of the title documents of 9 Windele Road, Drumcondra, Dublin 9, please contact Padraig Turley and Company, Solicitors, 27 Bridge Street Lower, City Gate, Dublin 8. This property is held under a deed of lease and mortgage dated 30 March 1929 and made between Dublin Corporation of the one part and Martin Foy of the other part

In the matter of the *Landlord and Tenant Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978*: an application by John McKenna and Catherine McKenna of 305 Harold's Cross Road in the city of Dublin

Take notice that any person having any interest in the freehold estate of the property known as 305 Harold's Cross Road, in the city of Dublin, held under an indenture of lease dated 14 November 1834 and made between Henry Coulson Beauchamp of the one part and John Dodd of the other part subject to an annual rent of Sterling £78.0s10d but indemnified as to £73.0s10d and to the covenants and conditions therein contained.

Take notice that John McKenna and Catherine McKenna intend to submit an application to the county registrar at Arás Uí Dhálaigh, Inns Quay, Dublin 7 for the acquisition of the freehold interest in the aforesaid property and any party ascertaining 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 within 21 days from the date of this notice.

In default of any such notice being received, John McKenna and Catherine McKenna intend to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for directions as maybe appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion are unknown or unascertained.

Date: 24 May 2002

Signed: Joseph T Deane & Associates, solicitors for the applicants, St Andrews House, 28/30 Exchequer Street, Dublin 2

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

To any such person or persons for the time being entitled to the interest in the freehold estate of the following property: the premises known as 3 Beresford Place, Dublin 1 in the county of the city of Dublin, held under an indenture of lease dated 16 August 1946 and made between Violet Kathleen McCormick and Elizabeth Ivy Norman of the one part and Bartholomew Glavin of the second part for a term of 120 years from 1 April 1946, subject to the yearly rent of £155 during the first 21½ years of the said term and thereafter the yearly rent of £180 and to the covenants on the part of the lessee and conditions therein contained.

Take notice that Frederic Ozanam Trust (Incorporated), being persons entitled under the provisions of sections 9 and 10 of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978*, intend to submit an application to the county registrar for the county of the city of Dublin for the acquisition of the freehold interest in the aforesaid property and any party asserting that they hold a superior interest in the aforesaid property (or any of them) are called upon to furnish evidence of title to the aforementioned premises to the below named within 21 days from the date of this notice.

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

Date: 10 May 2002

Signed: Kilcullen & Associates, solicitors for the applicant, 183 Lower Rathmines Road, Rathmines, Dublin 6

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* and in the matter of the *Landlord and Tenant (Ground Rent) Acts, 1967-1984*: an application by St Laurence O'Toole Diocesan Trust

Take notice that any person having any interest in the freehold estate of the following property: all that and those that part of the lands of Ballycreen Lower containing two roods statute measure or thereabouts comprising the former national school at Ballycreen situate in the parish of Ballykine, barony of Ballinacor South and county of Wicklow.

Take notice that St Laurence O'Toole Diocesan Trust intends to submit an application to the county registrar for the county of Wicklow for the acquisition of the freehold interest in the aforesaid property asserting that they hold a superior interest in the aforesaid property are called upon to furnish evidence of title to the aforementioned property to the below named within 21 days from the date of this notice.

In default of any such notice being received, St Laurence O'Toole Diocesan Trust intends to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the county of Wicklow 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 property are unknown or unascertained.

Date: 23 May 2002

Signed: Arthur O'Hagan, solicitors for the applicant, 9 Harcourt Street, Dublin 2

In the matter of the *Landlord and Tenant (Ground Rents) Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978*: an application by Michael Tuite

Take notice that any person having any interest in the freehold estate of the following properties: all that and those of the premises known as 11 Fairview Strand situate in the parish of Conturk barony of Coolock formerly in the county but now in the city of Dublin held under indenture of lease dated 12 May 1952 and made between Arthur Greene, John Nassau Greene and Dermot McGillicuddy of the one part and Charles F Kenny of the other part for a term of 99 years and subject to the yearly rent of £7.10 and the covenants on the part of the lessee to be performed and conditions therein contained.

Take notice that Michael Tuite intends to submit an application to the county registrar for the county of the city of Dublin for the acquisition of the freehold interest in the aforesaid properties and any party asserting that they hold a superior interest in the aforesaid premises (or any of them) are called upon to furnish evidence of title to the aforementioned 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 of the city of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in each of the aforesaid premises are unknown or unascertained.

Date: 24 May 2002

Signed: Kent Carty Solicitors, 47/48 Parnell Square, Dublin 1

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 Ciaran Tuite

Take notice that any person having any interest in the freehold estate of the following properties: all that and those of the premises known as 13 Fairview Strand situate in the parish of Conturk barony of Coolock formerly in the county but now in the city of Dublin held under indenture of lease dated 12 May 1952 and made between Arthur Greene, John Nassau Greene and Dermot McGillicuddy of the one part and Charles F Kenny of the other part for a term of 99 years and subject to the yearly rent of £8.00 and the covenants on the part of the lessee to be performed and conditions therein contained.

Take notice that Ciaran Tuite intends to submit an application to the county registrar for the county of the city of Dublin for the acquisition of the freehold interest in the aforesaid properties and any party asserting that they hold a superior interest in the aforesaid premises (or any of them) are called upon to furnish evidence of title to the aforementioned 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 of the city of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in each of the aforesaid premises are unknown or unascertained.

Date: 24 May 2002

Signed: Kent Carty Solicitors, 47/48 Parnell Square, Dublin 1

LAW DIRECTORY ERRATA SHEET 2002

PAGE		SECTION	AMENDMENT
74	John Callinan	Alphabetical list of solicitors	Add telephone number 065 6828990 and fax number 065 6829016
149	Jim Grogan	Alphabetical list of solicitors	Delete mobile number and add telephone number 021 4516450 & fax number 021 4516453
173	Marie Keane	Alphabetical list of solicitors	Add telephone number 065 6828990 and fax number 065 6829016
203	Henry J McCourt	Alphabetical list of solicitors	Amend telephone number from 021 4631222 to 021 4631322
237	Michael Mullane	Alphabetical list of solicitors	Amend telephone number from 021 4631222 to 021 4631322
347	Brian O'Brien-Kenny	Members not holding PCs	Amend entry to read Office of the Parliamentary Counsel to the Government, Upr Merrion St
349	Evenlyn Robinson	Members not holding PCs	Amend entry to read Office of the Parliamentary Counsel to the Government, Upr Merrion St
354	Fiona C Carroll	Service of the state	Amend entry to read Office of the Parliamentary Counsel to the Government, Upr Merrion St
355	Ann Marie Crowley	Service of the state	Amend entry to read Office of the Parliamentary Counsel to the Government, Upr Merrion St
356	Margaret Kennedy	Service of the state	Amend entry to read Office of the Parliamentary Counsel to the Government, Upr Merrion St
356	Mary Johnson	Service of the state	Amend entry to read Office of the Parliamentary Counsel to the Government, Upr Merrion St
357	Michael D Murphy	Service of the state	Amend entry to read Office of the Parliamentary Counsel to the Government, Upr Merrion St
358	Brian O'Brien-Kenny	Service of the state	Amend entry to read Office of the Parliamentary Counsel to the Government, Upr Merrion St
358	Evelyn Robinson	Service of the state	Amend entry to read Office of the Parliamentary Counsel to the Government, Upr Merrion St
358	June Reardon	Service of the state	Amend entry to read Office of the Parliamentary Counsel to the Government, Upr Merrion St
365	John Callinan & Co Ennis	Alphabetical list of firms	Add telephone number 065 6828990 and fax number 065 6829016
365	John Callinan & Co Sixmilebridge	Alphabetical list of firms	Delete telephone number 065 6828990 and fax number 065 6829016
374	Jim Grogan	Alphabetical list of firms	Delete mobile number and add telephone number 021 4516450 & fax number 021 4516453
379	McCourt Mullane	Alphabetical list of firms	Amend telephone number from 021 4631222 to 021 4631322
394	Barry Doyle & Co	Alphabetical list of firms	Delete entry from page 394 and move to page 408 in the Dublin firm section
448	PR Hanna	Alphabetical list of firms	Delete entry from page 448 and move to page 419 in the Dublin firm section
508	Buckley Hennessey & Co	Alphabetical list of firms	Delete firm entry from the Meath section page 508 and move to page 531 in the Westmeath section
679	Kilkenny	Revenue sheriff	Amend to read Thomas Murran
780	Robert Corbet	Solicitor trademark agents	Amend firm to read Arthur Cox, Earlsfort Centre, Earlsfort Terrace, Dublin 2
783	Office of the Director of Equality Investigations	Government departments and organisations	Read as separate organisation