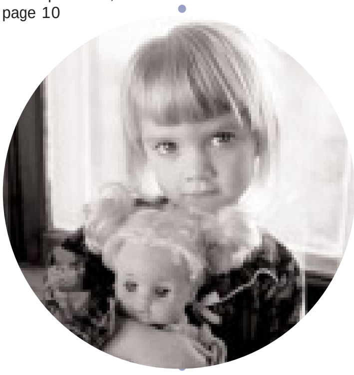
LawSociety Gazette

Regulars

COVER: Sikorsky helicopter S92, see cover story, page 10



Cover Story

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

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

Volume 96, number 4
Subscriptions: €57.15

Solicitors required for the Revenue Solicitor's Office

The Revenue Commissioners are seeking Solicitors who are interested in working in a challenging legal environment in the Revenue Solicitor's Office.

This office provides legal services to the Revenue Commissioners in relation to Tax, Customs and Excise and related matters. Those services include the conduct of Court proceedings taken by or against the Commissioners, the provision of advice on all areas of the Commissioners' responsibilities including those activities arising from the State's membership of the EU.

The work of the office is stimulating, demanding and high profile and involves advice, case work and legal representation in areas which include:

- Criminal prosecution of Revenue cases taken in the name of the Director of Public Prosecutions
- Capital Gains and Inheritance Tax: property, inheritance, domicile and trusts;
- Customs and Excise Legislation: classification, E.U. matters and excise licensing;
- Corporate taxation: insolvency and related regulatory and enforcement issues;
- Tax and Duty appeals before the Appeal Commissioners;
- Tribunals: representation at the *Moriarty* and *Flood Tribunals*;
- State representation on certain Revenue matters before the European Court of Justice;
- E-commerce developments as they impact Revenue

There are a number of posts available and a panel may be established from which future vacancies may be filled. All these Dublin based posts are permanent and pensionable.

Applications from Solicitors with experience of criminal litigation or who hold a Diploma in European Law would be especially welcome to fill current vacancies.

Essential: Applicants must be admitted and enrolled as a Solicitor in the State or have applied to be enrolled as a solicitor in the State by 29th March 2002.

Salary Scale: €24,836 - €58,760 (full PRSI)

(Entry at a point above the minimum up to €38,691 is possible for appointees with suitable experience.)

Closing date: 9th May 2002

If you require additional information on these vacancies please feel free to contact Finbarr O' Leary, Manpower Planning and Recruitment Unit, phone: (01) 6748331 or (01) 7024218 or visit our website: www.revenue.ie.

For application forms and further details contact: Maria/Caroline at 8787564/8787563

Office of the Civil Service and Local Appointments Commissioners

Revenue

Historic day for the profession

I have never been entirely sure what a 'curate's egg' is, but I'm reasonably confident that the news this month resembles one. Let's start with the good news. The Oireachtas has finally passed the *Courts and Court Officers Act* and the *Solicitors (Amendment) Act*. Both of these pieces of legislation are vital to the solicitors' profession, albeit for vastly different reasons.

The *Courts and Court Officers Act* finally gives us parity of esteem, if I may borrow a phrase, in terms of judicial appointments. Suitably qualified and experienced solicitors will now be eligible to become judges of the High and Supreme Courts. As the largest branch of the legal profession, we have fought long and hard for that right. In this regard, I would particularly like to pay tribute to our colleagues Ernest Cantillon, Geraldine Clarke and Ken Murphy for their unstinting efforts in pointing out the justice of our position that 80% of lawyers should not be excluded from such appointments. I can think of any number of my solicitor colleagues who can – and, I hope, will – make fine judges in the superior courts.

You may also have seen the recent notices that appeared in national newspapers and on the Law Society's website advertising three vacancies on the High Court bench and seeking applications from both solicitors and barristers. This is indeed a historic day, not just for the profession but for the justice system as a whole. The closing date for applications is 17 May, so perhaps the day when we see solicitors sitting as High Court judges is closer than we thought.

Correcting the mistakes

The society also enthusiastically supported the passage of the *Solicitors (Amendment) Act*, not least because it contains the long overdue ban on 'personal injury advertising' by solicitors. As you are well aware, advertising was forced on a reluctant solicitors' profession back in 1994, and this act goes some way to correcting that mistake. The Registrar's Committee of the Law Society is currently drafting the new advertising regulations and these will be available in the very near future.

Now for the bad news. I have no doubt that you were all as bemused as I was by the media feeding frenzy that followed publication of the Motor Insurance Advisory Board Report last month. Despite the fact that the overwhelming majority of the report's recommendations concerned business practices in the insurance industry, the legal profession still received a drubbing in the media. But let me remind you: the report found that Irish insurers make ten times the profits of their UK counterparts. Think about that – ten times the actual profits. Then consider that only one or two firms have a near monopoly on the motor insurance business in Ireland. Now, doesn't it seem extraordinary that the blame for high motor insurance premiums should be laid at our door?

The Law Society has taken a good deal of public criticism for our decision not to make a submission to the MIAB task force. We believed that insurance costs were an internal matter for the insurance industry, just as the costs of dentistry or brain surgery are a matter for the medical professions. So we find it difficult to accept the level of critiscism. But so be it.

'This is indeed a historic day, not just for the profession but the justice system as a whole'

Citizens' access to justice

We welcome the vast majority of the report's 67 recommendations, but we do take issue with a very small number of the proposals, particularly those relating to citizens' access to justice and the creation of a Personal Injuries Assessment Board, which, we believe, could inhibit victims' rights to fair and speedy compensation. I am also unconvinced by the assertion that legal fees add an extra 40% to the cost of compensation awards. For example, what about the 21% VAT on professional services? Has that been included in anybody's calculations?

I'm not pretending that everything is rosy in the garden or that the system is perfect. Far from it. The Law Society is in the reform business, and we are working on ways in which litigation costs can be contained or lowered. We will continue to develop those ideas and publicise them when we are ready. In the meantime, as a profession we all have a responsibility to be – and be seen to be – above reproach in the way that we handle not just our clients' affairs but our whole approach to the litigation process.

Elma Lynch,
President.

Society wants 'one of the three new appointments'

JUDICIAL APPOINTMENT STATISTICS RELEASED

The government appointed 35 judges over the course of the last Dáil, of which only 15 were solicitors. The information was released in reply to a parliamentary question put down by Deputy Alan Shatter. In his written answer, justice minister John O'Donoghue said that three barristers were appointed to the Supreme Court, 11 barristers to the High Court, five barristers and two solicitors to the Circuit Court, and 13 solicitors and one barrister to the District Court.

MCELLIN JOINS LAND REGISTRY BOARDS

Immediate past-president of the Law Society, Ward McEllin, has been appointed to the board of directors of the Land Registry and Registry of Deeds by outgoing justice minister John O'Donoghue. The minister said McEllin would be joining the board 'as the move to commercial semi-state status becomes imminent'.

For the first time in the history of the profession, solicitors are now eligible to be appointed judges of the High and Supreme Courts. Until now only barristers could be appointed, but this was changed by the passing of the *Courts and Court Officers Act, 2002*.

Late last month, advertisements were published in the national newspapers inviting applications from suitably qualified barristers and, for the first time, solicitors for three new positions as judges of the High Court. Approximately 80% of practising lawyers in Ireland are solicitors and 20% are barristers. The Law Society had frequently described the ineligibility of solicitors for senior judicial office as 'a relic of history which was contrary to the public interest'.

Commenting on the historic development, Law Society Director General Ken Murphy said: 'This is something for which the Law Society has campaigned for decades. It is clearly in the public interest that the judiciary be drawn from the widest pool of suitably qualified legal talent. Many solicitors would have the legal knowledge, temperament and other personal characteristics to be excellent judges of the High and Supreme Courts. We hope that at least one of the three new appointments will be a solicitor'.

Historic day for the solicitors' profession

PAY AND FILE TAX SEMINARS

The Revenue Commissioners are hosting a series of seminars around the country to highlight the recent changes to the self-employed pay & file tax regime. Each seminar will start at 7pm and include a question and answer session and workshops on the Revenue On-Line System. Forthcoming seminars include: 8 May, South Court Hotel, Limerick; 14 May, Southern Hotel, Sligo; 15 May, Haydens Hotel, Ballinasloe, Galway; 21 May, Gresham Hotel, Dublin; and 28 May, Hibernian Hotel, Mallow, Cork. For more information, e-mail to cgcomms@revenue.ie.

ONE TO WATCH: NEW LEGISLATION

Solicitors (Amendment) Act, 2002

The *Solicitors (Amendment) Bill, 1998* was passed by the Dáil with amendments on 28 March 2002. As it had been a Seanad bill (first introduced in the Seanad in 1998, and passed by the Seanad on 22 October 1998), it had to go back to the Seanad so that the amendments made by the Dáil on 28 March could be passed. It was passed by the Seanad, without any further amendment, on 4 April 2001. It was subsequently signed by the president (that is, enacted) on 13 April 2002 – act no 19 of 2002. Only one section dealing with the *Establishment directive*, section 20, comes into effect immediately. No commencement dates for the other sections have been set as yet.

Most of the bill consists of amendments to previous legislation, to extend or refine powers and procedures. This should be borne in mind in the summary which follows. In highlighting what is new, I have not given a detailed representation of the overall powers, procedures and concerns of the existing legislation.

The wholly new provisions appear towards the end of the act:

- Section 18 introduces a new power for the High Court on the application of the Law Society. If a solicitor or any other person has contravened, is contravening or is likely to contravene any provision of the *Solicitors Acts, 1954 to 2002*, or any regulations, the court may by order prohibit this. This provision will enable the society to seek an injunction against solicitors who are in breach of the acts or regulations, for example, by practising without a current practising certificate
- Section 19 gives power to the Law Society to apply to the Disciplinary Tribunal to hold an inquiry into alleged misconduct by an apprentice, and the section sets out the procedure to be followed
- Section 20 implements the *Establishment directive* (98/5/EC) and any corresponding measure and provides that regulations may be made in relation to compensation fund contributions, professional indemnity insurance, professional practice conduct and discipline
- Section 21 provides that a report of a case by a solicitor shall have the same authority as if made by a barrister. This removes any doubt as to whether solicitors can produce official reports of court cases.

The other sections deal with amendments to existing legislation:

- Section 2 extends the conditions under which the society can refuse to grant a practising certificate or can attach conditions to it. Now, in addition to 'all the circumstances, including the financial state of his practice', the new paragraph (q) includes the number and nature of complaints made to the society, either alleging misconduct by the solicitor or under section 8 or 9 of the 1994 act (inadequate professional services, excessive fees) within the preceding two years, or the need adequately to protect or secure the interests of the solicitor's clients.
- Section 3 inserts a new sub-section in relation to the power of an authorised person to inspect a solicitor's accounts, make copies and have access to bank statements. The previous sub-section (11) required the inspector to inform the solicitor or clerk or servant of the solicitor of the purpose of his attendance. The new version excepts this requirement where the society reasonably considers that to do so would prejudice the exercise of any of the society's functions
- Section 4 deals with advertising.

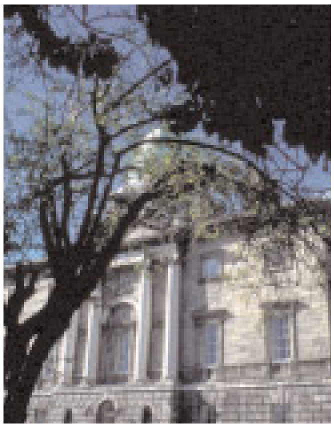
Society helps with competition study

The Law Society has made a major 220-page submission to the Competition Authority in a comprehensive response to the 74 specific questions in the questionnaire, which the authority has given to all seven of the professions that it is studying. It is planned that the text of the society's submission will be available on the society's website shortly.

According to director general Ken Murphy, the Law Society welcomes the authority's decision to study the provision of certain professional services, saying: 'It is right and in the public interest that the provision of such services be reviewed from time to time to ensure that any inherent restrictions on competition result in consumer benefits and are proportionate to such benefits'. He added that 'the society believes it has a good story to tell on the competition issue and is pleased to have the opportunity to tell it'.

Among the key points made and explained in detail in the society's submission are:

- It is a vital role of the lawyer in any democratic society to interpose and mediate between the enormous powers of the state and the relative weakness of the individual citizen
- Competition law clearly applies to any restrictions within the solicitors' profession. Nevertheless, the European Court of Justice has recently held in the *NOVA* case that even a regulation inherently restrictive of competition may be justified where it is 'necessary for the proper practice of the legal profession'
- There are no artificial barriers to entry to the solicitors' profession in Ireland. There are no quotas
- There are no Law Society recommended standard or scale fees to which the solicitors' profession works.



Law Society: has a good story to tell

Fees are for negotiation between solicitors and their clients, subject, in cases of dispute, to independent determination by the taxing master or county registrar

- People who are not solicitors can and do advise on Irish legal matters
- There are no restrictions on advertising beyond what is required by law to meet commonly-accepted principles
- Every practising solicitor contributes to a statutory compensation fund with current reserves of €27.5 million and must maintain professional indemnity insurance to protect the public against negligence
- Certain areas are reserved to solicitors by the *Solicitors Acts* – primarily the preparation of legal documents for reward in the areas of conveyancing and probate – for reasons of consumer protection and to avoid any conflicts of interest
- There is active and vibrant competition in the market for legal services in Ireland.

A Law Society working group put an enormous effort into the preparation of this 220-page submission, with the assistance of competition experts from A&L Goodbody and London-based Europe Economics.

The existing prohibitions on solicitors' advertising are preserved (bringing the profession into disrepute, in bad taste and so on) but, in addition, advertisements for personal injury claims and any encouragement to take them is prohibited. Sub-section (3) sets out the only information which may be included in an advertisement, and 'personal injuries' may be included in a list of legal services offered. The society is empowered to make regulations with the consent of the minister to give effect to these sub-sections

- Section 5 prohibits certain advertisements by non-solicitors, including 'advertisements which expressly or impliedly undertake to provide a specified service, being a service of a legal nature that could otherwise be provided by a solicitor, for or in expectation of a fee, gain or reward that is directly related to the provision of that service', and personal injury claims advertising. A three-month adjustment period is provided for the application of the advertising provisions after their commencement (section 6)
- Section 7 adds to the definition of 'misconduct' to include (a) having any direct or indirect connection with an unqualified person who has drawn up or prepared certain legal documents or who seeks to provide other legal services, or (b) accepting instructions to provide legal services to such a person
- Section 8 concerns the composition of the Disciplinary Tribunal. The numbers appointed are doubled to 20 practitioners and ten lay people, and members may be re-appointed for one additional period of up to five years. The members of each class are to be at least 40% men and 40% women. Payment of expenses may be on the basis of actual expenses, or on the basis of an agreed annual sum to cover expenses
- Section 9 expands the section dealing with inquiries by the Disciplinary Tribunal. For the future, the society is to be informed if any application in relation to a solicitor is made to the tribunal. The tribunal must make a finding in respect of each allegation of misconduct. On completion of the inquiry, the tribunal must make a report to the High Court, including a verbatim note of the evidence given and submissions made. The report is to contain details of the case, the evidence and so on, and, if there has been misconduct, an opinion as to the fitness of the respondent solicitor to be a member of the profession and its recommendations as to the appropriate sanction. The sum which the tribunal may order to be paid to the compensation fund is increased from £5,000 to €15,000, and the tribunal may take into account any previous finding of misconduct made by it or by the High Court. Appeals lie to the High Court, and may be taken by the society or an applicant against a finding by the tribunal that there is no *prima facie* case for inquiry into a solicitor's conduct or against a finding that there has been no misconduct, as well as being taken by a respondent
- Section 10 requires the High Court, in determining any sanction against a solicitor, to take into account any previous finding of misconduct by the tribunal or the court
- Section 11 empowers the tribunal to require submissions in writing of an outline of evidence expected to be given by witnesses. If the tribunal forms the view that one or more witnesses may not add anything material to the evidence, it may inform the party concerned, and draw their attention to the

RETIREMENT TRUST SCHEME
Unit prices: 1 April 2002
Managed fund: 470.057c
All-equity fund: 130.482c
Cash fund: 242.504c
Pension protector fund: –

NEW INTERNATIONAL LAW GROUP FORMED

A new organisation has been formed to promote the study and understanding of international law in Ireland. The Irish Society of International Law will be holding lectures and seminars on international law issues, starting with a public lecture on the International Criminal Court by Professor William Schabas of NUI Galway's Centre for Human Rights on Thursday 16 May at 7.30pm in the Law Society's Education Centre in Blackhall Place. The lecture is followed by a reception and all are welcome to attend. The group will also be developing a website and will be producing a quarterly newsletter. For more information, contact Jonathan Tomkin or Colm Fahy at ISIL@justice.com.

Major study on women in the law launched

Researchers working on the first major study of women in the law in Ireland will be sending out questionnaires to a random sample of 3,000 members of the profession in the coming months. The study, which is supported by the Law Society and the Bar Council and funded by the Department of Justice, is being co-ordinated by Trinity College law professor Ivana Bacik and law lecturer Cathryn Costello. The ultimate aim of the project is to develop a set of recommendations to advance the position of women in the law, including those in legal education and academia, the legal professions, employed lawyers and judges. The researchers claim that even the most basic historical gender data is difficult to locate or is non-existent. The project hopes to fill the knowledge gap that currently exists.

The questionnaire, entitled *Careers in the law*, will be processed anonymously, and aims to provide a snapshot of career choices, progression and mobility, and the 'gendered experience' of lawyers. It will also deal with topics such as the reconciliation of working and family life, career changes and attitudes to women lawyers.

Based on the responses to the questionnaires and other sources (including a series of interviews and regional focus groups), a report of the findings will be published, together with recommendations to redress any problems revealed. This publication will be sent to legal professional bodies, universities, career guidance bodies, government departments and other organisations.

For more information about the project, contact TCD's law school at womeninlaw@tcd.ie or visit the website www.tcd.ie/Law/womeninlaw.html.

Taxing master imposes costs penalty

Practitioners should note that on taxation of costs in the case of *John Casey v Mid Cork Electrical Limited and Others* (High Court, 1998, no 2387P, taxing master Charles Moran, 23 May 2001), the taxing master accepted the defendants' submission that a doctor witness who had prepared a report and attended court on behalf of the plaintiff should not be allowed his court attendance fees on a party-and-party basis because his name had not appeared in the schedule furnished to the defendants in compliance with SI 391 of 1998. Objections were brought in to the disallowance, including written submissions on the point. At the hearing of the objections, the taxing master confirmed his original ruling. The matter was not appealed to the High Court.

Patricia Lord, solicitor

tribunal's power to order payment by that party to an unnecessary witness of up to €10,000 in respect of the witness's avoidable expense. Where the tribunal decides to make such an order, the relevant party must be informed that this is contemplated, and the tribunal must consider any representations in writing. An appeal lies to the High Court within 21 days

- Section 12 clarifies that complaints made to or received by the society may include complaints made by the registrar of solicitors
- Section 13 creates a new section 10A in the 1994 act, which concerns obstruction of the investigation of a complaint. It gives the society power to apply to the High Court to seek an order compelling a response to correspondence or attendance at a meeting. An order may also censure the solicitor, and require payment of a money penalty and provide for 'such matters of a consequential nature as the court considers appropriate'
- Section 14 substitutes a new section 12 in the 1994 act, entitled *Contribution by solicitor*. If the society upholds a complaint of inadequate professional services or excessive charges, it may require payment by the solicitor of up to €3,000 by way of contribution towards the costs of the investigation. If the society has made a determination that the solicitor did not respond appropriately in a timely manner or at all to a written request by the society and the society incurred costs as a consequence, the solicitor may be required to pay up to €3,000 towards these costs. This applies to allegations of misconduct also. In each of these circumstances, the society may also issue a reprimand to the solicitor, and so notify the complainant
- Section 15 extends the society's power to attend, with or without notice, at the place of business of a solicitor and to require the production of documents, to circumstances where it is investigating (a) complaints of inadequate professional services or excessive charges or (b) the capacity of a solicitor to protect or secure his clients' interests. Again, the requirement to inform the solicitor of the purpose of the attendance is not necessary if the society reasonably considers that to do so could prejudice the investigation
- Section 16 increases the maximum amount payable from the compensation fund to a solicitor's client by way of compensation for loss due to dishonesty from £350,000 to €700,000. The minimum amount required to be held in the compensation fund is also increased from £1 million to €2 million
- Section 17 concerns publication of the outcome of a disciplinary inquiry. The society is empowered to publish orders made by the tribunal or the High Court, or notices of the making of such orders and their effects, together with a summary of the reports, in such a manner as the society thinks fit, subject to a waiting period and appeal, if any.
- Section 22 amends maximum fines provided for in the *Solicitors Acts*, increasing them and converting them to euros. Sums of £1,500 are increased to €3,000 and sums of £10,000 are increased to €30,000, and in one case (a body corporate saying or implying it is qualified to act as a solicitor, section 64 of the 1954 act) the increase is from £100 and £25 to €3,000.

A new compendium of the *Solicitors Acts* will be prepared in the coming months. G

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

No jurisdiction changes for now

The *Courts and Court Officers Act*, which became law in mid-April, provides for the increase in the jurisdiction of the Circuit Court from £30,000 (€38,000) to €100,000 and an increase in the District Court jurisdiction from £5,000 (€6,350) to €20,000, *writes Ken Murphy*. These changes will only come into operation on the making of the appropriate order or orders by the minister for justice, equality and law reform.

So when will the order or orders be made? In conversation with the Law Society on the day the bill completed its passage through the Oireachtas, minister O'Donoghue acknowledged that consultation with the unions representing the relevant courts staff would be necessary before the order could be made. In addition, he accepted that some notice should be given and that the first day of a new court term might be an appropriate commencement date.

John O'Donohue: urged not to change court jurisdictions

However, all that was before the publication of the report by the Motor Insurance Advisory Board. A key recommendation of that report, echoing the lobbying by the Insurance Industry Federation over the final few days of the bill's passage through the Oireachtas, was that the increases in jurisdiction should not be proceeded with. The analysis was that the higher jurisdictions would lead to higher awards of damages and, consequently, higher insurance premium costs.

Minister of state Noel Treacy, speaking at the launch of the MIAB report, had to make the slightly embarrassing public declaration that he was now urging his ministerial colleague John O'Donoghue not to give effect to the legislation which the government had passed through the Oireachtas only two weeks previously. Given the obvious political risks of any government measure which, it is warned, would lead to an increase in motor insurance premiums, the planned increases in jurisdiction of the Circuit and District Courts now seem unlikely to be implemented, in the near future at least.

The Law Society had argued privately and publicly that the proposed levels of increase were greatly excessive and would quickly lead to unacceptable backlogs in the Circuit and District Courts unless the resources of these courts, including judicial appointments and staffing resources, were greatly increased. Although some increases to recognise the effects of a decade of inflation since the jurisdictions were last increased in 1991 would seem sensible, the politics of motor insurance premiums may well cause paralysis on the jurisdiction issue for some considerable time to come.

Register of reserved judgments planned

One of the very desirable innovations of the *Courts and Court Officers Act, 2002*, although it awaits a ministerial order to activate it, is the provision that the Courts Service 'shall establish and maintain in the prescribed form and manner a register of every judgment reserved by the Supreme Court, the High Court, the Circuit Court and the District Court in any civil proceedings to be known as the register of reserved judgments'.

If judgment in the proceedings concerned is not delivered within the prescribed period or periods from the date on which it is reserved, the Courts Service shall list the proceedings before the judge who reserved judgment therein and give notice of the listing to the parties as well as a copy of the notice to the president of the court concerned. The judge concerned will then be obliged to fix a date not later than which the judgment must be delivered.

Ken Murphy

UCC LAW DEPARTMENT LAUNCHES NEW LLM

University College Cork's law faculty has announced a new master's degree in e-law and commercial law starting in October 2002. UCC claims that the new LLM degree will be the first with this specialisation in Ireland. Among the courses available will be e-commerce, e-law, intellectual property law, credit and security law, mergers and acquisitions law, and competition law. Details of the postgraduate programmes available can be obtained from the UCC law faculty on tel: 021 490 3249 or e-mail: lawfac@ucc.ie.

Postcard from the past

At a general meeting of the Council specially summoned on Friday 17 January 1868, the Council passed the following resolution:

'That an Address be presented to Her Most Gracious Majesty the Queen expressive of our abhorrence and detestation of Fenianism and our determination to support in every legitimate way, in our power, the efforts of Her Majesty's Government to suppress and exterminate this foolish and wicked Conspiracy.'

At the Council meeting on Wednesday 29 January 1868, the following letter from The Right Honorable Gathorne Hardy MP was ordered to be entered on the minutes:

'Sir,

I have had the honor to lay before the Queen the loyal and dutiful Address of the Attorneys and Solicitors of Ireland with reference to the Conspiracy called Fenianism.

And I have to inform you that Her Majesty was pleased to receive the Address very graciously.

I am Sir,

Your obedient servant

Gathorne Hardy'

Extracted from the *Minute Book of The Incorporated Society of the Attorneys & Solicitors of Ireland* – 1864-1869

Statistics and propaganda

A media war erupted in the wake of the recent publication of the Motor Insurance Advisory Board (MIAB) report. Ken Murphy surveys the battlefield

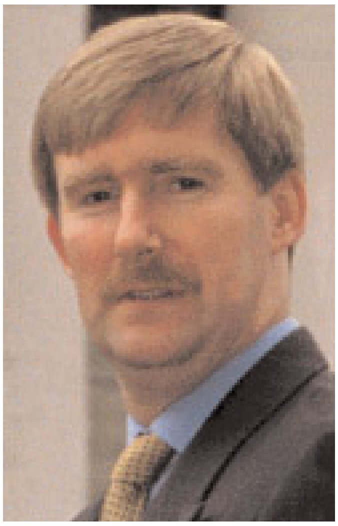
The media storm that erupted and blew for days following the publication on 17 April of the report of the Motor Insurance Advisory Board at times drowned out attempts by the Law Society to communicate its views.

Those who were prepared to listen heard the society welcome this report. Of the 67 specific recommendations made by the report, there were perhaps only three or four in respect of which the society would have reservations because of their potential impact on victims. All of the rest we enthusiastically endorse.

Contrary to what was asserted on the radio by the chairperson of the MIAB, Dorothea Dowling, the Law Society has stated publicly on numerous occasions over the years that the personal injury compensation system in Ireland is far from perfect and is overdue for reform. We have said repeatedly and publicly that we would welcome any fair and sensible proposals to improve the current system. For over a year, the society has had in place a working group, comprising many of the top litigation practitioners in the country, studying the problems of the existing system, the systems of other countries and the reforms that would be desirable here.

Spinning out of control

In the spinning of the MIAB report, much play was made of the assertion that, as it is often falsely asserted, '40 cents out of every euro in compensation is accounted for by legal costs'. Of course, this is not true even on the basis of what is asserted in the MIAB report. The 40% figure is generated by the insurance industry, and the Law Society is not in a position to check the data which allegedly underpins it. However, to the extent that it is correct, it needs to be analysed in the terms in which its presented, namely that it represents the costs not just of solicitors and barristers but of all experts, such as doctors, engineers, accountants, actuaries and so on, on both sides of the case – not just one side of the case – plus 21% VAT.



Ken Murphy: 'the only voices not heard were the victims' voices'

Statistics that don't fit

We are constantly told that this 40% figure, representing the alleged ratio of litigation costs to the amounts paid to claimants, is highly significant. Figures which purport to show unfavourable comparisons between the motor insurance and personal injury compensation systems in Ireland and the UK abound in the MIAB report. However, the extent to which the 40% figure is used for propaganda purposes is illustrated by the fact that its equivalent UK figure is no less than 107%. This latter figure doesn't appear to accord with the slant that the MIAB likes to put on statistics, so it is quietly disregarded.

Of course, the 40% figure is not new. That figure, or one close to it, has been bouncing around for years. The one truly new 'headline' figure to emerge from the MIAB report was that, on the Insurance Industry Federation's own calculation, between 1983 and 1999, the total profits of Irish motor insurers amounted to IR£342 million compared to stg£30 million in the UK. The media reported that the Irish insurance industry was ten times more profitable than its UK counterpart over the period in question. Given that the Irish profit was generated on premium income that could only have been a tiny fraction of that of UK insurers, however, its true level of profitability must be vastly greater than ten times the UK industry.

Squeals of pain

With increasing frequency over the last year or two, we have heard very justified squeals of pain from business lobbies and individual premium payers reporting annual increases in insurance premiums of the order of 20, 50 or even 100%. The insurance industry has made a valiant attempt to suggest that the reason for the very high insurance premiums in Ireland is the level of 'legal costs' associated with claims. But, of course, this does not in any way justify or explain the extraordinary escalation in premiums in the last couple of years. 'Legal costs' have not increased to any significant extent, if at all. So how can the rocketing premiums be explained? Clearly premium levels are being driven by something other than 'legal costs'. Has it simply been an all-time record few years for ripping-off the premium-paying public?

The insurance industry and the legal profession are constantly described by the media as 'vested interests' to whom transparency and accountability must be applied in large dollops. But are we the only vested interests using statistics for propaganda purposes in recent times?

What of the Motor Insurance Advisory Board itself? Surely that should also be viewed as a vested interest when its composition is considered in the interests of transparency. In addition to its chairman, Dorothea Dowling, whose full-time job is as group liability manager of CIE, the overwhelming majority of members of the board are either associated in some way or other with the insurance industry or are representatives of potential defendants or defence interests in personal injury claims.

Undeniably, the MIAB won the statistical propaganda battle hands-down in the days following publication of its report. Powerful and well-funded vested interests clashed, but the MIAB had the best story to tell – the 'you have been ripped-off' story that the public wanted to hear and that played perfectly in the media.

The only vested interest whose voice was not heard, and never is heard because it has no organised and well-funded voice to defend its interests, was the voice of the victims of accidents. G

Ken Murphy is the director general of the Law Society.

Letters

Leading question from the Bar Council

From: Jerry Carroll, director, The Bar Council

I refer to the issue of the *Law Society Gazette* of April 2002 and, specifically, an article (on page 3) entitled *No ban on joint advocacy with solicitors, says the Bar*.

The Bar Council wishes to bring to your attention that the article does not accurately reflect the submission and observation of the Bar Council to the Select Committee on Justice, Equality, Defence and Women's Rights. In the course of its presentation, the chairman of the Bar Council, Rory Brady SC, made it plain that there is no restriction in the code of conduct of the Bar and there is no practice that prevents a solicitor and a counsel exercising jointly their rights of advocacy before the courts. In fact, it was pointed out to the select committee that the concurrent exercise of rights of audience has already occurred in a number of cases, including cases before the European Court.

However, at no stage did any representative of the Bar Council state that junior counsel could appear with a solicitor acting as 'lead advocate'.

As you are probably aware, part of the background to the appearance of both the Law Society and the Bar Council before the select committee included an exchange of correspondence with Deputy Alan Shatter. The position of the Bar Council is set out clearly and unequivocally in that correspondence. The Bar Council does not and did not resile from its position that it could see no basis for recognising Deputy Shatter (or indeed any other solicitor) as, in substance, a senior counsel and thus he could not lead junior counsel. If there is any doubt about the Bar Council's position, we have no objection to the entire of the correspondence with Deputy Shatter being published in the *Law Society Gazette* and this will make it clear what our position is and was at all times.

Unfortunately, the quotation from Rory Brady in your article is clearly out of context. The question that precedes the passage in your article that


No ban on joint advocacy with solicitors, says the Bar

quotes Rory Brady was cast solely in the context of junior counsel acting 'jointly with solicitors as advocates' and not in the context of junior counsel appearing with a solicitor acting as lead advocate. Our position could not have been more clearly stated in the correspondence that was available to all of the members of the select committee and Law Society.

Finally, the Bar Council notes that it would appear that, while the Law Society is opposed to fusion of the professions, some members of the solicitors' branch of the profession aspire to a fused legal profession. That fusion is not in the public interest. G

DUMB AND DUMBER

From: David A Tarrant, Tarrant & Tarrant, Solicitors, Arklow

My late father, Cyril D Tarrant, was once defending a client in Gorey District Court on two charges: a) driving a motor bike without an audible warning device (in other words, a horn) and b) driving the same vehicle without a silencer. He argued before Judge Sean McGee that 'one summons cancelled out the other, because you could hear him coming for miles'.

From: Seosamh O'Daimhin, Patrick MacGrath and Son, Co Tipperary

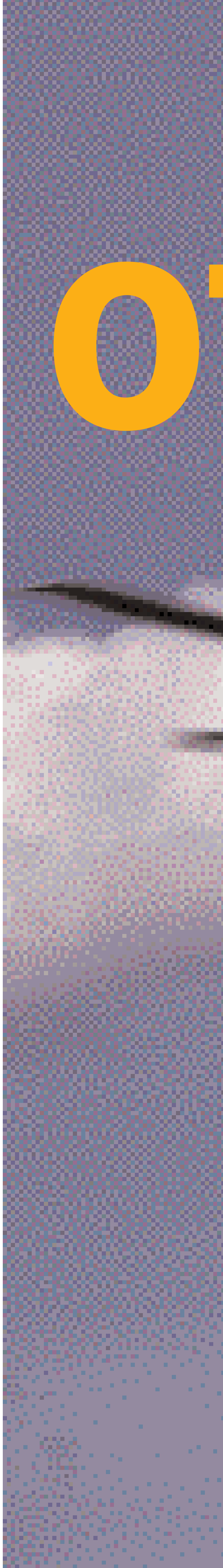
I recently came across this tale of a miscreant and a hapless police officer which comes from the Australian state where drinking and driving is considered a sport, Queensland: A routine police patrol parked outside a local neighbourhood tavern. Late in the evening, the officer noticed a man leaving the bar so intoxicated that he could barely walk. The man stumbled around the car park for a few minutes, with the officer quietly observing. After what seemed an eternity and trying his keys on five vehicles, the man managed to find his car, which he fell into. He was there for a few minutes as a number of other patrons left the bar and drove off. Finally, he started the car, switched the wipers on and off (it was a fine, dry night), flicked the indicators on and off, tooted the horn and then switched on the lights. He moved the vehicle forward a few inches, reversed a little and then remained stationary for a few more minutes as more patrons left in their vehicles. At last, he pulled out of the car park and started to drive slowly down the road. The police officer, having patiently waited all this time, now started up the patrol car, put on the flashing lights, promptly pulled the man over and carried out a breathalyser test. To his amazement, the breathalyser indicated no evidence of the man having consumed alcohol at all! Dumbfounded, the officer said: 'I'll have to ask you to accompany me to the police station. This breathalyser equipment must be broken'. 'I doubt it,' replied the man. 'Tonight, I'm the designated decoy'.

From: Peter Duff, Peter Duff & Co, Blackrock, County Dublin

Letter addressed to my late client, 'Mr Bloggs':
'Dear Mr Bloggs Decd,
The following is a valuation of the above investment based on the bid price at 8 April 2002 as requested ... I trust this is to your satisfaction. Please read the important note overleaf and do not hesitate to contact us should you have any queries.
Yours sincerely,
EBS Asset Managers Ltd'.

Seosamh O'Daimhin wins the bottle of champagne this month.

Flight o



Public procurement is always big business, and never more so than now. But one recent controversy involving the Department of Defence and a number of helicopter manufacturers shows how vital it is that the state is seen to be above reproach when it's doing business. Barry O'Halloran reports

The state is one of the biggest and best customers in any developed economy. Its buying power is measured in the billions – and thanks to us taxpayers, it's got a guaranteed income backed up by the force of law. It's got almost unlimited borrowing power and has a near insatiable appetite for a huge range of goods and services.

Best of all, as long as you don't live under the permanent threat of military coups or economic collapse, it's a safe bet that the state will be there to pay its bill when the job is done. So it follows that public procurement (where the state or public bodies seek goods or services from the private sector) is big business.

And this country looks like a very profitable customer right now. Since the National Development Plan (NDP) was published in late 1999, the government has been issuing tenders for a huge range of infrastructure projects. The plan was originally valued at €51 billion, but, according to some estimates, construction inflation since then could mean it will cost as much as €75 billion. Individual projects are valued in the hundreds of millions of euro. For example, the Kilcock-Kinnegad stretch of the Dublin-Galway motorway will cost €274 million, the Waterford by-pass €152 million.

The plan is on top of the state's other requirements, which stretch to anything from stationery to ships. The Department of Defence is negotiating the purchase of two naval vessels at an estimated cost of €25 million each. But public bodies do not just seek goods; they also need services of various kinds. For example, the Department of the Taoiseach spent over €2 million on legal advice each year in 1999, 2000 and 2001. By last month, its bill for this year had reached €511,000.

Foreign exchange

With the market here boosted by the on-going investment in infrastructure, there is plenty of interest from abroad. Turkish giant, Gama Construction, has been chosen to build the Ballincollig part of a network of new road developments around Cork city. British engineering specialist Carillion (formerly part of Tarmac), Spanish road-builder Dragados and French company Vinci have all made serious bids for Irish road projects. Belgian company Alstom has won the contract to build Luas trams, while US giant Bechtel and Japanese engineering multinational Mitsui have formally expressed interest in rail projects such as the proposed metro network in Dublin.

The multi-million euro works and supply projects all attract the interest of big players from abroad, largely because they are the only ones with the capacity to deliver. For example, the name Alstom is going to become very familiar to anyone who follows the business media, as this is one of the few rail construction and development specialists in Europe and is likely to bid for any sizeable project here.

Last year, the Department of Public Enterprise got over 100 replies to a market-testing document it issued as part of its plans to develop an €8 billion high-capacity rail network linking Dublin Airport,

f fancy

MAIN POINTS

- Public procurement is booming thanks to the National Development Plan
- EU tendering procedures explained
- Court action over government's Sikorsky helicopter contract

the city centre, and outlying areas of Shankill, Tallaght and Clondalkin. Of that 100, around 30 were thought to be viable players, while only six or so were regarded as being capable of leading consortia.

None of the lead players were from this country, although this would not rule out Irish companies from having reasonably prominent and profitable roles in the development if and when it gets going. The global players frequently form or lead consortia made up of a number of operators with different fields of specialisation. The groups often include one or two Irish partners.

The consortia allow the members to share expertise, giving them different elements of each project to handle. More importantly, this allows consortium members to spread the cost and risk involved in each project. Simply putting together a design-and-build proposal for a rail network or motorway can cost a seven-figure sum. This money is spent before the business or businesses involved are sure that they have the job in the first place.

Large-scale road and rail projects are likely to be operated as public/private partnerships (PPP). This is simply a system for getting the private sector to carry some of the cost of developing and operating public services. The deal is that the state saves some of our money, while the businesses involved make a profit, either through running the service and getting paid, getting the state to pay them directly, or a combination.

We have yet to see a fully-fledged PPP in this country, as most of the likely candidate projects are still in their early stages. Typically, it is thought that the companies involved would be paid to design and build rail networks or motorways, for example. Once they are completed, the private-sector partner will, in theory, run them, charging the public fares for carrying them on rail networks and tolls for allowing them to use the relevant stretches of motorway. After a period of time, they would then be handed back to the state.

Minister for Defence Michael Smith

Whatever shape these projects finally take, getting involved in the public procurement market often means dealing in sums that look like long distance phone numbers for some very obscure corner of the world. It follows that the key players, who often pack a lot of financial clout, put a great deal of effort and money into succeeding in this market. In short, there is a lot at stake.

The law governing this area is entirely the work of the EU. Four directives make up the main body of the legislation. There are a number of other directives dealing with remedies or which amend the original statutes. They have all been transposed into Irish law by statutory instruments. The SIs merely state that the directives have been transposed into our law.

The four main directives are:

- *The public supplies directive* (council directive 93/36/EEC), which outlines the law covering the supply of goods to public bodies
- *The public works directive* (council directive 93/37/EEC), which outlines the law covering the construction of infrastructure, public buildings and facilities, and so on
- *The public services directive* (council directive 92/50/EEC), which outlines the law dealing with the supply of services
- *The public utilities directive* (council directive 93/38/EEC), which deals with utilities operating in the water, energy and transport sectors.

According to solicitor Patrick McGovern, these are binding on all public bodies and utilities. 'Typically this means utilities or other entities with special or exclusive rights, whether they are privately or publicly owned', he says.

The first thing that any public body has to do, if it is entering the public procurement process, is advertise in the official journal of the European Union. The notices must outline what is required, giving the relevant technical or other specifications, if they apply. At this stage, you can safely assume that a high number of these ads originate in this country, but no-one seems to be monitoring who is doing most of the procuring.

'I could not give a *quantum* on who is doing the most procuring', McGovern says. 'There is a definite flow of notices coming through. Government ministers and semi-states are all doing a lot of public procurement. At the same time, there is a very heightened awareness of the whole area in all sectors because of the National Development Plan'.

Love me tender

There are three kinds of tendering systems used under EU law. The first is open tendering. This is a basic approach, where the organisation advertises for someone to supply what it is looking for, leaving it open to anyone who wishes to make an offer. The candidate is then chosen on the basis of whoever is offering best value for money.

The second is restrictive tendering. This is where a limited number of suppliers are invited to make an offer. A preliminary or pre-qualification round that allows the organisation to look around at what is available and draw up a shortlist of viable candidates precedes this. The candidates are then invited to make an offer, and, once again, the one offering the best value for the public's money is chosen. This system is the most popular, as it allows the organisation close control over the process. The National Roads Authority uses the system when tendering for NDP projects. The Department of Defence also took this approach when it was tendering for search-and-rescue helicopters.

Finally, there is the negotiated system. This is designed for complex areas where it may initially be difficult to determine issues such as price. The negotiations are generally followed by a best and final offer stage, where the candidates do exactly what it says on the tin and put forward their best and final offer. The decision is made on this basis.

McGovern points out that the negotiated system is used far less frequently than the other approaches. The supply directives limit the circumstances where it can be used to complex contracts where it is not possible to determine central elements. However, he says that proposed reforms, put on hold after the collapse of the Santer commission in 1999, will broaden these considerably.

'The circumstances in which you are permitted to have recourse to the negotiated procedure are thought to be too limited at this stage', he explains. 'It's inherently desirable in complex transactions, and it allows for greater competition. The draft directive recognises that fact'.

After 11 September, Minister for Defence Michael Smith asked the four candidates for the €125m search-and-rescue helicopter contract – EH Industries UK, Eurocopter, Sikorsky and CHC Scotia Scotland – to submit a best and final offer.

One commercial solicitor, who does not want to be named, agrees that this is not usually a feature of the restrictive tendering process. At the time, the minister said that he took the step because of the 'changed international situation'. Eurocopter, which sought a judicial review of the decision to award the contract to Sikorsky (for three to five of its S-92 craft), said afterwards that it cut its price by 27% in response to this move.

However, when determining who wins public contracts, it's not always the case that cheapest equals best. Public bodies have to adhere to five basic criteria when they make their decisions. They are:

- Non-discrimination
- Equality of treatment
- Transparency
- Mutual recognition (of qualifications, expertise, and so on, across national boundaries), and
- Proportionality.

Eurocopter: seeking a judicial review of the tendering decision

'The deal, and with it the nation's search-and-rescue services, are up in the air'

The first three are self-explanatory, and lawyers regard them as the most important because they are central to guaranteeing that the procedure is fair. Eurocopter believes that it was not fairly treated in the process and is seeking a judicial review of the decision. This, in theory at least, could result in the contract being overturned and given to Eurocopter.

Clear as mud?

One lawyer points out that, from Eurocopter's point of view, the procedure did not look transparent. 'Everything should be specified in the tender documents: all the relevant criteria have to be specified, the function of whatever it is that is being sought, technical criteria and any other issues that might have been taken into account. There should not be any surprises'.

But there was a surprise. Sikorsky announced that it would give €159 million worth of maintenance work to FLS at Dublin Airport. The former TEAM Aer Lingus plant is owned by the troubled Danish aircraft maintenance specialist, FLS Aerospace, which lost €15.6 million last year. Around 200 jobs are to go there, but Sikorsky's offer would create 50 if it goes ahead. Political considerations may have been involved: in a single constituency, 50 jobs can mean a lot.

These kind of offset deals can be considered in public procurement contracts, but if they are to be a factor, all parties have to be informed at the outset. Offset did not feature in the helicopter contract, and Michael Smith afterwards claimed it was never an issue, saying the contract was awarded on the merits of Sikorsky's offer.

Eurocopter is not necessarily basing its claims to the contract on the offset deal alone. In fact, its offering – the EC725 – scored slightly higher with an expert assessment group that judged each of the four aircraft on offer. There were just seven points in it (1,803 to 1,796), and Department of Defence secretary general David O'Callaghan argued that there was little to choose between the pair.

However, the minister opted for Sikorsky because it was claimed the element of Eurocopter's offer dealing with future spare parts and maintenance could have added millions of euro extra to the eventual bill. The issue is now with the courts, and the government has agreed not to proceed with Sikorsky until the judicial review process is completed. This means that the deal, and with it the nation's search-and-rescue services, are up in the air. Which, if nothing else, shows how important it is that the state gets these things right the first time. G

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

A safe dis

Last year, the *Distance selling directive* became Irish law. While this may be good news for consumers, could it be another nail in the dot.com coffin? Edward Madden looks at how distance retailers, particularly those selling on the Internet, will be affected by the new regulations

On 15 May 2001, one full year after the EU's official implementation deadline, the *Directive on distance selling* (directive 97/7/EC) finally made its way into Irish law via the *European Communities (Protection of Consumers in Respect of Contracts Made by Means of Distance Communication) Regulations 2001*. Aimed at contracts concluded without the simultaneous presence of the parties, the terms of the resulting Irish regulations are broad enough to capture the vast majority of business-to-consumer e-commerce activities and can be seen as quite an onerous piece of legislation with many disadvantages, especially for on-line trade.

To the extent that the new law imposes obligations on Internet retailers ('e-tailers') that render the inherent advantages of electronic communications as a business medium redundant (such as speed of communications and paperless contracting), it is arguable that the regulations will, in the long term, do more to discourage e-commerce enterprise than protect consumers.

The concept of 'distance contract'

Before any transaction falls within the regulation's terms, the purported agreement will have to amount to a 'distance contract'. Such contracts necessarily relate to the sale of goods or supply of services by a retailer under an organised selling structure (for example, an on-line shop). The regulation will not apply to once-off transactions as such. Additionally, the retailer must have made use exclusively of one or more methods of distance communication up to and including the moment that the contract is made. A non-exhaustive list of the means of distance communication is set out in the regulation and includes catalogues, letters, radio, television, fax, e-mail, and videotext.

The protection offered by the regulations only applies to 'consumers', who are defined as 'natural persons' who have contracted for purposes outside his or her trade, profession or business. This definition is almost identical to that contained in the *Consumer Credit Act, 1995*. It is important to note that a body corporate cannot be a consumer for the purposes of the regulations, and to this extent most business-to-business transactions won't be covered by the legislation.

Certain types of agreement are not covered by the regulations due to the existence of parallel legislation or the fact that the application of the regulations to such agreements would be unworkable. Examples are distance contracts relating to the sale or supply of financial services or 'agreements' involving vending machines or public telephones.

The regulations also refer to a second category of agreement to which the main rights concerning the provision of information, confirmation and the right

stance?

to withdraw will not apply. These contracts include:

- Agreements for the provision of 'foodstuffs, beverages, or other goods intended for everyday consumption supplied to the home, residence or workplace of the consumer by regular roundsmen' and
- Agreements for the supply of 'accommodation, transport, catering or leisure services where the supplier undertakes, when the contract is made, to provide those services on a specific date or within a specific period'.

MAIN POINTS

- **Distance contracts explained**
- **Main provisions in the regulations**
- **New obligations on the retailer**

Once an agreement falls within the terms of the regulations, a number of onerous obligations are imposed on the retailer and a number of important rights are granted to the consumer. Failure to comply with these rights and obligations is a criminal offence that carries a penalty of up to **€**3,000. The director of consumer affairs is charged with enforcing the regulations. One of the director's most far-reaching powers concerns a case where he reasonably believes that a retailer is conducting inertia selling (as explained below). In such an event, the director has the power of entry, inspection and, in some cases, seizure of documents.

The most important rights and obligations are outlined below.

The right to information

Aside from the law of contract's formality requirements, the regulations have introduced a further two preconditions to the enforceability of consumer distance contracts.

Pre-contract information. Retailers are now required 'in good time prior to making the contract' to provide the consumer with enough information to enable him to decide whether or not to proceed with the purchase (regulation 4). In effect, the required information will set out the terms of the contract to be entered into (see **panel 1** overleaf). The information must be set out in a clear and comprehensive fashion and in a manner 'which is appropriate to the means of distance communication used'.

This requirement is likely to be satisfied quite easily in the case of e-tailers trading via the web. Websites, by their nature, can be designed and created without any great difficulty. However, careful consideration will need to be given by e-tailers to the positioning and accessibility of any terms and conditions. The common practice of cloaking a link to the terms of any agreement among distracting multimedia design will only assist a court in finding that the consumer was not presented in fair manner with the requisite information before the contract was made.

Even if the information is clearly visible or accessible to the consumer, the retailer is also obliged to explain the commercial purpose of such

PANEL 1
PRE-CONTRACT INFORMATION

According to regulation 4(1), to ensure that any intended contract is enforceable, the following information must be provided to the consumer *before* the contract is made:

- The identity of the retailer. If the contract requires payment in advance, then the consumer must also be furnished with the address of the retailer
- The main characteristics of the goods or services (that is, a detailed description)
- The consideration to be paid for the goods or services (this amount must include all applicable taxes)
- If the goods need to be physically delivered, the cost of delivery of those goods
- The manner in which payment and delivery of the goods (or performance in the case of services) will take place
- If the agreement is one to which the withdrawal right applies, then the existence of this right must be brought to the consumer's attention
- If there is a cost over and above the normal basic rate for using the means of distance communication (for example, a premium rate phone call), then the cost of using that means of distance communication should be provided
- The period throughout which the terms of the offer and price shall remain valid
- If the proposed contract concerns the supply of goods or services to be performed permanently or recurrently, the minimum duration of the contract.

information (in addition to the commercial purpose of any legal terms and conditions). Consumers must be made aware that they are entering into a binding legal agreement in the clearest possible terms. The retailer must also have 'due regard to any enactment or rule of law requiring good faith in commercial transactions or governing protection of those who are unable to give their consent, such as minors'.

Requirement to confirm the transaction. Once the contract has been concluded, the retailer is obliged to furnish the consumer with a confirmation of the transaction (containing the information set out in **panel 2** below). In drafting the directive, the European Commission felt that consumers could be particularly damaged in the area of e-commerce, as electronic communications are predominantly ephemeral in nature. Hence, the confirmation must be in writing or in 'another durable medium'. Consequently, it would appear that section 12(1) of the *Electronic Commerce Act, 2000* is precluded from applying in this case. That section provides, subject to certain conditions, that where a legal requirement of writing exists, that requirement will be satisfied if the communication is in electronic form.

In practice, where goods are being physically delivered to a consumer, this requirement will be satisfied by the presentation of the confirmation enclosed with the product on delivery. The confirmation can follow at any time after the conclusion of the contract up to the delivery of the goods or the commencement of the service contracted for. Inconvenience will exist in cases where no physical delivery is to take place, such as where the consumer buys software on-line for immediate download or where the consumer signs up on-line for a subscription to a member-only website. In such cases, the retailer must still forward physical copies of a confirmation to the consumer before the agreement can be deemed enforceable. This is necessary even though the agreement was concluded, paid for and performed entirely by electronic means. This requirement appears to negate the benefit offered by the Internet in enabling the public to create contracts in a paperless environment.

A question that may arise in practice is whether a website that enables (or requests) the consumer to print a copy of the confirmation complies with the confirmation requirement. It cannot be denied that a printed page is in fact a 'durable medium'. However, as the onus to create the physical copy is placed on the computer user, it may be the case that such an activity does not satisfy the regulations.

The right to withdraw

Perhaps the right with the most far-reaching implications for all retailers is the withdrawal right of the consumer (regulations 6, 7, and 8). With certain exceptions (see **panel 3** opposite), every distance contract will contain an implied term that the consumer has a period of seven days in which to walk away. This right exists irrespective of the fact that a legally-binding agreement has been validly created in the eyes of the law. The rationale for this right was explained in the recitals to the directive as being necessary to protect the vulnerability of the consumer caused by the inability 'to see the product or ascertain the nature of the service' to be provided before the contract is concluded. This 'cooling-off' right is not unique in Irish law; a similar right exists under section 50 of the *Consumer Credit Act, 1995* in respect of most consumer credit agreements.

The seven-day period starts on the day the consumer receives the goods, or, in the case of an agreement for the supply of services, on the day the contract was formed. However, the withdrawal period may last longer than the seven-day period. If the retailer has failed to provide the consumer with a confirmation, then the cooling-off period continues in force until seven days after the retailer finally complies with the confirmation requirement. The extended cooling-off period may last up to three months.

PANEL 2
THE CONFIRMATION NEEDED

In addition to providing the consumer with information at the pre-contract stage, once the contract has been concluded, the retailer is obliged to 'confirm' the transaction by furnishing the consumer the following information in writing or 'another durable medium':

- The information listed in the first six points of panel 1
- In the case of contracts where the withdrawal right exists, information on the conditions and procedures for the exercise of this right
- The geographical address of the supplier to which the consumer can direct any complaints
- Details of any after-sales service or guarantees concerning the goods/services
- If the contract is for an unspecified duration or a duration of greater than one year, the conditions for cancellation of the contract.

Importantly, consumers have the right to cancel the contract without penalty. The only expense that may be levied on the consumer is the direct cost of returning the goods. All sums paid by the consumer must be returned and all credit arrangements entered into by or on behalf of the consumer to finance the transaction must be cancelled without charge or penalty.

Prompt performance

One of the main criticisms of on-line retailing has been the inefficiency or inability of some businesses to deal with the huge number of orders that an on-line store can produce. The lack of an efficient 'back-office' strategy has led to the demise of many dot.com retailers. A welcome feature of the regulation provides a maximum timescale within which the contract must be performed (regulation 9). Retailers are now obliged to perform the contract within 30 days from its formation. This deadline may be varied by the mutual consent of the parties, but retailers should be aware that anything in excess of 30 days could be deemed an unfair term in accordance with the *European Communities (Unfair Terms in Consumer Contracts) Regulations 1995*.

Very often a retailer may not be able to perform the contract within the time period due to lack of stock. In that case, the retailer must notify the consumer of his right to a refund. This refund must take place no later than a further 30 days after the consumer has been notified of this right (that is, within 60 days after the date of the contract). An exception to the absolute right of a consumer to a refund exists in the case of 'outdoor leisure events which by their nature cannot be rescheduled'. In such cases, if the parties have agreed in advance, a refund is not mandatory.

PANEL 3

EXCLUSIONS FROM WITHDRAWAL RIGHT

Regulation 6(4) sets out a number of instances when the withdrawal right will not apply, including:

- Where the provision of services has begun with the consumer's consent before the withdrawal period has expired
- Where the subject matter of the agreement is the supply of goods or services the price of which is dependent on fluctuations in the financial market and hence are beyond the control of the supplier
- Contracts for the supply of goods which have been made to specifications detailed by the consumer or which are clearly personalised, or any goods which by their nature cannot be returned or are liable to deteriorate or expire rapidly
- Contracts for the supply of audio or video recordings or software which were unsealed by the consumer
- Agreements for the supply of newspapers, periodicals and magazines
- Agreements for gaming and lottery services.

An additional option for a retailer who cannot perform the agreement due to unavailability of goods is the delivery of 'equivalent goods or services' to the consumer. However, the consumer must have been notified of this possibility in advance of creating the contract, and if the consumer wishes to reject such goods within the cooling-off period, it will be the retailer who is responsible for the cost of returning the goods. The regulations also provide that the delivery of equivalent goods should not be regarded as inertia selling.

Payment protection

Supporters of e-commerce generally argue that the fraudulent use of payment cards in the on-line environment is no more prevalent than in normal physical transactions. In reality, this is not the case: rough estimates of between 20% and 40% of all attempts to buy products on-line involve fraud. Advanced encryption software is available to ensure adequate security on-line, but the most secure software is often prohibitively expensive for start-up companies. Moreover, while many entities are capable of protecting the electronic communications that carry credit-card details, many businesses don't pay the necessary attention to keeping secure the computers on which customer's details are stored. The result is like locking the front door while leaving the rear entrance unguarded. The onus of creating a secure on-line shopping environment for customers' details rests with the banks, whose persistent failure in deriving a secure alternative to the use of credit cards on-line has been detrimental to the on-line business community. In most cases of on-line fraud, it will be the retailer who is responsible for the costs.

The regulations further safeguard the consumer's position by providing that consumers are now entitled to request a cancellation of any payment on their credit, debit, charge or store card if it has been fraudulently used. Furthermore, the consumer will be entitled to have any sums charged re-credited or sums paid returned. Unfortunately, it is unclear who will be made responsible for the actual loss to the consumer. Without an indication as to who will be responsible for re-crediting the cards or returning payment in the event of fraud, it is likely that retailers will remain responsible. This is unlike the position in the UK, where the *Consumer Protection (Distance Selling) Regulations 2000* provide that, in the event of fraud, it will be the card issuer who will be responsible.

Banning inertia selling

Inertia selling is the name given to the delivery of unsolicited goods or services to a consumer coupled with a demand for payment. Under normal contract law principles, such contracts are in any event

unenforceable against a consumer. A welcome element of the regulation is to make it an offence for a person acting in the course of trade to demand payment, without reasonable cause, for what he knows to be unsolicited goods or services (regulation 11). It is also an offence for a retailer seeking payment for unsolicited goods or services to:

- Threaten to bring legal proceedings against the consumer to recover payment
- Place the name of the consumer on a debtors list or the like, or threaten to do so, or
- Invoke or cause to be invoked a collection procedure, or threaten to do so.

International problems

One of the most difficult and worrying aspects of any consumer contract involving an international dimension concerns choice of law and choice of forum issues: in what jurisdiction will the consumer be obliged to sue in order to obtain redress in the event of difficulties, and what law will govern the agreement? Like all directives, the *Distance selling directive* is a piece of harmonising legislation and theoretically the laws of all EU member states on distance contracts are now fully approximated. In practice, a consumer in Ireland should not be unfairly prejudiced by a choice of law clause that seeks to apply French law to the agreement, even if the contract was concluded in Germany and performed in Ireland. The regulation specifically recognises this, providing that any clause in a distance contract that purports to apply the law of a non-EU state shall be void, provided the contract has a close connection with the territory of a member state.

The future?

Consumer protection legislation should always be welcomed where the benefits to society outweigh the corresponding disadvantages to commerce. It cannot be denied that the consumer protection measures now enshrined in the regulations were necessary for some areas of distance selling where the potential injustice to consumers is obvious. However, e-commerce activities by their nature have developed by emphasising the advantages that a faster, borderless and paperless method of trading have over conventional methods. Furthermore, the heretofore low level of capital expenditure needed to establish and maintain an on-line selling environment capable of accessing a vast international market was an important incentive to the creation of e-commerce. Such costs are now bound to increase.

The fact that the regulations have now introduced 'speed-calming' measures in addition to shifting a large proportion of the risk of on-line trade to e-tailers may unfortunately be just another nail in the coffin of the dot.com sector. G

Edward Madden is a solicitor in the technology, innovation and IP unit of the Dublin law firm BCM Hanby Wallace.

STATES OF

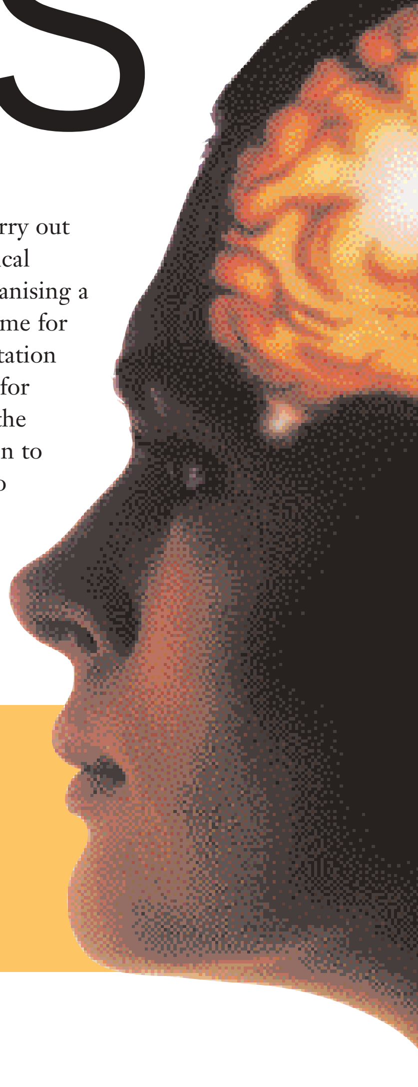
The *Mental Health Act, 2001* passed into law last summer. Alma Clissmann discusses some of its provisions, including the establishment of a mental health commission and the new office of inspector of mental health services

The *Mental Health Act, 2001* is limited in scope and primarily seeks to ensure compliance with human rights obligations by prescribing the automatic review of involuntary admissions. It is estimated that only 11% of patients with severe or perplexing problems who require admission are admitted involuntarily, a figure somewhat over 2,000 a year. The act also establishes a mental health commission to manage the review procedure and set standards for this type of health care. This commission has now been established, and the 13 members named. One member of the legal profession, Diarmuid McGuinness SC, has been appointed, as provided in section 35. The term of office of commission members is five years (section 36), and they may be reappointed, but they may not be members of the Oireachtas or the European Parliament or of a mental health tribunal set up by the commission under the act.

Section 3 defines 'mental disorder', and section 4 states a principle that, in making decisions under this act, the best interests of the person concerned must be the principal consideration. When any decision in respect of a person is being contemplated, that person must be consulted as far as is practicable and given an opportunity to make representations, which must be taken into account. In making any decision under the act, 'due regard shall be given to the need to respect the right of the person to dignity, bodily integrity, privacy and autonomy'.

Part 3 is entitled 'independent review of detention'. A new independent mental health commission is established with its principal functions stated to be 'to promote, encourage and foster the establishment and maintenance of high standards and good practices in the delivery of mental health services and to take all reasonable steps to protect the interests of persons detained in approved centres under this act' (section 33).

Its functions are stated to include the appointment of members of and staff for tribunals, the establishment of a panel of consultant psychiatrists to carry out independent medical examinations, organising a free legal aid scheme for patients in consultation with the minister for finance, advising the minister in relation to matters relating to the functions or activities of the commission, and the preparation and periodic



LAW SOCIETY INITIATIVES

The Law Reform Committee of the Law Society has published a report, *Mental health: the case for reform*, and made submissions to the department and the Oireachtas at the time of the enactment of the *Mental Health Act, 2001*. The committee continues to monitor developments in this area. Brian Gallagher, a member of the committee, has recently been appointed as Law Society representative on the Royal College of Psychiatrists' New Law Committee.

review of a code or codes of practice for the guidance of people working in the mental health services.

Mental health tribunals

The commission is charged with establishing a system of mental health tribunals, consisting of three members. One should be a consultant psychiatrist and one a practising barrister or solicitor of at least seven years' immediately prior experience. The third member should not be either of these, but another person or a doctor or a nurse. The third member could therefore be a lay person. Voting is by majority and membership lasts for up to three years, and may be renewed.

The tribunals' powers are set out in section 48. They may require attendances and documents, and failure to comply is an offence. Each tribunal is responsible for notifications of its own hearings and the furnishing of reports and information to the various participants. Legal representatives and witnesses have court privileges, and hearings are to be conducted in private. There is no requirement for notification of family members or their attendance.

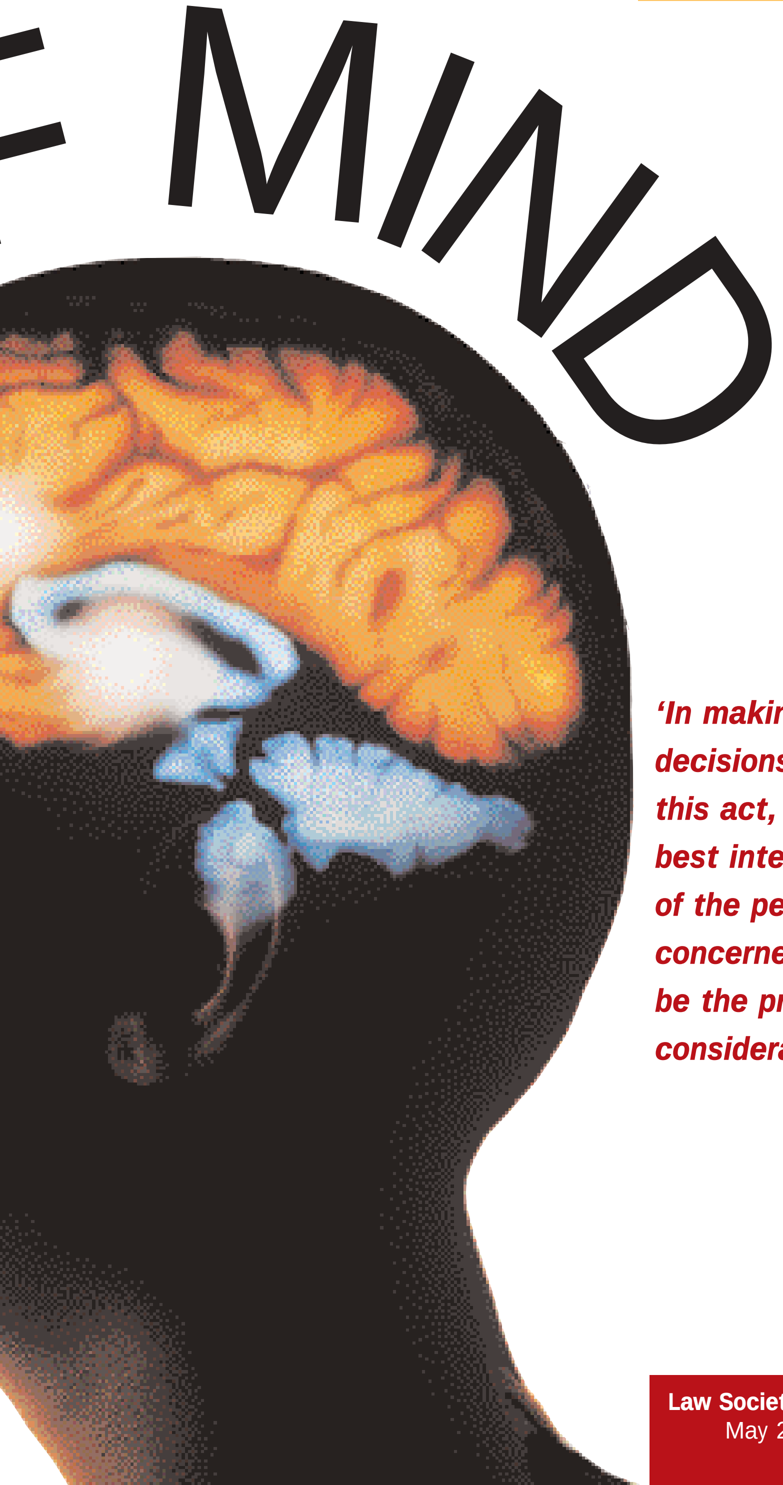
Section 50 establishes a new office, that of inspector of mental health services, who will be a consultant psychiatrist appointed by the commission. There is provision for continuity between the previous office of inspector of mental hospitals and this new office. The principal functions of the inspector are to visit all approved centres and other places where mental health services are provided and to carry out an annual review of mental health services in the state and report on it to the commission. Section 51(2) lists the powers available to the inspector for his inspections, which include the power to require documents and take evidence on oath. When making an inspection, the inspector is required to see every resident who has requested a visit or on whose behalf a visit has been requested and every patient the propriety of whose detention he or she has reason to doubt, and must look at compliance with the act and any rules made under it. Non-cooperation with the inspector is an offence. Section 54 provides for the appointment of assistant inspectors. The commission can cause the inspector to institute investigations into approved centres or other premises on its own initiative or at the request of the minister.

Now that the commission is established, it can be expected that it will recruit a chief executive (section 38) and staff, and start planning the new tribunal system. It will also be able to recruit the new inspector of mental health services to be its investigator on the ground. When the tribunal system is ready, which it is anticipated will take at least a year, it will be time to look to activating the other parts of the act, including the new procedure for involuntary admissions. G

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

MAIN POINTS

- ***Mental Health Act, 2001***
- **Independent review of detention**
- **New system of mental health tribunals**



'In making decisions under this act, the best interests of the person concerned must be the principal consideration'

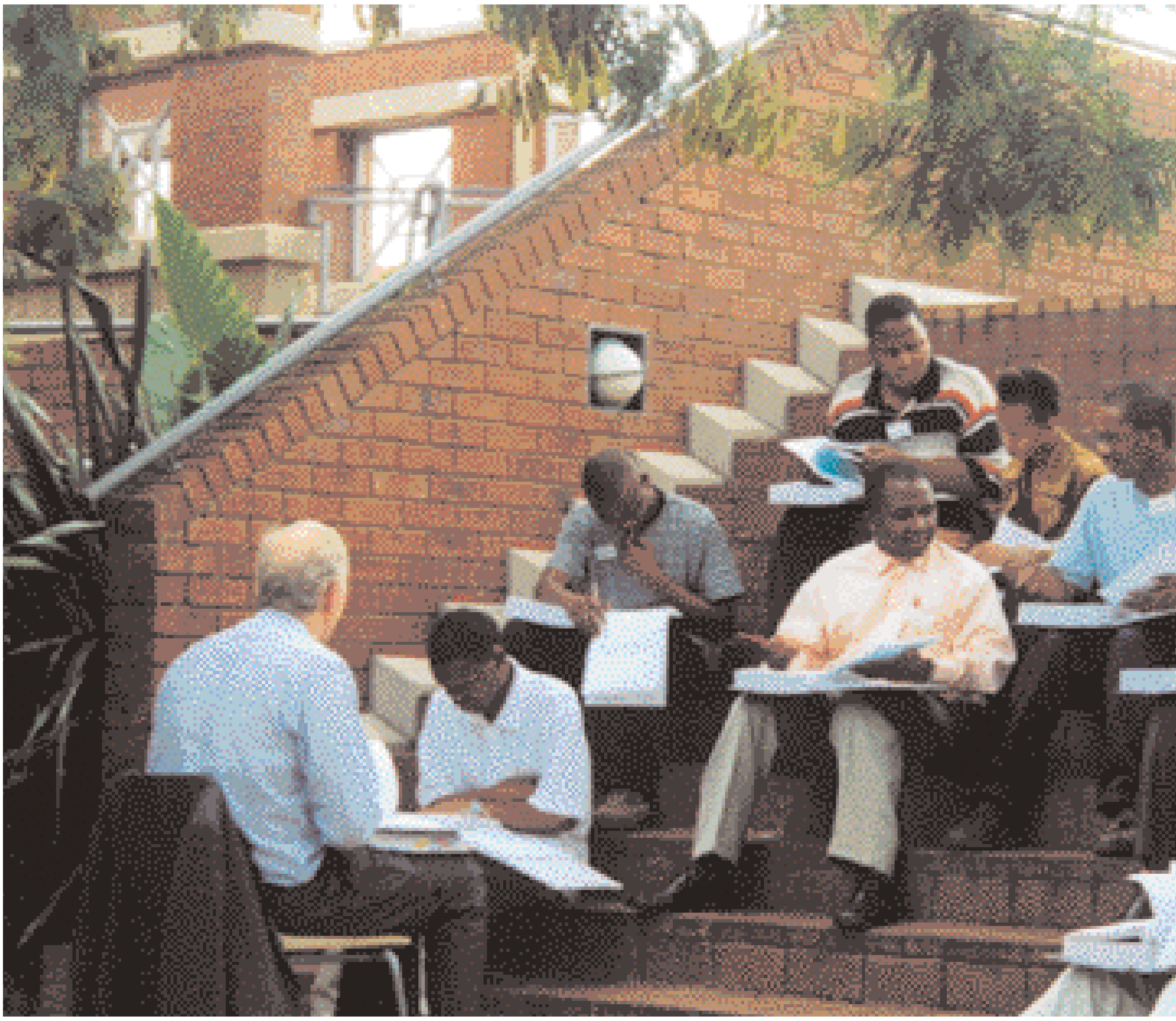
a FRIEND

In March, a group of Irish solicitors travelled to South Africa to provide a commercial law course for lawyers from underprivileged backgrounds. Here, Michael Irvine explains how this unique project came about

On Saturday 3 March, a small group of solicitors met together at Dublin airport to travel to South Africa to provide a course in commercial law for under-privileged attorneys. The group of solicitors included Philip Daly, Michael Dickson and Michael Carrigan, together with Robert Kirk, professor of accounting at the University of Ulster.

About 18 months before, suggestions had been made to the Law Society of Ireland that it should become more actively engaged in providing technical assistance to lawyers in less fortunate countries, and the matter was discussed at length by the society's EU and International Affairs Committee. Some years earlier, the society had given help to lawyers in Poland by providing them with information about the administration and organisation of a bar association. Ten Polish lawyers had also visited Ireland, spending two weeks in law firms here to gain some practical experience. The Irish government had provided some financial assistance for this project.

The EU and International Affairs Committee



MAIN POINTS

- Reasons for undertaking the South African project
- Difficulties in administering an aid programme
- Structure of the course

Helping hand: students attending the Law Society course for South African lawyers from underprivileged backgrounds

in need

decided to investigate whether government funding could be obtained for a rather more ambitious programme. Over the past few years, the Irish government has increased its foreign aid budget and now provides around €372 million a year to Africa. In particular, Ireland has special arrangements with Zambia, Tanzania, Uganda, Lesotho, Ethiopia and Mozambique. South Africa doesn't have special status, but does receive Irish aid. The aid given concentrates on three aspects: the relief of poverty, democratisation and education. In order to get assistance, the South African project had to qualify under one of these aid priorities.

Challenging times

Furthermore, administering an aid programme can present problems. For example, it can be difficult to determine accurately the needs of the beneficiary or to ensure that these needs can be met.

The beneficiary countries must have suitable arrangements to allow training to be successfully delivered. As this was the first such venture for the Law Society, it was decided at the outset that the assistance should be undertaken overseas because hosting foreign groups in Dublin has become difficult due to high accommodation and other costs, and possible complications with travel and visas. It was also agreed that the host country should have fairly well-developed communications, easy access, and be an understanding beneficiary. South Africa fitted these criteria.

However, it was not immediately evident that the society could give assistance that would fall under one of the core aid requirements. Discussions began between Michael Irvine and Nic Swart, the chief executive of the recently formed South African Law Society.

It soon became apparent in discussion with the SA Law Society that the South African government was anxious to ensure equal participation in all of the country's affairs by all of the citizens of the country. This is an enormous undertaking in the post-apartheid era and is mirrored in the practice of law as in other areas. Many of the more lucrative areas of law are still controlled by white professionals; black, Asian or coloured lawyers do not have the same opportunities. Commercial law is still the preserve of the large, predominantly white law firms of Johannesburg, Cape Town and Durban. Such historic facts fall to the SA Law Society to correct. This is not easy, but the body must demonstrate to the government that efforts are being made to correct the imbalance.

The Law Society team with some of the South African students

The problem is exacerbated by the exodus of whites from the country. This concentrates expertise in an ever-decreasing number who have less and less time to provide practical training, except to the very few lawyers who can gain admission to the large commercial firms. As a result, the SA Law Society was eager to obtain training for lawyers from under-privileged backgrounds in practical aspects of commercial law, which would help to broaden the skill base.

Getting the ball rolling

The proposed programme submitted to the Irish government by both law societies came under the two core heads of Irish aid: education and the alleviation of poverty. Such assistance would enable more lawyers in South Africa, over time, to practise in the area of commercial law. This would meet both the educational objective and help the development of commerce, thereby contributing to the alleviation of poverty in the country.

The Irish government's response was to agree grant aid of £50,000 for the proposed project. This was to cover the costs of two courses given for 50 lawyers in South Africa, including the cost of travel to South Africa for the Irish consultants, their accommodation costs for 12 days, the cost of travel and accommodation for the attending South African lawyers and certain small administrative costs for both societies. It was decided that the courses would be held in March and September in Pretoria and Durban respectively.

A small sub-committee of the EU and International Affairs Committee, comprising Michael Irvine, Michael Dickson, Michael Carrigan, John Buckley, Julie O'Connell, Philip Daly, Robert Kirk and Simon Stubbings was formed. The last two members were co-opted to specifically deal with certain accounting elements that were to be addressed in the programme.

The sub-committee began work in December 2001 to devise a commercial law course that would be deliverable in five days, would address a particular topic in a practical manner and which might have wider implications in commercial law. After a great deal of discussion, the sub-committee chose the specific topic of mergers and acquisitions, as many of the practical matters associated with this subject could be equally applicable in an initial public offering or joint venture. We also felt that all lawyers would receive at some time instructions to buy or sell a business of varying size, so a properly constructed course with good material could be used as a reference for undertaking this and other work in the commercial field.

Workshops and practical demonstrations were central to the course, with examples and exercises as well as lectures. All participants were provided with lectures and draft documentation that was examined and explained to them. Videos were produced and role playing undertaken. Exercises for workshops were included in the documentation manual given to each student at the start of the course.

At the end of the week, there was a written examination which, because of time factors, was a multiple-choice exam. In the last session, participants were encouraged to make suggestions and assess elements of the course. The course was at all times intended to be practical and to give the participants greater knowledge and confidence in approaching commercial transactions, particularly in regard to the purchase and sale of shares in a company.

Preliminary research into South African law allowed the Irish team to incorporate local points when discussing mergers and acquisitions. The topic that caused most concern related to 'close companies', a concept unknown in Ireland. Close companies or corporations are similar to limited partnerships. A founder agreement is put in place that limits members' liabilities but indicates how shareholdings based on percentages are to be divided. The aim is to provide a limited liability vehicle with minimum bureaucracy. It is extensively used for small businesses, so it had to be addressed.

SOUTH AFRICAN LAW SOCIETY

The South African Law Society was established in March 1998. It represents the Association of Law Societies (which are the Natal Law Society, the Law Society of the Transvaal, the Law Society of the Orange Free State and the Law Society of the Cape of Good Hope), the National Association of Democratic Lawyers and the Black Lawyers' Association. The Association of Law Societies were the old law societies of the four original provinces of South Africa.

The three associations are the constituent members of the SA Law Society and have thoroughly committed themselves to building an organised legal profession that would be non-racial, non-sexist, democratic, representative, transparent and accountable to its members and the public that it serves. The SA Law Society has, as one of its objectives, the promotion of legal education.

THE STRUCTURE OF THE COURSE

Part 1
- Business/commercial structures
- The sale/purchase of a business or of the assets of a business

Part 2
- The structure of the purchase and sale of shares in a company
- Examination of the concept of due diligence

Part 3
- The examination of accounts of a business and the taxation of a business
- The basic terms, and their meaning, in a share purchase agreement

Part 4
- An overview of a share purchase agreement and the items likely to be negotiated
- The drafting of a share purchase agreement

Part 5
- The jurisdictional, applicable law and dispute aspect of share purchase agreements
- The procedural aspects of share purchase transactions to completion.

'The Law Society of Ireland can play a role, if it so decides, in helping less fortunate lawyers around the world'

Attendees on the course were selected by the SA Law Society, which was extremely careful to ensure that they met the criterion of being 'underprivileged lawyers'. 'Underprivileged' in the South African context includes race, gender and financial hardship.

The SA Law Society resolved that 50% of participants should be graduates who had attended the full-time practical law school for six months. The other 50% were invited through the attorneys' journal *De rebus* from the ranks of junior practitioners who had not attended the school. At least 80% of the participants were from a historically disadvantaged background and at least 50% of them were women. Preference as to who should attend was based on exam results and also on the applications made and the reasons given by candidates for desiring further commercial training. It was decided that preference should be given to those in the profession who were not likely to get exposure and/or training in commercial law within their firms or work environment.

Both law societies were anxious to ensure the training was of a sufficiently high quality, so a strict performance-assessment element was included. Assessments of the participants will continue to be made on an on-going basis through a range of assignments and interviews.

Best of both worlds

The SA Law Society was responsible for providing facilities for the course, refreshments during the course and accommodation for attendees who were from outside Pretoria. The Irish were to be responsible for the preparation and delivery of the course. All of the work undertaken in the preparation and provision of the training was undertaken by Irish solicitors on a *de bono* basis.

Everyone agreed that the venture had been worthwhile. Friendships were made and the whole team enjoyed the working and recreational environment in South Africa.

The course was a success, and it is to be hoped that this first foray into technical assistance will not be the last undertaken by the Law Society of Ireland. The SA Law Society will undertake follow-up surveys with the participants to determine how useful the course was to practitioners and how much commercial law is now being undertaken by those who attended.

From the Law Society of Ireland's point of view, the experience gained in providing technical assistance should allow it to reflect on the type of help it could provide in the future. The society can play a role, if it so decides, in helping less fortunate lawyers around the world. It is a role we should not ignore. G

Michael Irvine is a partner in the Dublin law firm Matheson Ormsby Prentice.

FAMILY

A wealth of practitioner experience was shared at a recent conference on family law. Keith Walsh outlines some of the more recent developments highlighted by the speakers, as well as some practical advice for solicitors engaged in judicial separation and divorce proceedings

'Family law is very important and its importance grows every year, as do the number of specialist practitioners', said Judge Elizabeth Dunne in her introduction to the 2002 *Family law in Ireland* conference. The conference distilled the wisdom of experienced experts and gave those present, most of whom were solicitors, a practical and detailed update on recent developments in family law.

No significant reforms

Solicitor David Bergin told the conference that the new *Consolidated Circuit Court Rules 2001* had not made any real difference to judicial separation and divorce procedure and that their introduction could be seen as a lost opportunity, as no significant reforms were made to the old rules nor were they made any easier to use. One welcome development was the virtual abolition of the old application form used when applying for maintenance, custody, access or barring orders to the Circuit Court, where they were not brought in the context of judicial separation or divorce proceedings. All applications to the court in matrimonial proceedings are now to be made by way of family law civil bill, except when applying to appoint registered fathers as guardian, to commission blood tests and to rule maintenance agreements.

Many divorce cases are now on consent, and practitioners often proceed by way of motion for judgment in default of defence following issue and service of the usual proceedings, which means that it is not necessary for the respondent to be present in court. The decree will recite this fact and the divorce may be queried in other jurisdictions where it is normal for both parties to be present. A better way to proceed is to avail of rule 10G of the rules for what Bergin describes as a 'fast-track divorce', where the usual proceedings are issued and served, the respondent files a form of consent defence, the applicant then serves a notice of motion for judgment by consent and the consent is recited on the decree, avoiding any future problems.

Another potential difficulty is the unnecessary issuing of an affidavit of means. Many solicitors will be familiar with a situation where the respondent

MATTERS

spouse agrees to a simple consent divorce only to reconsider on viewing the applicant's affidavit of means, the parties having obtained a judicial separation several years previously. Rule 17 states that where 'financial relief under the acts is sought', the parties must file an affidavit of means. However, if a simple consent divorce is being sought with no financial reliefs, then it may not be necessary to file an affidavit of means. The Dublin courts have in the past held that section 18(10) – the order blocking succession rights – is not a financial relief. But Circuit Court offices outside Dublin may insist that an affidavit of means is issued with the civil bill in all cases.

MAIN POINTS

- ***Consolidated Circuit Court Rules 2001***
- **The family home and property adjustment orders**
- **The division of assets**

Bergin advised that interim applications for maintenance should be considered carefully before issue, as they may not be in the long-term interests of clients. Many are made too quickly and may not benefit the client. The interim hearing will be short and the facts available to the court may be few, as there will be no discovery, possibly no affidavit of means and probably few vouching documents. Once the figure of maintenance is set, the applicant will have to live on this until the outcome of the full hearing and this figure may not be changed following the full hearing, even though the complete facts and figures are now available. The respondent may also point to the fact that the other party has survived on the maintenance until the hearing date. An alternative to periodic maintenance is to apply for a lump-sum order, which is designed to last until the projected hearing date and has the advantage of not fixing any specific weekly sum in the judge's mind.

Walls and a roof

Muriel Walls of McCann FitzGerald discussed the issues surrounding the family home before and after marital breakdown, and highlighted the legal difficulties facing cohabiting couples. The Law Reform Commission is currently examining this area of law and a white paper is expected towards the end of the year. When advising an unmarried couple buying a home, solicitors should, at the very least, explain the difference between joint tenancy and tenancy in common, set out the pros and cons of each and ensure the couple deal with any beneficial interest arising. One or other of the couple may also have to be directed towards independent legal advice.

Couples outside marriage, particularly the dependent partner, are more vulnerable than married couples, and Walls suggests that solicitors should advise couples to execute a co-ownership agreement to record the initial contribution made by each, as well as each party's proposed future mortgage contributions.

The possibility of the relationship breaking down could also be dealt with and a means of property division in this event also incorporated into the agreement.

Walls also talked about with the transfer or sale of the family home on the granting of a decree of judicial separation. The duty of the court is to ensure that couples must live separate and apart after the decree is granted. The family home does not necessarily have to be transferred or sold immediately following the judicial separation, but may be held in joint names for a specified period of time, for example, until the youngest child attains the age of 18 (or 23 if they continue in full-time education). In this case, the spouse remaining in the family home would be given an exclusive right of residence or, in extreme cases, the other spouse would be barred. The main advantage of postponing a sale is continuity and stability for the family, while the negative factors are the difficulties posed for the non-residing spouse by locking up the equity in the home as well as a possible liability to capital gains tax on the eventual sale of the property.

One of the areas of confusion facing family law practitioners at the moment was also clearly dealt with – following up the property adjustment order. When the court makes a property adjustment order transferring the home into the sole name of one party when granting a decree of judicial separation or divorce, the court order itself does not transfer the title. It is a direction to the transferor spouse that he or she will execute all documents to give effect to this order or, in default of this, that the county registrar will do so. Therefore, the solicitors involved must also agree and have executed the necessary documents to ensure title is transferred correctly. While the Land Registry or Registry of Deeds will be sent a copy of the order, this in itself will not transfer the legal title.

'Clients and practitioners are entitled to know what may happen in their case and there must be some clear rules to the game'

Any lending institution or mortgagee will also have to give its prior consent in writing to the transfer and can also release the transferor spouse from all liability under the mortgage. The rights of the mortgagee to refuse either of these are 'vexed', according to Walls, and most lenders are prepared to consent to the transfer and release if the remaining spouse can prove their ability to repay the loan. The bank or building society may also take the net equity value into account or seek a guarantor.

A regime of uncertainty

Gerry Durcan SC provided a comprehensive review of the laws of ancillary reliefs on divorce in the last 12 months. Durcan highlighted the unpredictability of financial results on divorce. Recent cases here and in England have been determined based on a concept of fairness in all the circumstances, leading to a very subjective and individualised approach to cases.

While section 20 of the 1996 act sets out the factors to be taken into account, no legislative assistance as to their weight is given and the courts have been shy in laying down general principles as to the relative importance of factors such as conduct in the marriage, years together and apart as well as the status of assets introduced pre-marriage and post-separation. In the recent case of *K v K* (unreported, Supreme Court, 6 November 2001), McGuinness J stated that the court must have regard to all the factors set out in section 20 of the 1996 act and must weigh them according to the facts of the individual case. The trial judge must also give reasons for how he or she arrives at a decision. She went on to say that there is no principle of equal division of assets between man and wife under the common law and the courts must follow the statutory guidelines. In deciding what is proper provision, the courts must in this case consider the separation deed, the amount of time apart, the wife's financial needs and her role as primary carer as well as the fact that the husband accumulated his wealth following separation. Unfortunately, the Supreme Court did not differentiate or prioritise these factors, but did state that the principal objective is fairness having regard to all the circumstances, in particular those under section 20. Each case is thus to be determined on its facts.

This approach presents family lawyers with huge difficulties in advising their clients. Essentially, there are no rules, as cases can be distinguished on their facts, which means that a knowledge of judges and practical experience is far more important than case law, particularly when evaluating a potential settlement. While there is always a need for fairness, it must be tempered by the need for certainty. Clients and practitioners are entitled to know what may happen in their case and there must be some clear rules to the game.

One of the most problematic and unpredictable factors to be taken into account in dividing assets on divorce is the status of a prior agreement, be it a deed of separation or a decree of judicial separation. Practitioners were advised by Durcan to include the phrase 'in full and final agreement' in all legal separations and to remember that, under the 1996 *Divorce Act*, the court must be satisfied that proper provision has been made for the spouses.

Lessons for the future

One of the themes emerging from the conference was the sense of frustration felt by family lawyers at the lack of practical information available to them. Speakers and participants both expressed the view that case reporting and written judgments would greatly help lawyers and their clients in managing the whole process of divorce. The current lack of predictability raises serious issues for solicitors in advising their clients about the desirability of a potential settlement and leads to greater problems for the clients, who are involved in life-altering proceedings. Most practitioners are forced to rely primarily on their own experience, as there are very few rules or guidelines in place. G

Keith Walsh is a solicitor with the Dublin law firm Anthony Harris & Co.

Oil may put skids on global recovery

Davy STOCKBROKERS

History may be repeating itself. Just as the world economy claws its way back to recovery, a Middle East oil crisis could send it spinning back into recession, as Alan Murphy explains

Alan Murphy: 'Oil prices will continue to take centre stage over the coming months'

Due to the increasing tensions and the recent tragic events in the Middle East, the world is beginning to contemplate its fourth oil shock. Oil prices have already risen more than 60% from their mid-November 2001 lows of about \$17 per barrel. While this price surge stops well short of earlier oil shocks, it certainly hints at what may be ahead in the event of a further escalation of geopolitical tensions.

Given the very tentative nature of the recovery in global economies, a recent piece of research by Morgan Stanley's Stephen Roach made interest reading. In his thesis, Mr Roach outlines what the last three oil shocks have done to the global economy. A common thread from all three are that they all hit a cyclically vulnerable global economy that was ripe for a fall. Anything sound familiar?

According to Mr Roach, another oil shock now could hit the global economy at an especially vulnerable point in time. The 1990 shock is probably closest in nature to the current economic cycle, the difference being that in 1990 the US was in a late-cycle soft landing, while now it seems to be in early-cycle recovery. Put simply, it is like recovering from a bad flu – such a shaky economy lacks the immunities needed to withstand the pressures of any type of shock.

Possible outcomes

Three scenarios could well play out. The first, a worst-case outcome, sees a permanent spike to \$40 a barrel well into 2003. This would accompany a political implosion in the Middle East and an extended oil embargo of the West. The second involves a temporary spike in prices, with oil surging to \$40 a barrel and holding there for a couple of months. This resembles the circumstances surrounding Iraq's invasion of Kuwait in 1990, when prices spiked to \$40 a barrel for six weeks. The third case is a 'best outcome Middle East breakthrough scenario' that envisions a prompt resolution to the conflict between Israel and the Palestinians. In the event of such an outcome, Mr Roach expects an immediate elimination of the \$5 a barrel 'geopolitical fear premium' that is currently being discounted by the oil markets.

The first and third outcomes are at the extremes – low-probability outcomes. The second alternative is designed to mirror the outcome of a previous conflict. However, the actual endgame will probably differ significantly from all three alternatives.

When examined, the first alternative – a permanent oil shock – leaves the global economy entrenched in recession. Roach estimates that it would knock 0.8% off world GDP growth in 2002 and push his growth predictions to 1.8%, making 2001/02 the worst two years of back-to-back growth in the world economy in recorded history. For those of you familiar with the various alphabetical letters used to describe business cycles, the outcome of this would see the world business cycle trapped in a capital L.

The third and best-case scenario could provide a much-needed further boost to global growth in 2002 and into 2003. The immediate elimination of the \$5 'fear premium' would move the business cycle down the alphabet to qualify as more of a U-shaped recovery in global markets.

The temporary price spike is estimated to knock as much off growth in 2002 as does the permanent spike. Roach's research sees the global economy remaining in recession in 2002 but quickly returning to roughly its baseline trajectory of 3.8% growth in 2003.

Given the Bush administration's intentions regarding Iraq and global terrorism and on-going tensions between Israel and the Palestinians, oil prices will continue to take centre stage over the coming months. With corporate America still disappointing an increasingly optimistic investment public, another oil shock could take a serious toll on fragile economic recovery and equity markets. G

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

RECENT OIL SHOCKS TO HIT THE GLOBAL ECONOMY

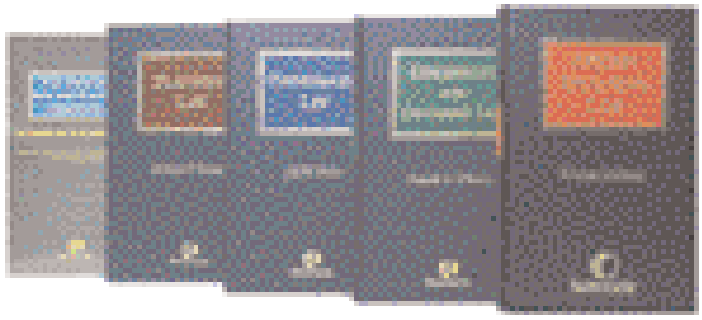
- The oil embargo of 1973, following on from the Yom Kippur War, came at a time when world GDP was at 7% – a record high. The world economy plunged into a two-year recession when oil prices spiked from \$4 to \$16 a barrel
- The second oil shock came in the aftermath of the Iranian revolution in 1979. With Iranian oil curtailed from late 1978 to autumn 1979, the price of oil nearly tripled from \$13 to \$34 a barrel. At the time, global economies were still recovering from the earlier oil shock and world growth was at 4.5%. They were also trapped in a vicious inflationary spiral. This led to sharp interest rate increases in the US that took the world into its worst recession ever in 1981-82
- Again the Middle East played host to the third oil shock, with a more recent player taking the headlines. Iraq's invasion of Kuwait saw oil prices double from \$17 to \$40 a barrel in 1990. Prior to the invasion, and thanks to Alan Greenspan's intervention, the world economy was already coming in for a 'soft landing'. However, this oil shock quickly accelerated the landing and the US economy was pushed into recession in late 1990. Just like the first two, the third one culminated in global recession.

Butterworths Irish Annotated Statutes

Designed with you in mind!

Following feedback from practitioners we have put together a set of publications that are fully cross-referenced covering key areas of Irish law. **Butterworths Ireland** have designed **Butterworths Irish Annotated Statutes** to meet your needs. Uniquely, they consolidate and annotate all Irish legislation still on the Statute Book. Full details of all relevant caselaw, explanations of terms, amendments and cross-references are given. Easy to use, the **Butterworths Irish Annotated Statutes** series provides the busy practitioner with the primary and essential reference to the subject covered.

- Liquor Licensing Law
- Commercial and Consumer Law
- Conveyancing Law
- Planning Law, and Irish Planning Law and Practice Supplement: The Planning and Development Act 2000



Butterworths Irish Annotated Statutes are attractively bound and expertly written, succeeding in making complex areas of the law simple. An essential reference tool for all practitioners.

Buy Liquor Licensing Law and one other title from the BIAS series and receive a 15% discount on your order

PRIORITY ORDER FORM

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
	BIAS Set	[illegible]	[illegible]	[illegible]	
	Liquor Licensing Law	[illegible]	[illegible]	[illegible]	
	Commercial and Consumer law	[illegible]	[illegible]	[illegible]	
	Conveyancing law	[illegible]	[illegible]	[illegible]	
	Planning Law, and Irish Planning Law and Practice Supplement: The Planning and Development Act 2000	[illegible]	[illegible]	[illegible]	

Name:

E-mail:

Firm:

Address:

Postcode:

Telephone:

www.butterworths.com

Butterworths

Book review

Competition law and practice

Vincent Power. Butterworths (2001), 26 Upper Ormond Quay, Dublin 7. ISBN: 1-85475-1352. Price: **€**240.

This book is a monumental undertaking. It runs to 71 chapters over 1,874 pages of text, excluding introductory pages. The amount of research and scholarship undertaken is apparent from the extensive footnotes. This is a truly magisterial work that must have been many years in gestation. The only match that comes to mind is Vincent Power's own book on EC shipping law.

The approach is to cover both European and Irish competition law side by side. Given their symbiotic relationship, this is the only way to comprehensively deal with the subject. Throughout the book there are lengthy extracts from relevant legislation, guidelines and decisions of both the European Commission and the Irish Competition Authority. The book is a combination of relevant legislation, case law, procedure and commentary. This practical focus will make it most useful for anyone who works in the area.

As one would expect, the book opens with an extended look at the sources of Irish competition law and its development. This is complemented by an interesting discussion of the economics of competition. The book then moves to an overview of the institutions involved in both EU and Irish competition law. Extensive treatment is given to anti-competitive arrangements and abuse of dominance. In 21 chapters, consideration is given to selected arrangements and practices. These chapters are tightly written and the author attempts to treat of the variety of agreements and themes covered under their individual headings. Mergers and the relationship between the state and competition law are covered in comparable depth.

Of great interest are the three other sections of the book. Ten chapters are given over to an analysis of specific sectors. Given the speed of developments in the area of sectoral regulation, this must have been a daunting section to write. However, the coverage of sectors such as transport, energy and the media makes for a very interesting read. I suspect that subsequent editions will see these chapters expanded further. Practice and procedure is also dealt with at length. The book covers notification, complaints, enforcement, investigation and litigation. Finally, the book, relatively briefly, moves to a consideration of reforms.

Given the speed of development in an area such as competition, a book such as this, which draws together the law and regulation in the area, is welcome. It is unfortunate for the book that, since its publication, the *Competition Act, 2002* has been enacted and that this measure, when brought into force, will make profound changes to Irish competition law, particularly in the area of mergers. Doubtless, subsequent editions of this book will deal with this legislation in the same masterful way as the current competition legislation is covered in the first edition.

There are a few minor criticisms that one can make of this impressive book. The pages are very flimsy and the text of one side can be clearly seen from the other. For a book that will be a major reference work, this is a drawback. Second, the index, while being adequate, does not match the proportions of the book. A more comprehensive index would be of value to the busy practitioner. Third, the price of this book will put it out of the reach of the interested trainee or newly-qualified solicitor.

In summary, this will be an indispensable reference point for the commercial lawyer. It is more comprehensive, lucid and up to date than any of the competing volumes on this subject. One can foresee Power on competition joining Courtney and McMahon and Binchy as one of the seminal Irish law texts. G

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

Committee reports

TECHNOLOGY

Extension of Revenue on-line service

The Revenue On-line Service (ROS) has now been extended to facilitate the filing of capital tax returns in the same manner as self-assessment taxes.

This will mean a big improvement in the turnaround time for the acceptance of the returns and the issue of any repayments to be made by Revenue.

In addition, the calculations currently done manually in relation to CAT are done automatically by the system. Certificates of discharge and in very few cases notification of audit will issue within 24 hours if returns are filed using the ROS system. From the point of view of solicitors, this will substantially lower the costs of handling these cases and dealing with Revenue.

For further information, please contact the Revenue On-line Information Desk on tel: 1890 201106 or roshelp@ revenue.ie.

Land Registry to introduce electronic form 17

The Land Registry intends to extend its electronic access service (EAS) over the coming year with the initiation of a number of major projects.

These include:

- An imaging project which is set to capture two main areas of data, including file plans attached to folios and archive folios which have not yet been transferred into a structured data system. The Land Registry hopes that by mid-2002 the EAS system will be available throughout the entire country to enable checking of status of applications (via case tracking), order of copy documents and the filing of electronic form 17s. While the Land Registry estimates it would take 15-20 years to complete a structured data capture programme for all 1.5 million folios, it expects to capture 6.5-7 million individual page images over a three-year period through imaging. The end result of the combination of structured data and imaging would be to complete the recapture in one form or another of all folios by 2005. Where folios are retained in an imaged format, they would be accessible through a names index database
- The Land Registry also intends to introduce an electronic form 17 service for the majority of transactions lodged for registration. This service would have a number of features based on completion of an electronic version of the form 17 on-line by practitioners. The benefits are stated to include:
  - immediate availability of application numbers
  - reduction of potential for errors
  - the system will have a number of in-built checks, including confirmation of registered owner if the folio has been computerised and a facility for calculation of fees
  - the service will be available to all and new EAS customers
  - the service will operate on a web-browser basis through the existing EAS website
  - it will be possible to build up a multiple of different applications
  - while the system will prompt for standard documents, it will be possible to list off additional documents.

The Land Registry has indicated that the form 17 system will not be intended to capture all applications. Further details are available from Peter McHugh on tel: 01 804 8167 or e-mail at Peter.McHugh@LandRegistry.ie.

Technology Committee

FAMILY LAW AND CIVIL LEGAL AID

Revised edition of the family law code of practice

The fundamental changes in family law and procedure, particularly since 1989, have been immense and consequently the family law practitioner has seen significant changes in the practice of family law, changes which affect our approach and the approach of the rest of the profession to family law. No longer 'a small section of the litigation department', or the *pro bono* work carried out under pressure by many of our colleagues, family law is now recognised as a branch of law in its own right that requires a completely different approach and attitude. It is a branch of law which is developing, albeit slowly, its own jurisprudence and it is clear that bigger changes are to come, given the recent appointment of the working party on the jurisdiction of the courts under the chairmanship of Mr Justice Niall Fennelly. Proposals for the setting up of an independent family section which would encompass all the services available for the support of the family, together with specialised District, Circuit and High Courts, are very much on the cards and the coming years will see these changes come into operation.

The *in camera* rule is also under threat and it is clear that there is pressure to modify the rule in the interests of informing the public.

Solicitors who operate in this field should be encouraged to deal with their work in a manner calculated to encourage and assist the parties to achieve a constructive settlement of their differences as quickly as may be reasonable. Concepts such as winning and fighting should be cast aside and replaced with the search for fair and just solutions, and the needs of children should be considered as paramount in trying to work out arrangements for the future.

Sometimes it is much easier to litigate than to be conciliatory, to accuse and allege rather than find a constructive middle course, to pull an unhappy couple further apart rather than help them to recognise their differences and as a result to help them find solutions. There is much work still to be done to produce a consistent and complete change in solicitors' approach and attitudes towards resolving family law matters.

The code of practice issued by the Family Law and Civil Legal Aid Committee of the Law Society in 1996 has now been revised by the committee and is designed to take into account the changing nature of family law. The revised edition is available now in the members' section of the society's website (www.lawsociety.ie) and will be included in the new edition of the *Guide to professional conduct*.

The committee hopes that the revised code of practice will assist colleagues in the process of change. G

Family Law and Civil Legal Aid Committee

Practice notes

RESIDENTIAL PROPERTY TAX

The Conveyancing Committee has received the following notice from the Revenue Commissioners in relation to certificates of clearance in respect of residential property tax:

'**Residential property tax certificate of clearance**

While residential property tax was abolished with effect from 5 April 1997, a clearance certificate procedure remains in place in relation to the sale of certain residential properties to assist the Revenue Commissioners to collect outstanding tax.

The value threshold relating to the residential property tax certificate of clearance has been increased to €438,000 in accordance with the 'indexation' provisions in the legislation.

The new threshold, which relates exclusively to the tax clearance procedure, applies to house sale contracts executed on or after 5 April 2002. From that date, where the sale consideration for residential property exceeds €438,000, the vendor must provide the purchaser with a certificate from the Revenue Commissioners indicating that all residential property tax due *for years for which the tax was in operation* has been paid'.

Conveyancing Committee

PREMIER GUARANTEE SCHEME

The Conveyancing Committee does not recommend one product or insurance policy over another where there are competing products or policies in the marketplace. The committee has examined the new Premier Guarantee Scheme, launched as an alternative to HomeBond, and has formed the opinion that it offers an alternative which should be acceptable to conveyancing practitioners. In doing so, the committee repeats that it is not favouring or endorsing the Premier Guarantee Scheme over the HomeBond scheme. Either is acceptable as a form of cover from a conveyancing perspective.

Practitioners should be alert to the fact that if a developer offers the Premier Guarantee Scheme on the purchase of a new house, the building agreement, undertaking, certificate of title and letter of loan offer should be amended/qualified appropriately with the consent of the lender.

Practitioners should be aware that it appears that a number of lenders have not yet approved the Premier Guarantee Scheme.

Conveyancing Committee

UNDERTAKINGS RE: TIMBER-FRAMED HOUSES – A REMINDER

Several practitioners have recently contacted the Conveyancing Committee indicating that they have been advised by some companies providing construction systems or kits for timber-framed houses that the Law Society has retracted its practice note published in the March 2001 issue of the *Gazette*. The practice note has **not** been retracted and the Conveyancing Committee would like to take this opportunity to remind solicitors of the recommendation that they do not provide an undertaking to discharge the costs of such systems or kits to supplying companies.

Conveyancing Committee

Practice notes

STAMP DUTY CLAW BACK RULES FOR INVESTORS

The Conveyancing Committee would like to bring the following exchange of letters with the Revenue Commissioners to the attention of practitioners:

'Revenue Commissioners,
Stamp Duty Customer Services Branch,
24 January 2002

Re: stamp duty rates applicable to investors

We wish to advise you that we have experienced queries from practitioners with regard to the stamp duty rules and rates applicable to investors pursuant to the budgetary changes announced on 5 December 2001. In the circumstances, we would be obliged if you would kindly furnish us with a direction on the following queries in order that we might advise practitioners accordingly:

Supposing the owner of an existing principal private dwelling house purchases a new principal private residence prior to 5 December 2001 and now finds that due to the downturn in the property market he is unable to sell the existing house and subsequently decides to remain in the existing house and to rent out the newly-acquired premises. What are the **claw back rules** which apply to this situation?

i) Is it the rates which were in force at the time of purchase (prior to 5 December 2001), that is, the difference between the 9% (investor) rate and the stamp duty actually paid, or

ii) Do the rates introduced on 5 December 2001 apply, which will mean that the purchaser is not now liable to pay any further stamp duty since the stamp duty discharged pre-budget 2001 as an owner-occupier is exactly the same as the liability of an investor post-budget 2001? In other words, does the purchaser (who turns investor) get the benefit of the post-budget 2001 reduced rates on stamp duty or is he liable to the claw back rate of stamp duty which applied at the date of purchase (prior to 5 December 2001), which would mean that such a person would constitute the only type of investor who is still obliged to pay the 9% stamp duty rate?

iii) Following on from (ii) above, could you clarify the stamp duty position applicable to a person who purchases a new apartment as a principal private residence for, say, IR£95,000 in June 2001 (in other words, no stamp duty is liable on the purchase) and now wishes to rent out the premises? If the claw back rules applicable prior to 5 December 2001 are applied, the purchaser will be obliged to pay 3% of the purchase price (less VAT), but if the post-budget 2001 claw back rules apply, then the property is exempt from stamp duty.

Conveyancing Committee'

'Conveyancing Committee,
Law Society of Ireland,
6 February 2002

Re: stamp duty rates applicable to investors

I refer to your recent letter which raises some queries from your members in relation to stamp duty.

In view of the questions posed and to avoid confusion, I must preface our reply by drawing the attention of your readers to the fact that the changes made in the *Finance Act, 2002* have **no effect** on the claw back provisions of the reliefs available for the purchase of a **new** house by an owner-occupier who certifies that he or she will occupy it as his or her principal private residence.

In your first example, an individual has purchased a new residential property prior to 6 December 2001. If the property in question is grant size (that is, under 1346 sq ft/125 sq m) and is for owner-occupation, no stamp duty liability will arise where an effective deed of transfer with appropriate certification is executed prior to 6 December 2001.

If after 6 December 2001, the purchaser decides to rent out the newly-acquired property, a claw-back of stamp duty will be due equal to the amount which would have been liable as at the date of transfer had the purchaser not claimed the relief in question.

Similarly in your second example, again assuming that the property is a grant-sized house, where the property is rented out at any stage within five years from the date of the transfer, a claw back of the duty otherwise payable if the relief was not claimed will arise. In the example provided, the claw back arising is at the rate of 3% on the VAT exclusive amount.

In general, the effective date for claw back of stamp duty is the original date of transfer. The stamp duty rates which were appropriate as at that date will dictate the amount of duty due.

Your readers will find information regarding stamp duty on the Revenue website at www.revenue.ie. Hoping that this information is of some assistance.

Customer Service Stamp Duty Branch'

NEW RIAI FORM 1B (APARTMENTS)

The Conveyancing Committee would like to inform the profession that it has recently agreed the format of a new RIAI form of certificate of opinion on compliance for certifying compliance of an apartment where the architect has been involved in providing a professional architectural service at the design and construction stage of the apartment block.

The existing RIAI form of certificate of opinion on compliance for apartments (form 1A) only applies where a professional architectural service has been provided in the design but a site inspection service has **not** been provided in the construction of the apartment block and where the architect has **not** administered the building contract for the construction of the apartment block. G

Conveyancing Committee

LEGISLATION UPDATE: 22 MARCH – 17 APRIL 2002

ACTS PASSED

Arramara Teoranta (Acquisition of Shares) Act, 2002
Number: 11/2002
Contents note: Provides for an increase in the maximum share capital which may be taken up by the minister for the marine and natural resources in Arramara Teoranta. Amends the *Alginate Industries (Ireland) Limited (Acquisition of Shares) Acts, 1949 and 1954*
Date enacted: 10/4/2002
Commencement date: 10/4/2002; appointed day order to be made (per section 3 of the act)

Civil Defence Act, 2002
Number: 16/2002
Contents note: Updates civil defence legislation generally. Provides for the establishment of the Civil Defence Board to oversee, supervise and co-ordinate the operations and future development of civil defence in co-operation with, and in support of, all of the major emergency services; transfers functions from the minister for defence to the board; amends the *Air-Raid Precautions Act, 1939* and provides for related matters
Date enacted: 10/4/2002
Commencement date: Commencement order/s to be made (per section 1(3) of the act); establishment day order to be made (per section 6 of the act)

Competition Act, 2002
Number: 14/2002
Contents note: Consolidates existing enactments relating to competition and mergers; replaces the *Mergers, Takeovers and Monopolies (Control) Acts, 1978 to 1996*, the *Competition Act, 1991* and the *Competition (Amendment) Act, 1996*. Also introduces new provisions with reference to EU competition law and new competition and merger law provisions following mainly from the work of the Competition and Mergers Review Group
Date enacted: 10/4/2002
Commencement date: commencement order/s to be made (per section 2 of the act)

Courts and Court Officers Act, 2002
Number: 15/2002
Contents note: Makes provision in relation to the qualification of judges, including provision for the eligibility of solicitors for appointment as judges of the superior courts; makes provision in relation to judicial appointments and the Judicial Appointments Advisory Board (JAAB); increases the monetary jurisdictions of the Circuit Court from £30,000 to €100,000 (section 13), and the District Court from £5,000 to €20,000 (section 14); and provides for related matters
Date enacted: 10/4/2002
Commencement date: commencement order/s to be made for sections 13 to 21, 22, 29 and 46 of the act. Section 31 is deemed to have come into operation on 1/1/2002. Sections 39 to 43 are deemed to have come into operation on 9/11/1999. 10/4/2002 for all other sections

Electoral (Amendment) Act, 2002
Number: 4/2002
Contents note: Provides that a candidate at a Dáil election who is not in possession of a certificate of political affiliation (confirmation that a candidate is a candidate of a political party registered in the register of political parties) must have his or her nomination paper assented to by 30 electors (excluding the candidate or proposer) who are registered Dáil electors in the constituency concerned. Provides for similar arrangements in relation to nomination papers at European Parliament and local elections, except that the number of assentors is 60 and 15 respectively. Amends and extends the *Electoral Acts, 1992 to 2001*, the *European Parliament Elections Acts, 1992 to 2001*, the *Local Elections Regulations 1995* (SI 297/1995) and the *Local Elections (Disclosure of Donations and Expenditure) Act, 1999*. (Provides an alternative to election deposits following the High Court decision in *Redmond v Minister for the Environment*, 31/7/2001, which found that the sections of the *Electoral Act, 1992* and the *European Parliament Elections Act, 1997*, relating to deposits at elections, were repugnant to the constitution)
Date enacted: 25/3/2002
Commencement date: 25/3/2002

Finance Act, 2002
Number: 5/2002
Contents note: Provides for the imposition, repeal, remission, alteration and regulation of taxation, of stamp duties and of duties relating to excise, and otherwise makes further provision in connection with finance, including the regulation of customs
Date enacted: 25/3/2002
Commencement date: various – see act

Gas (Interim) (Regulation) Act, 2002
Number: 10/2002
Contents note: Provides for the regulation of the gas sector in the state by the Commission for Energy Regulation and for that purpose transfers to it certain functions of the minister for public enterprise; provides for the change of name of the Commission for Electricity Regulation to the Commission for Energy Regulation; amends and extends the *Gas Acts, 1976 to 2000*, the *Electricity Regulation Acts, 1999 and 2000*; gives effect to directive 98/30/EC and provides for related matters
Date enacted: 10/4/2002
Commencement date: 10/4/2002; appointed day order to be made (per section 3 of the act)

Housing (Miscellaneous Provisions) Act, 2002
Number: 9/2002
Contents note: Provides for the making available, and resale, of affordable houses; the purchase of the interest of a housing authority in a house which is subject to a shared ownership lease and the sale of such a house; the making of grants in respect of new houses and to approved bodies; the giving of certain information by mortgage lenders to the minister for the environment and local government. Extends the powers and increases the borrowing limit of the Housing Finance Agency. Amends and extends the *Housing Acts, 1966 to 1998*, the *Finance Act, 1970* and the *Housing Finance Agency Act, 1981*. Amends the *Housing (Private Rented Dwellings) Act, 1982*, the *Building Societies Act, 1989*, the *National Treasury Management Agency Act, 1990*, and the *Dublin Docklands Development Authority Act, 1997*. Amends the *Criminal Justice (Public Order) Act, 1994*, by the insertion of a new part IIA – offences relating to entering and occupying land without consent
Date enacted: 10/4/2002
Commencement date: Commencement order/s to be made for all sections, except section 12 (per s1(3) of the act). Section 12 is deemed to have come into operation on 1/1/2001 (per section 12(4) of the act)

Medical Practitioners (Amendment) Act, 2002
Number: 17/2002
Contents note: Makes further provision in relation to the general register of medical practitioners; amends the *Medical Practitioners Act, 1978*
Date enacted: 10/4/2002
Commencement date: Commencement order to be made (per section 11 of the act)

Pensions (Amendment) Act, 2002
Number: 18/2002
Contents note: Provides for the introduction of a framework for personal retirement savings accounts (PRSAs); the establishment of a pensions ombudsman and other amendments to the *Pensions Act, 1990* following consideration of reports from the Pensions Board in the context of the National Pensions Policy Initiative
Date enacted: 13/4/2002
Commencement date: Commencement order/s to be made (per ss1(3) and 1(4) of the act)

Public Health (Tobacco) Act, 2002
Number: 6/2002
Contents note: Provides for the regulation and control of the sale, marketing and smoking of tobacco products and for enforcing such controls. Provides for the establishment of the Tobacco Control Agency to provide for the registration of persons engaged in the business of selling tobacco products by retail, to provide for a prohibition on the advertising of tobacco products, a prohibition on sponsorship by manufacturers and importers of tobacco products and prohibitions on certain marketing practices in relation to tobacco

products. Provides for the prohibition or restriction of tobacco smoking in certain places. Repeals the *Tobacco Products (Control of Advertising, Sponsorship and Sales Promotion) Act, 1978* and the *Tobacco (Health Promotion and Protection) Act, 1988*, and provides for related matters
Date enacted: 27/3/2002
Commencement date: commencement order/s to be made (per s1(2) of the act)

Radiological Protection (Amendment) Act, 2002
Number: 3/2002
Contents note: Makes further provision in relation to the licensing powers of the Radiological Protection Institute of Ireland in connection with the use of x-ray equipment by practitioners, and in relation to the powers of the minister for public enterprise to fix licence fees in respect of licences issued by the institute. Amends the *Radiological Protection Acts, 1991 and 1995*
Date enacted: 20/3/2002
Commencement date: Commencement order/s to be made per s12(3) of the act: 8/4/2002 for all sections of the act (per SI 133/2002)

Residential Institutions Redress Act, 2002
Number: 13/2002
Contents note: Provides for the making of financial awards to persons who as children were resident in certain institutions in the state and who suffered injuries consistent with abuse received while so resident; establishes a Residential Institutions Redress Board to make such awards, and a Residential Institutions Redress Committee as an appeals body to review such awards, and provides for related matters
Date enacted: 10/4/2002
Commencement date: 10/4/2002; establishment day order to be made (per section 2 of the act)

Road Traffic Act, 2002
Number: 12/2002
Contents note: Provides for a system of penalty points for minor driving offences; permits preliminary breath testing (breathalysing) of drivers where they are involved in a road accident or a breach of road traffic law; provides a framework for implementing the *European convention on driving disqualifications* (which permits the imposition by member states of driving disqualifications for offences committed in another member state); increases certain financial penalties for road traffic offences, and provides for related matters. Amends and extends the *Road Traffic Acts, 1961 to 1995*
Date enacted: 10/4/2002
Commencement date: Commencement order/s to be made (per section 26(2) of the act)

Social Welfare (Miscellaneous Provisions) Act, 2002
Number: 8/2002
Contents note: Provides for increases in the monthly rates of child benefit and in the amounts of the respite care and widowed parent grants as announced in the budget 2002; extends payment of child dependant increases for certain children of recipients of short-term social welfare payments and provides for changes in the linking arrangements for certain claims to disability benefit and pre-retirement allowance. Provides for certain other miscellaneous amendments to the social welfare code and for amendment of the provisions relating to the administration of public service data. Amends legislation relating to the registration of births, deaths and marriages, primarily to facilitate the implementation of the new computerised system of registration of births and deaths. Amends and extends the *Social Welfare Acts*, the *Charities Act, 1961*, the *Combat Poverty Agency Act, 1986*, the *Health Contributions Act, 1979*, the *Births and Deaths Registration Acts, 1863 to 1996*, the *Marriages (Ireland) Act 1844*, the *Registration of Marriages (Ireland) Act 1863*, the *Family Law (Maintenance of Spouses and Children) Act, 1976*, and the *Vital Statistics and Births, Deaths and Marriages Registration Act, 1952*
Date enacted: 27/3/2002
Commencement date: Various commencement dates for sections 1 to 9, 13 and 17 – see act. Commencement order/s to be made for the remaining sections, ss10, 11, 12, 14, 15 and 16

Solicitors (Amendment) Act, 2002
Number: 19/2002
Contents note: Amends the *Solicitors Acts, 1954 to 1994* in relation to the Law Society's regulatory powers, the composition and powers of the Solicitors Disciplinary Tribunal and advertising by solicitors. Implements the lawyers establishment directive 98/5/EC and, for the removal of doubt, provides that a report of a case made by a solicitor shall have the same authority as if it had been made by a barrister
Date enacted: 13/4/2002
Commencement date: Commencement order/s to be made for all sections except section 20 (implementation of the establishment directive) which comes into operation on 13/4/2002 (per section 23(2) of the act)

Tribunals of Inquiry (Evidence) (Amendment) Act, 2002
Number: 7/2002
Contents note: Makes provision, in relation to the publication of reports of tribunals, that a risk of prejudice to any pending criminal trial will not arise from the tribunal's proceedings; provides a legal basis for the appointment of additional and reserve members of tribunals as requested by the tribunal of inquiry into certain planning matters and payments; provides that a tribunal may appoint investigators to assist it in carrying out its functions. Amends the *Tribunals of Inquiry (Evidence) Acts, 1921 to 1998*
Date enacted: 27/3/2002
Commencement date: 27/3/2002

Twenty-first Amendment of the Constitution Act, 2001
Contents note: Amends the constitution by the deletion in article 13.6 of the words 'except in capital cases', and by the insertion of a new sub-section 2 in article 15.5: 'The Oireachtas shall not enact any law providing for the imposition of the death penalty'
Date enacted: 27/3/2002
Commencement date: 27/3/2002

SELECTED STATUTORY INSTRUMENTS

Asset Covered Securities Act, 2001 *(Commencement) Order 2002*
Number: SI 94/2002
Contents note: Appoints 22/3/2002 as the commencement date for all sections of the act

Circuit Court (Alteration of Circuits) Order 2002
Number: SI 134/2002
Contents note: Removes the county of Sligo from the Northern Circuit and adds it to the Midland Circuit. Paragraph 4 provides that business transacted in the Circuit Court which was initiated but not completed before the commencement of this order shall be continued and completed as if this order had been in operation when such business was initiated
Commencement date: 10/4/2002

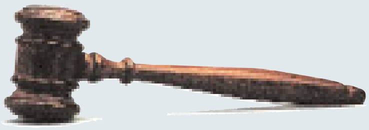
Companies (Forms) (No 3) Order 2002
Number: SI 114/2002
Contents note: Substitutes a new form B1 for the form B1 in part II of the fifth schedule to the *Companies Act, 1963*, as amended by the *Companies (Forms) Order 2002* (SI 38/2002) (annual returns)
Commencement date: 27/3/2002

Employment Regulation Order (Law Clerks Joint Labour Committee) 2002
Number: SI 88/2002
Contents note: Made by the Labour Court on the recommendation of the Law Clerks Joint Labour Committee; fixes statutory minimum rates of pay and regulates statutory conditions of employment for certain workers employed in solicitors' offices
Commencement date: 1/4/2002

European Communities (Milk Quota) (Amendment) Regulations 2002
Number: SI 97/2002
Contents note: Amend the *European Communities (Milk Quota) Regulations 2000* (SI 94/2000) to provide for the operation of milk production partnerships in Ireland
Commencement date: 21/3/2002

Valuation Act, 2001 *(Commencement) Order 2002*
Number: SI 131/2002
Contents note: Appoints 2/5/2002 as the commencement date for all sections of the act. G

Prepared by the Law Society Library



Personal injury judgments

Road traffic accident – sink falling from trailer – dispute as to nature and extent of injuries – whether award of damages excessive – whether there should be a new trial

CASE

***Sharon Cawley v Joseph Foley and Rose Foley*, High Court (Kinlen J), Supreme Court (Denham, Geoghegan and Fennelly JJ), judgment of Geoghegan J for the Supreme Court of 20 December 2001.**

THE FACTS

On 13 November 1999, Sharon Cawley was driving in her car with her children along a road between 5pm and 6pm. There was a vehicle with a trailer attached in front of her. She was driving behind the vehicle when one of the doors of the trailer opened suddenly and a sink fell from the trailer which caused Ms Cawley to brake suddenly. She was wearing a seat belt at the time.

Although Ms Cawley did not feel any pain immediately following the accident, after she went home she began to shake and became upset. She lay down on the settee and fell asleep. When she woke up, her right shoulder was stiff and painful and her chest was sore, as was her lower back. It appears that she stayed in bed most of the weekend and was a lot worse on the following Monday morning. Ms Cawley complained that her shoulder has become more painful; she had pain in the back of her neck and it was radiating up, her eyes were feeling sore, her head was heavy, and she was afraid that there was something wrong with her. She visited her doctor and was referred to casualty. At that stage, she stated her headaches were severe and she had a collar fixed to her neck. She was sent for physiotherapy but had to discontinue it because it appeared to be causing headaches. She claimed that she was not able to do some of her normal housework, such as hoovering, and she found it painful to dress in the mornings.

High Court proceedings were issued against the owners and driver of the vehicle and trailer. Essentially, Ms Cawley argued that she was injured because of the sudden braking. The Foleys disputed that Ms Cawley had in fact been injured. It was put to Ms Cawley that, although the sink undoubtedly fell out from the trailer, she had come to a halt without any difficulty.

HIGH COURT JUDGMENT

The matter came before Kinlen J. At the trial there had been considerable argument and engineering evidence about the speed of Ms Cawley's car at the time. Kinlen J in his judgment said that it must have been a frightening experience for Ms Cawley to see something like a sink falling from a vehicle when she was driving with three children. However, he said that she had no physical injuries of any note. All the tests done and x-rays were negative. He said the court was satisfied that she did not suffer as much as she would have the court believe, considering that some of her injuries may very well have predated the accident. There were other inconsistencies.

However, the judge was satisfied that the accident should not have occurred. There had been damage, but not nearly as much as Ms Cawley had alleged. The fact that she was vulnerable from her previous accident and injuries was a matter which the Foleys had to put up with. One must accept the plaintiff as one finds him or her.

HIGH COURT AWARD

General damages to date of trial:	£20,000
General damages for the future:	£5,000
Special damages:	£301
Total:	£25,301

THE SUPREME COURT

The Foleys appealed the decision of Kinlen J. The case came before the Supreme Court (Denham, Geoghegan and Fennelly JJ), with Geoghegan J delivering judgment on 20 December 2001.

Having recited the facts above, Geoghegan J stated that the Foleys had appealed the award on numerous grounds, but there was a focus on three principal issues. The first issue was whether it was open to the judge in the High Court to find that Ms Cawley suffered any injury at all in the incident (adopting the neutral term). Second, it was submitted that there was a lack of clarity of findings by the High Court judge both as to causality and injuries, and the issue arose in that context as to whether the trial was unsatisfactory. Finally, the question arose of whether the amount of damages was too high.

In his judgment, Geoghegan J stated that the tort of negligence contained three essential elements. First of all there must be a duty of care; second, there must be a breach of that duty; and third, damage must result from that breach. In the present case, the first two components existed, but it was the third element that was in issue. The Foleys contended that on the evidence as appearing in the transcript it was not open to the High Court judge to find in favour of Ms Cawley on the liability issue or, alternatively, if it was open to the judge to so find, he had not given any indication in the judgment as to what findings of fact he had made.

The Supreme Court considered that Kinlen J in the High Court did make a finding of fact that Ms Cawley did have to brake suddenly as a consequence of the sink falling out of the trailer and that she suffered some injuries as a consequence. Geoghegan J stated that it was open to the High Court judge to accept these facts even if they did not tally with speeds and distances put forward by the relevant expert.

The Foleys had argued that they were entitled to have an adjudication in the judgment on the precise issues they had raised and that the absence of reference to these rendered the judgment unsatisfactory and therefore the trial unsatisfactory. The Supreme Court said that it would undoubtedly have been highly desirable if the High Court judge had made a finding of facts on all the issues raised at the hearing as envisaged by the Supreme Court in *Hay v O'Grady* ([1992] 1IR 210). However, the absence of such precise findings in this case would not in the Supreme Court's view warrant a new trial. It was reasonably clear that Kinlen J in the High Court accepted Ms Cawley's basic story and that was the end of the matter. The Supreme Court noted that it was desirable for counsel to make closing submissions to the judge where this was appropriate.

The Supreme Court considered that it was open to the trial judge to find that there would be some suffering into the future. However, it was obvious from the judgment of Kinlen J that he did not attach great significance to any of Ms Cawley's injuries.

SUPREME COURT AWARD

The Supreme Court stated that it would not interfere with the award of a High Court judge unless the award was substantially above or below that which might be considered by the Supreme Court to be a reasonable award.

The Supreme Court held that the award of £25,000 for general damages, even allowing for the fact that £5,000 of that was for future pain and suffering, was wholly excessive and a figure of £12,500 was substituted for general damages.

The appeal was allowed to the extent of substituting of £12,801 instead of the High Court judgment of £25,301.

Occupiers' liability – house and grounds open to the public – whether a person was 'a visitor' or 'recreational user' on the premises – extent of duty to such a person – person injured on steps – whether precautions were reasonable

CASE

***Imra Heaves v Westmeath County Council*, Circuit Court judgment of Judge Bryan McMahon of 17 October 2001 at Mullingar Circuit Court.**

THE FACTS

Imra Heaves was a regular visitor to the grounds of Belvedere House in Co Westmeath, whose gardens and surrounding areas are open to visitors. On Sunday 26 July 1998, shortly after the premises were open to the public at noon, Mr Heaves arrived at the car park, parked his car, paid £1 entry fee for himself and 50p for each of his two children. Two attendants at a wooden hut in the car park took the money. Mr Heaves proceeded past the collection hut and on to premises behind the house which overlooked a lake which had formal steps leading down to another lower terrace.

As Mr Heaves was walking on the lower terrace in front of the house and admiring the view on to the lake, his two children strayed from his side. Shortly thereafter, he heard one of the children call from his left as he looked over the lake. 'We're over here', one child said. There was no note of panic in the tone used. Mr Heaves looked to his left but could not see his children. He then proceeded to walk towards the bushes which marked the end of that terrace and he came across a set of rustic steps descending to a still lower grassy woodland level. Approaching the steps, he saw one of his children halfway down the steps with his back against the wall and the other child standing at the bottom of the steps. This was the first time that Mr Heaves had seen these steps and apparently the children had never been down the steps before.

Mr Heaves then proceeded to go down the steps. Standing on the top step, he put his right foot on to the second step and, as he did so, he slipped on an uneven indentation which was partly covered with lichen and moss. As he transferred his weight from his left foot to his right foot he slipped and slid down the steps hitting his right elbow off the row of rocks which formed a barrier on the right hand side. Mr Heaves sustained some injuries and he sued Westmeath County Council as the occupiers of the premises in question.

THE JUDGMENT

Judge Bryan McMahon in his judgment delivered on 17 October 2001 set out the facts above and then considered the law on occupiers' liability laid down in the *Occupiers' Liability Act, 1995*. Under the 1995 act, people who come on to another person's premises are divided into three categories: visitors, trespassers and recreational users.

To the visitor, the occupier owes a duty to take such care as is reasonable in the circumstances to ensure that a visitor to the premises does not suffer injury or damage by reason of any danger existing thereon. The judge noted that this duty was comparable to the duty of care in ordinary negligence actions. Noting that trespassers and recreational users, however, were not so generously treated under the legislation, the judge said that for these entrants the occupier must merely ensure that he does not intentionally injure them, or does not act with reckless disregard for their safety.

Mr Heaves had argued that he was a lawful visitor on the premises and was entitled to what may be described as the common duty of care, that is, a duty on the part of Westmeath County Council to take reasonable care. Westmeath County Council argued that Mr Heaves was a recreational user and was accordingly only owed the lower standard of care. In the alternative, Westmeath County Council claimed that even if Mr Heaves was a visitor, the council was not in breach of its statutory duty in the circumstances.

The judge examined the definitions of 'visitor' and 'recreational user' under the *Occupiers' Liability Act, 1995* and noted that the term 'visitor' includes an entrant who was present on premises by virtue of a contract. Accordingly, it would appear that Mr Heaves in the present case should be classified as a visitor. After all, according to the judge, he paid an entry fee in respect of himself and his children. In common law, he would be classified as a contractual invitee.

The definition of 'recreational user' on the other hand was intended, the judge said, to cover people who entered premises with or without permission, without a charge to engage in a recreational activity conducted in the open air (including any sporting activity) or to engage in scientific research and nature study or to explore caves, visit sites and buildings of historical, architectural, traditional, artistic and archaeological or scientific importance – see section 1(1) of the 1995 act).

Referring to the definitions, the judge said that by entering under a contract Mr Heaves was definitely in the category of a 'visitor' and by paying a charge he was outside the category of 'recreational user'. Reference was made to McMahon and Binchy, *Law of torts*, 3rd ed, p322.

Judge McMahon stated that in the legislative classification on occupiers' liability, it was important to remember that there were three and only three categories; these categories were exhaustive; there were no more categories. Furthermore, the judge said that an entrant could not be in two categories at the one time. Reference was made to McMahon and Binchy, *Law of torts*, 1st ed, 1980, pp230-262.

Duty owed to a visitor

The standard of duty owed to visitors is a common duty of care; that is, a duty to ensure that a visitor to a premises does not suffer injury or damage by reason of any danger existing thereon. The court proceeded to examine the nature of this duty in the present case.

The engineer who gave evidence on behalf of Mr Heaves pointed out that the second step in particular on which Mr Heaves slipped had a rough indentation and when covered in moss might constitute a trap. Mr Heaves's own evidence was that he approached the steps with caution. His children had already negotiated the steps safely and he prepared to descend with all due care and deliberation. The judge noted that Mr Heaves was aware that it was not a normal stairway and as he approached to descend he had his right arm extended to balance himself. The sandals which Mr Heaves was wearing at the time were exhibited in court and they had rough soles which in normal circumstances would be quite safe to walk on. It had been suggested by Mr Heaves's engineer that the steps may have been cordoned off, or a warning might have been placed at the head of the steps to alert visitors. The engineer also suggested that the steps could have been made less hazardous had a handrail been placed on the left-hand side of the stairs where the wall bordered the steps. When pressed, the engineer suggested that there were special chemicals which might have been used on the steps annually to clear away any moss and lichen that made them hazardous.

Judge McMahon then considered the evidence of the head gardener employed by Westmeath County Council to look after the grounds. The gardener testified that a good cleaning system was in place. He personally supervised the grounds and kept them in order. He regularly patrolled the grounds and he had two assistants to help him clean and maintain the grounds. Thousands of people had visited the premises and there were no complaints or incidents regarding the condition of the premises and certainly none relating to the steps. Each year the services of an independent contractor were engaged who came and accompanied the gardener throughout the grounds. When potential hazards and trouble spots were identified, any required measures were taken to remedy any hazards. Places that were considered to be hazardous were cleaned up and sprayed with appropriate weed killers and with stronger chemicals when required.

The head gardener testified that this annual consultation with the contractor had taken place in the previous month and that the recommended spraying, including treating the steps in question, had been carried out in accordance with instructions at that time. The judge concluded that it was clear that the annual inspection recommended by Mr Heaves's engineer as being the reasonable measure required of the occupier had, in fact, been carried out a short time prior to the fall. Further, the gardener stated that the steps in question were brushed regularly twice a week and also were, with the rest of the grounds, subject to a daily inspection during the high season. There was also evidence that the premises in question were listed premises and that it was not permitted to make structural alterations without permission due to the historical importance of the buildings. This was of significance when the suggestion that a hand rail should have been erected on the stairway in question came to be considered.

Judge McMahon concluded that the duty of Westmeath County Council was to take reasonable care and no more. He noted that it was frequently said in this context that the occupier is not an insurer. This means that the occupier does not guarantee that an accident will never occur on the premises. It is not an issue of strict liability; the law only requires that the occupier takes reasonable precautions, and in judging the occupier's conduct all of the circumstances of the case must be taken into account.

He noted that one must be careful when assessing the conduct of Westmeath County Council, for example, that one is 'not condemning with the benefit of hindsight'. This was especially so in the Heaves case, where there had been evidence that since the accident Westmeath County Council had put up a warning notice and had cordoned off the access to the steps in question. The judge noted that such post-accident precautions did not entitle the court to conclude that their initial omission inevitably spoke of negligence at the time of injury. Such responses might be warranted pending a full investigation and assessment of the hazard, and might be the result of a cautious insurer insisting on better risk management. The judge observed: 'Because we are more prudent or more cautious today, does not necessarily mean that we were negligent yesterday'.

Precautions were reasonable

The court found that the precautions which Westmeath County Council had taken in all the circumstances were reasonable. The council had personnel appointed to address such risks. A satisfactory cleaning system was in place. The gardener had engaged an outside expert to advise him. He duly implemented the advice he received and this was exactly what Mr Heaves's engineer said Westmeath County Council should do to avoid the negligence label.

Judge McMahon referred in conclusion to the evidence of Mr Heaves that before he commenced his descent on the steps he approached them with his 'eyes open and fully aware of the nature of the steps that confronted him'. The judge noted Mr Heaves was in full possession of all requisite knowledge that a warning notice, had there been one there, would have given him, and in the circumstances he could not conclude that the absence of such a notice in any way contributed to Mr Heaves's injury. The judge also noted that Mr Heaves's two young children, aged five and three years at the time, had safely negotiated the same steps some moments previous to Mr Heaves's fall and, if it was safe for them, it cannot have represented a serious risk to an adult who was fully aware of what lay before him.

He held that although Mr Heaves was 'a visitor' within the statutory definition, there was no failure on the part of Westmeath County Council to discharge its statutory duty to take reasonable care in respect of dangers existing on the premises. Mr Heaves's action was accordingly dismissed. G

These judgments were summarised by solicitor Dr Eamonn Hall.

FirstLaw Update

www.firstlaw.ie

News from Ireland's on-line legal awareness service
Compiled by Robert Forde BL for FirstLaw

ADMINISTRATION

Casual trading

Local authorities – injunction – casual and street trading – whether injunction should issue – Casual Trading Act, 1995

The plaintiffs brought proceedings seeking an injunction to restrain the defendants from interfering with the plaintiffs' right to hold a fair and market. The plaintiffs complained that the local authority planned to replace the traditional market with a new market at an unsuitable location. The plaintiffs submitted that there was a real issue to be tried, a public right was in issue, damages were not an adequate remedy and the balance of convenience must favour the plaintiffs.

Mr Justice Ó Caoimh granted the relief sought, holding that the plaintiffs had demonstrated that there were real issues to be tried and damages did not represent an adequate remedy. Also, the balance of convenience favoured the plaintiffs and in the circumstances they were entitled to the interlocutory relief which they sought.

***Simmonds and Others v Cork County Council and Others,* High Court, Mr Justice Ó Caoimh, 22/02/2002** [FL5048]

Damages, state liability

European law – state liability – statutory interpretation – damages – breach of statutory duty – beef industry – export refund scheme – whether minister entitled to make disallowances and forfeit securities – whether sampling system adopted by minister sufficient and reliable

The plaintiff was involved in the export of beef to various countries. The defendant operated as the intervention agent in Ireland and operated two intervention schemes in relation to beef (the aid for private storage scheme and the export refund scheme). The plaintiff availed of both these schemes and received various payments under these schemes. However, the defendant conducted a sampling exercise on the beef products stored by the plaintiff and determined that the appropriate regulations had not been complied with. As a result, the defendant made certain disallowances and forfeited securities that the plaintiff had furnished. The plaintiff instituted proceedings, claiming the actions of the defendant were invalid and sought damages for negligence and breach of duty. The plaintiff was successful in the High Court and the defendant appealed to the Supreme Court. The Supreme Court referred a number of matters to the European Court of Justice under article 177. On behalf of the defendant, it was submitted that in the light of the answers received from the Court of Justice, the appeal should be allowed. The plaintiff disputed this assertion and sought the remittal of the action to the High Court for an assessment of damages.

The Supreme Court allowed the appeal and dismissed the plaintiff's claim. The preliminary ruling of the Court of Justice had made it clear that the interpretation of the High Court judge of the relevant regulations was erroneous. The Court of Justice had made it clear that the extrapolation exercise conducted by the minister was perfectly legitimate. The disallowances and forfeiture of the securities could not be regarded as a disproportionate response to the violation of the regulations involved.

***HMIL Limited v Minister for Agriculture,* Supreme Court, 24/01/2002** [FL4937]

Fair procedures, Garda Síochána

Judicial review – Garda Síochána – complaints procedure – fair procedures – conflict of evidence – meaning of 'vexatious' – whether complaint vexatious – Garda Síochána (Complaints) Act, 1986

The applicant had made a complaint about members of An Garda Síochána and was subsequently informed by the respondent that the complaint was inadmissible as it was vexatious but that he could appeal against the decision. His solicitor wrote back seeking clarification of the statutory basis for the appeal and also seeking copies of the statements and other papers which were before the respondent when the decision was made. The materials requested were denied because it was stated that the respondent regarded all documentation gathered in the course of an investigation as confidential. The appeal was not proceeded with, but the applicant issued judicial review proceedings challenging the decision of the respondent deeming his complaint inadmissible. The applicant submitted that the decision that his complaint was vexatious was clearly based on a conflict of evidence and, as such, the complaint could not be vexatious. The applicant was entitled to be given a reason for the decision. He was denied access to the material before the respondents and accordingly did not have the information which would have enabled him to exercise a meaningful right of appeal. On behalf of the respondent, it was contended that that there was no logic in the proposition that just because a complaint was countered by an opposing statement it could not be vexatious. The evidence in the present case was simply that there were such opposing statements and the respondent had formed the opinion that the complaint was vexatious. The applicant was told that his complaint was inadmissible because it was vexatious. This was a sufficient reason for him to decide whether or not to appeal and contest the proposition.

In dismissing the case, O'Sullivan J held that if a complaint was vexatious then it remained vexatious whether there was an opposing statement or not. The legislation imposed a duty upon the respondent upon receipt of a complaint to consider whether it was admissible, and this included considering whether it was vexatious or not. The applicant was given a reason for the decision and that reason was sufficient for him to exercise the non-statutory appeal procedure available. In the circumstances, the applicant's case would be dismissed.

***Kelly v Garda Síochána Complaints Board,* High Court, Mr Justice O'Sullivan, 15/02/2002** [FL4918]

Freedom of information

Statutory interpretation – disclosure – whether disclosure of documents should be ordered – Freedom of Information Act, 1997

The appellant had sought access to documents under the *Freedom of Information Act, 1997*. The information commissioner had refused access to certain documents and the appellant appealed to the High Court. Mr Justice O'Neill had already issued a judgment on 4/4/2001 in which it was stated that the court would examine the documents in question. The decision whether or not to disclose the documents centred around the interpretation of the phrase 'relate to personal information'. The appellant submitted that this phrase must include all documentation which directly or indirectly referred to the requester and his personal circumstances.

Mr Justice O'Neill held that a requester had a right of access to records. Where a doubt or ambiguity existed as to the connection of the record to the requester, a consideration of factors such as the circumstances in which the record was created, the purpose for which the record was created and whether it was created with the affairs of a particular individual in mind might assist in determining 'whether there is a sufficiently substantial link between the requester's personal information (as defined in the act) and the record in question'. The decision by the information commissioner to refuse access to certain files as they related to other parties and in another instance were subject to the *in camera* rule would be upheld. In relation to a decision not to disclose an affidavit due to the *in camera* rule, the court did not agree with the decision of the commissioner and the court would order its disclosure.

***H(E) v Information Commissioner*, High Court, Mr Justice O'Neill, 21/12/ 2001** [FL4947]

ARBITRATION

Injunction, property

Compulsory acquisition – public interest – compensation – interim award – unjust enrichment – tribunal of inquiry – delay – whether balance of convenience favoured granting of injunction – whether plaintiff had made out arguable case

The second defendant was the owner of certain lands which were the subject of an arbitration. The plaintiff, a local authority, sought an interlocutory injunction to prevent the first defendant, as statutory arbitrator, from embarking on the arbitration to hear the claim for assessment of compensation. The plaintiff claimed that there was evidence that substantial monies had been paid in order to effect the rezoning of the lands in question and that a tribunal of inquiry was investigating the matter. The plaintiff claimed that if the allegations were proved true then any award made in an arbitration would constitute unjust enrichment. In addition, it was claimed that the balance of convenience favoured the granting of the injunction and that, if an award was made, serious difficulties could be encountered in recovering any monies which should not have been paid. The second defendant opposed the granting of an injunction and claimed that the court's jurisdiction to intervene was limited to a challenge to the appointment of an arbitrator or to a dispute regarding the provisions of the contract giving rise to the arbitrator's appointment.

In granting the injunction sought, Mr Justice O'Sullivan held that the plaintiff had demonstrated an arguable case of unjust enrichment. The court would also take into account that the tribunal had decided to investigate the allegation. The balance of convenience heavily weighed in favour of granting the injunction sought subject to the qualification that the second defendant was entitled to compensation on the use of the lands prior to the change of zoning. The delay in the case was not such so as to prohibit making the order sought. In making the order, the court was influenced by the public interest considerations which applied to the case.

***Dun Laoghaire v Shackleton and Jackson Way Properties*, High Court, Mr Justice O'Sullivan, 23/01/2002** [FL4925]

CHILDREN AND YOUNG PERSONS

Custody

Family law – custody – Hague convention *– whether child wrongfully retained – whether child habitually resident in England –* Child Abduction and Enforcement of Custody Orders Act, 1991

The case concerned the custody of a child (RG). The High Court had directed that RG be returned to her father in England. The father lived in England and had sought the return of RG to England. The father had custody rights under the *Hague convention*. The mother of the child had become ill and had returned to Ireland bringing RG with her. The father contended he had consented to RG travelling with her mother on the basis that it was for a limited time only. The mother had subsequently died and had appointed the respondent (VC) as a testamentary guardian of the child. VC was an aunt of the child and asserted that the father had consented to RG remaining in Ireland for an indefinite period. The father (PG) sought the return of the child to England and Mr Justice Butler in the High Court ordered that the child be returned to England in a judgment delivered on 22/11/2001. The judge had found that there had been no change in the habitual residence of the child and there had been a wrongful retention of the child. The respondent appealed against the judgment to the Supreme Court on the basis that the issues relating to habitual residence and wrongful retention had been wrongly decided.

The Supreme Court allowed the appeal, holding that a more detailed explanation was required in relation to the finding that the habitual residence of the child had not changed. Given the absence of findings of essential facts, the matter had to be returned to the High Court for determination. Being a *Hague convention* case, the matter should be dealt with in the High Court as a matter of urgency.

***Minister for Justice (*ex parte *G(P)) v C(V)*, Supreme Court, 24/01/2002** [FL4912]

Health boards

Powers and duties of health boards – statutory interpretation – child care order – definition of 'guardian' – functions of District Court – whether health board could authorise placement of children outside of state – Adoption Act, 1952 – Child Care Act, 1991, *sections 18, 36, 47*

The proceedings concerned the placement of children by a health board outside the jurisdiction. The health board (the applicant) sought to place the child with a relative who lived in England. The matter came before the District Court, which stated a case for the opinion of the High Court. Finnegan J was satisfied that the District Court was entitled to direct the placement of a child outside the state pursuant to section 47 of the *Child Care Act, 1991*. The respondent (who was the mother of the child) appealed against the judgment, arguing that the High Court had erred in law in so holding. It was submitted that the District Court had only a supervisory jurisdiction in such matters and section 47 of the *Child Care Act, 1991* should be given a restrictive interpretation. Counsel on behalf of the health board submitted that the section should be given a purposive interpretation and the *Child Care Act, 1991* was intended to operate effectively in the realities of life in the state in the 20th century. This would reflect issues such as emigration and increased mobility regarding employment opportunities.

The Supreme Court dismissed the appeal. The *Child Care Act, 1991* should be approached in a purposive manner. The powers contained in section 47 included the power to direct the placement of a child outside the state where the evidence indicated that such a placement was truly in the best interests of the child. Such an order must be made rarely and with considerable caution, and the health board would continue to have responsibility for the welfare of the child concerned.

***Western Health Board v M*, Supreme Court, 21/12/2001** [FL5016]

COMPANY

Adverse possession, *Statute of Limitations*

Land law – banking law – credit and security – powers and duties of receiver – agency – adverse possession – statutory interpretation – whether appointment of receiver brought about change in occupation of lands – whether receiver agent of company – whether actions of banks statute barred – Statute of Limitations 1957

It was the intention of Bula to engage in major mining operations and to that end large sums of money were borrowed from banks and duly secured by a number of mortgages and debentures, which entitled the relevant bank holding security to appoint a receiver over the property of the company in the event of default being made by Bula in its obligations to the bank in question. Bula's commercial intentions were not realised and major financial difficulties ensued in consequence of which the banks called in their loans by formal demands. The banks appointed the first defendant as receiver over Bula's secured property, issued proceedings seeking the recovery of principal and interest and brought well charging order proceedings against Bula. It was contended on behalf of the plaintiffs that having regard to the provisions of sections 33 and 38 of the *Statute of Limitations*, the title of the banks to Bula's lands had become extinguished and the right of the mortgagees to principal and interest secured by the mortgages and debentures had also become extinguished. It was submitted that both sections must be interpreted in accordance with the plain ordinary meaning of the words used, however harsh, incongruous, contrary to common sense or even absurd the result might be. It was also submitted on behalf of the plaintiffs that 'to bring an action' means not merely the issuing of a summons to commence judicial proceedings but the successful conclusion of the action within the statutory time limit. A crucial issue revolved around whether or not the plaintiffs could establish adverse possession against the banks. It was contended that the appointment of the receiver had the consequence of putting Bula under his managerial control and, second, the disempowerment of the directors of the company. It was submitted that the appointment of the receiver did not bring about possession of the assets by the receiver to the exclusion of the company. It was contended that the receiver derived his powers solely from the debentures under which he was appointed to be the agent of the company and not of the banks. The defendants submitted that the receiver was lawfully appointed by the mortgagees under the debentures and had taken effective possession and control of Bula for the purpose of achieving the objective of the banks. It was contended that the receivership was outside the scope of the statute and had no part to play in the relationship between Bula, the banks and the receiver. It was contended that the essence of the statute in the context of property rights was adverse possession – in other words, for the statutory limitation period to apply there must be, per section 18(1), possession of the relevant land which was adverse to the interest of the true owner or the person (in this instance the banks) who claimed the right to *de facto* ownership.

Mr Justice Barr held that, subject to long established tenets of construction, words in a statute should be construed in accordance with their plain, ordinary meaning. The court had no function in remedying error in circumstances where legislation, though clear in its terms, was found to be defective. The activation of rights under the debentures, which arose when, consequent upon default by the company in paying its debts, the banks appointed the receiver to take control of the company and to arrange the sale of its secured assets for the benefit of the mortgagees, did not create a situation of adverse possession within the meaning of section 18(1) because there was no possession without right or authority which was the essence of 'adverse possession' within the meaning of the statute. A receivership involved two distinct relationships. First, that between the appointing mortgagee and the receiver, which related to the fundamental objective of the receivership, being entry into possession of the company's assets for the purpose of sale in the interest of the mortgagee. In practical terms vis-à-vis mortgagee and mortgagor, the control over the company's assets exercised by the receiver amounted to possession of the debtor's secured assets by him, which in turn in practical terms was possession by the mortgagee who appointed him. The second relationship was that between the receiver and third parties arising out of the receivership. Debentures normally provided, as in this case, that such dealings were conducted by the receiver as agent of the company in receivership. The mortgagees had no right to interfere in the receivership in that regard. There was no inconsistency between the foregoing relationships which represented long established commercial good sense. The plaintiffs had failed to establish the fundamental requirement of adverse possession of the lands under section 18(1), which was essential to the operation of the statute. The relationship between Bula, the banks and the receiver was one derived from the debentures and mortgages. It was not within the realm of the statute.

***Bula Limited and Others v Crowley and Others*, High Court, Mr Justice Barr, 01/02/2002** [FL5044]

Dismissal of proceedings

Practice and procedure – dismissal of proceedings – specific performance – share purchase – whether agreement void for illegality – whether plaintiff's claim bound to fail – Companies Act, 1963, *section 60*

The defendant brought a motion to strike out the plaintiffs' proceedings on the basis that the plaintiffs' claim was bound to fail. In the High Court, the application was rejected as the High Court judge was satisfied that there was at least an arguable issue to be tried. The plaintiffs had brought an action for specific performance relating to an agreement for a share purchase. The plaintiffs agreed to purchase shares held by the defendants. The shares were in a company which owned lands. The completion date for the acquisition of the shares was related to the grant of full planning permission. There were issues relating to whether in fact the agreement became operative due to planning matters. The defendants claimed that the agreement was illegal on its face and was in violation of section 60(1) of the *Companies Act, 1963*.

In dismissing the appeal, the Supreme Court held that the High Court judge was entirely correct in the view he took of the matter. If the action was to be allowed to proceed, then the court should not say anything which would prejudge any issues which might arise. It could be said that the company itself was not a party to the share purchase agreement and, second, it could be argued that the agreement, of itself, did not give within the terms of the relevant section any financial assistance for the purchase of the shares. It could not be said that the plaintiffs' claim would clearly and unarguably fail. Accordingly, the appeal would be dismissed and the order of the High Court judge affirmed. ***McGill and Another v Bogue and Others*, Supreme Court, 11/07/2000** [FL4911]

Property

Constitutional law – telecommunications – compulsory acquisition of shares – property rights – takeover – Eircom shares – whether proposed buy-out of shares infringed constitutional rights of share-holders – Bunreacht na hÉireann 1937 – Companies Act, 1963, *section 204*

The applicants brought proceedings over the buy-out by the respondent of shares held in Eircom. The applicants claimed that the exercise by the respondent of the buy-out was detrimental to the constitutional rights of the applicants. In particular, the applicants claimed that the buy-out of their shares infringed article 43 of the constitution which protected private property. In addition, the applicants claimed that any attempt by a corporate body to overwhelm the right of an individual infringed article 40 of the constitution.

In refusing the relief sought, Mr Justice Smyth held that the offer made by the respondent for the acquisition of the shares was fair and reasonable. All necessary procedural steps were taken and the legal requirements were observed. The principle of compulsory acquisition of minority shareholders enshrined in section 204 of the *Companies Act, 1963* was justified by reference to the public interest in the pursuit of corporate acquisitions and takeovers. The onus was on the dissenting shareholders to show that the court should exercise its discretion in their favour. Nothing in the evidence suggested that the court should grant the relief sought. ***Moran and Others v Valentia Communications*, High Court, Mr Justice Smyth, 21/01/2001** [FL5112]

CRIMINAL

Arrest, fair procedures

Evidence – arrest – detention – whether search of dwelling house carried out with consent – whether arrest of accused lawful – whether detention of accused lawfully extended – Criminal Justice Act, 1984 – Criminal Law Act, 1976

The accused had been arrested by the gardaí on suspicion of murder. The accused had allegedly made some statements admitting to the murder. The present application was brought on behalf of the accused objecting on a number of grounds. It was argued that the accused had not been taken to the garda station with reasonable expedition. The accused had been questioned for a brief period in his sister's house by the gardaí and had answered some questions put to him there. The defence also challenged the admission of evidence from interviews which had taken place at a garda station. It was also contended that evidence obtained from the accused was obtained as a result of an illegal search. It was argued that the arresting garda had arrested the accused not merely on the suspicion of having committed a crime but on the belief that he had committed a crime and therefore there were no reasonable grounds for the further detention of the accused and thus section 4 of the *Criminal Justice Act, 1984* providing for further detention did not apply.

Mr Justice Herbert ruled that the gardaí had no authority at common law or by statute to detain the accused in his sister's house and put various questions to him. The answers given and the interview that took place could not be used as evidence. One of the interviews conducted in the garda station was closely connected with the questioning that took place in his sister's house and could not be admitted. The accused had a sufficient interval to recollect himself and reappraise his position before the commencement of further interviews. There was no suggestion that anything said by the accused was the result of threats or intimidation by the gardaí. The court was not satisfied that the accused had been illegally searched. The accused had volunteered his arm for inspection by holding it out. In addition, the gardaí had the full and free consent when they searched a dwelling house to search for evidence. The purpose of section 4 of the *Criminal Justice Act, 1984* was to give the gardaí effecting an arrest adequate time but no more to progress to a position where a garda could prefer charges for the offence in question. On the evidence, there were *bona fide* grounds for believing that the detention of the accused was necessary for the proper investigation of the offence. The garda superintendent in question had acted entirely properly in directing that the detention of the accused be extended. ***DPP v Cleary*, High Court, Mr Justice Herbert, 07/12/2001** [FL4878]

Certiorari, jurisdiction of District Court

Judicial review – certiorari – *delay – striking out of summonses – whether District Court judge acted in excess of jurisdiction – whether case should be remitted to District Court* – Non-Fatal Offences Against the Person Act, 1997

The second-named respondent had been charged with offences under the *Non-Fatal Offences Against the Person Act, 1997*. Although summonses were served, they were adjourned and subsequently struck out. A second set of summonses were then issued and then dismissed by the first-named respondent. The applicant issued judicial review proceedings seeking an order of *certiorari* quashing the order of the judge. The applicant contended that the judge had acted in excess of jurisdiction and contrary to natural and constitutional justice in relisting the case and dismissing it without hearing the submissions of the prosecution.

Butler J held that the applicant was deprived of natural and constitutional justice because of the procedure adopted in relation to the submissions and because no opportunity was afforded to address the District Court when the summonses were struck out. The applicant was entitled to an order of *certiorari* quashing the order of the judge. However, as absolutely no blame could be attached to the second-named respondent or his solicitors and in view of the fact that almost four years and five months had elapsed since the date of the alleged offences, the matter would not be remitted to the District Court. ***DPP v Judge Brennan and O'Regan*, High Court, Mr Justice Butler, 20/03/2002** [FL5065]

LAND LAW

Specific performance

Property – specific performance – agency – contract – company law – whether terms of letter constituted completed agreement – whether time of essence in concluding agreement – Statute of Frauds 1695

The plaintiff had issued proceedings seeking a decree of specific performance against the defendant in relation to the sale of property. The plaintiff contended that a concluded agreement was reached with the auctioneer as agent of the defendant. The plaintiff had paid a deposit of 10% of the total price. The lands in question were owned by a company, the shares in the company being held by a brother (who held 99 out of the 100 shares and his sister (who held the remaining share). On behalf of the defendant, it was contended that the auctioneer was not acting as an agent for the defendant. In addition, attention was drawn to inaccuracies involving the title, the deposit and the closing date. The plaintiff relied upon the terms of a letter as being the completed agreement.

In granting the decree sought, Mr Justice O'Sullivan held that it was clear that the price was agreed and it was not the case that time was of the essence in concluding the contract (as had been submitted by the defendant). The auctioneer had the authority to act as agent on behalf of the defendant company. The letter constituted the agreement between the parties. The plaintiff was clearly prepared to accept the property 'warts and all' and was entitled to waive a term that was exclusively for his benefit. It was perfectly competent for the parties to have agreed either that there not need be a deposit or that once a booking deposit had been paid, the payment of the balance of the agreed deposit was something that would happen in due course. The memorandum in question was sufficient to satisfy the *Statute of Frauds*. The plaintiff was entitled to the decree sought.

***Higgins v Argent Developments Limited*, High Court, Mr Justice O'Sullivan, 01/02/2002** [FL4998]

REFUGEE AND IMMIGRATION

Amendment of pleadings, judicial review

Immigration, refugee and asylum law – practice and procedure – amendment of pleadings – whether Appeals Authority misdirected itself in law – Immigration Act, 1999 – Refugee Act, 1996 – Rules of the Superior Courts 1986, *order 84*

The applicants had applied for refugee status and had been refused. The applicants initiated judicial review proceedings claiming that as the Appeals Authority had received evidence of the persecution of the Roma people in Romania (of which the applicants were members) the authority should have recommended the applicants for refugee status. The applicants also claimed that there had been a failure to adhere to the requirements of the 1951 UN convention relating to the status of refugees and also to the criteria set out in the UNHCR handbook relating to refugees. The applicants sought a declaration that they were entitled to be granted refugee status. In addition, leave was sought to amend the statement of grounds.

In refusing the reliefs sought, Mr Justice McKechnie held that the application to amend pleadings must be solely considered under order 84 of the *Rules of the Superior Courts*. The grounds that were sought to be introduced had been before the High Court when leave was originally sought. Another judge of the High Court did not have the jurisdiction to effectively overrule an earlier order of the same court. The application to amend the statement of grounds would be refused. The court in reviewing the decision was exercising a supervisory jurisdiction over the decision-making process and not the decision itself. There was no factual basis for the case made by the applicants.

***R and Others v Minister for Justice and Others*, High Court, Mr Justice McKechnie 20/12/2001** [FL5092]

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

Eurlegal

News from the EU and International Affairs Committee

Edited by TP Kennedy, director of education, Law Society of Ireland

EU regulation on sales promotions in the internal market

When advertisers and promoters throughout the European Union are designing a sales promotional concept, they are obliged to take into account a significant number of legislative provisions on, for example, misleading and comparative advertising, data protection, legislation on dangerous imitations, distance contracts, door-to-door and pyramid selling and indication of prices legislation. In addition, advertisers in Ireland have been forced to develop concepts for promotional games and contests that comply with the *Gaming and Lotteries Act, 1956*. The *Gaming and Lotteries Act* provides that unlicensed games of chance that are linked to purchases are illegal. This means that promotions where, for example, consumers are offered the chance of winning €1000 instantly when they purchase a particular product are illegal unless the promoter has a licence to run the particular promotion. This has meant that Irish advertisers have been forced to run on-pack promotions where consumers are only permitted to win prizes where they engage in a test of skill such as, for example, the completion of a tiebreaker.

Skill-based promotions are not as popular with consumers, as they are forced not only to complete the skill-based tiebreaker/question/puzzle but, in addition, are often obliged to submit their personal details to the promoter of the contest/game. Many advertisers have flaunted the law and have organised and run illegal contests and games, as the penalties under the act are not particularly prohibitive. However, there is always the concern that a competitor who is losing sales because of the popularity of a particular sales promotion could issue injunctive proceedings against the promoter of the contest/game so that the promotion would have to stop and all promotional packs would have to be removed from the shelves. This could mean enormous costs for the promoter.

Where Irish promoters and advertisers wish to organise any type of promotion at a pan-European level, including contests/games on the Internet, they not only have to comply with Irish and European legislation on the running of promotions but are also forced to comply with the legislation which is particular to each of the member states of the EU. Take the example of a chocolate manufacturer who wishes to run a promotion across the EU whereby among all of the chocolate bars it manufactures, it distributes five bars which include tokens that can be exchanged for a cheque for €1000. In Ireland, this promotion would be illegal, as it would be contrary to the *Gaming and Lotteries Act* unless the promoter had managed to secure a licence. In the UK, however, it would appear that such a promotion may not be illegal as long as the promoter/manufacturer provided a 'free entry route' to the competition. In other words, as long as the promoter made provision that consumers could enter the game without making a purchase and by simply sending a request to the promoter that a promotional pack be opened on their behalf, the promotion would be legal.

Promoters and advertisers throughout the EU will be interested to hear that the legal environment in which they work may be set to change with the introduction in early October last year of a proposed EU regulation on sales promotions in the internal market. The proposed regulation requires member states, among other things, not to impose a general prohibition on instant-win promotions. This will make it much easier for advertisers to engage in pan-European promotions. It will also mean that if the regulation, as currently drafted, comes into effect, the Irish government will be forced to do away with the general prohibition in the *Gaming and Lotteries Act* on the organisation of chance-based games and contests that are linked to purchase. The rationale behind the prohibition on instant-win games and contests was to protect consumers against buying products or services that they did not need simply in order to enter the game. The European Commission noted in the communication that accompanies the proposed regulation that the notion that consumers would buy several units of the promoted product or service in order to be able to enter the game to win a prize seemed untenable given the odds of winning such prizes. Furthermore, the commission noted that as long as the winning odds ratio was easy to calculate, the restriction would be disproportionate and that the outright prohibition should be replaced with more appropriate and effective transparency requirements that would allow the consumer to make an informed decision to enter a game in full knowledge of the participation conditions and the winning odds ratio.

It is for this reason that the regulation outlines that, if promoters run an instant-win promotion, there is a requirement to provide, on the promotional pack, the value and nature of the prize, any associated costs other than the purchase of the promoted good or service that are payable in order to participate in the promotional contest or game and the actual or estimated odds of winning the prize. This means that in the future, if the proposed regulation as currently drafted is adopted by the EU, we will see at points of sale promotional products bearing information such as, for example, 'win a holiday for two to Paris valued at X euro – one in two million chance of winning'.

There is also a prohibition in the proposed regulation, as currently drafted, on the imposition by member states of a limitation on the value of a sales promotion (except for discounts on books) and a ban on discounts preceding seasonal sales. Member states are also prohibited in the draft regulation from putting in place a requirement for promoters to obtain an authorisation prior to the running and organisation of a sales promotion. Member states are allowed to continue particular sectoral rules that they have in place in relation to sales promotions, for example, the French book pricing system and the ban on the advertisement of premiums in conjunction with the sale of alcohol that is operable in some member states. Although member states are permitted to maintain these sectoral rules, these rules will be subject to the principle of mutual recognition, which means that member states cannot prohibit sales promotions in their territories that are legal in other countries of the EU, although they may be contrary to the sectoral rules that are operable in their country. This may result in reverse discrimination. Take for example an online Belgian bookshop that sells both French and Dutch publications – it will sell into France and the Netherlands, where there is book-pricing control, but it will not be subject to these controls as it will be subject to Belgian law. French and Dutch booksellers may find it difficult to compete with such enterprises.

There are also provisions in the proposed regulation in relation to the protection of children and adolescents. For example, a promoter is prohibited from providing a free gift consisting of an alcoholic beverage to individuals under 18 years of age. This is in line with a number of recent EU initiatives that seek to prevent abusive or excessive alcoholic consumption by minors, such as the *Television without frontiers directive*, which states that advertising for alcoholic beverages may not be aimed specifically at minors or, in particular, depict minors consuming these beverages. There are no provisions in the proposed regulation in relation to the sanctions that can be imposed, and this will have to be decided by each of the member states.

The European Commission hopes that the proposed regulation will be adopted in the first half of 2003 and has prioritised it as urgent. This deadline for adoption will obviously depend on the priority that is given to the proposal by the Danish and Greek presidencies. The proposal is currently being considered by the Committee on the Environment, Public Health and Consumer Policy, by the Committee on Legal Affairs and the Internal Market and by the Committee on Economic and Monetary Affairs of the European Parliament. Each of these committees has prepared a report, and the internal voting by each of these committees on these reports will take place at the end of April 2002. The reports will then be referred to the plenary session of the European Parliament and voting will take place on the proposed regulation and the proposed amendments of the various committees in the session beginning on 13 May 2002. It will be interesting to see what provisions of the proposed regulation survive the European parliamentary process. A reading of the draft reports produced by the aforementioned committees suggests that there may be substantial amendments proposed by the European Parliament. Once the parliament has finalised its proposed amendments, the proposed regulation and the proposed amendments will also have to be considered by the Council of the European Communities, and negotiations will have to be concluded with each of the member states. G

Lynn Sheehan is a solicitor with the Cork law firm Ronan Daly Jermyn.

Recent developments in European law

COMPETITION

Case T-175/99 *UPS Europe SA v Commission, supported by Deutsche Post SA*, 20 March 2002. UPS Europe SA is in the United Parcels Service group of companies, which distributes parcels throughout the world. It has offices in all EU member states and is in competition with DHL International Ltd. In May 1998, the commission was notified of a proposed concentration by which Deutsche Post AG (DP) sought to acquire, by the purchase of 22.498% of DHL's shares, control of that company jointly with two other companies. In June 1998, the commission declared that concentration compatible with the common market. Despite this decision, UPS argued that DP was abusing its dominant position. UPS argued that DP was only able to acquire the shares in DHL due to the revenue it obtained on the reserved postal market. It argued that DP was not entitled to use its exclusive rights for any purpose other than complying with its obligations to provide the service of general economic interest with which it was entrusted. The commission rejected that complaint and UPS sought to have the commission rejection annulled. The CFI dismissed the application. It held that being granted an exclusive right does not preclude an undertaking from earning profits from its reserved activity and from extending its activities into non-reserved areas. However, funds deriving from the monopoly and used for the acquisition must not derive from excessive prices or other unfair practices on the reserved postal market. Where there are grounds for suspecting abuse of a dominant position, it is necessary to examine the source of the funds employed. In this case, UP had not proved any abusive practice on the part of DP on the reserved letter market. The fact that DP possessed funds for acquiring the shares in DHL did not imply the existence of abusive conduct on the reserved market.

Cases T-9/99, 15/99, 16/99, 21/99, 23/99, 28/99 and 31/99 *HFB and Others v Commission*, 20 March 2002. The largest national markets for district heating pipes are Denmark and Germany. Denmark is the main manufacturer and provides all member states in which district heating is used. In 1990, four Danish producers concluded an agreement on cooperation on their domestic market. From 1991, two German producers regularly participated in their meetings. It was in that context that negotiations took place leading to a 1994 agreement setting quotas for the EU market. In 1995, a Swedish undertaking reported the situation to the commission. It complained that it was being forced from the sector by the tactics of the cartel. The commission concluded the existence of a series of agreement and practices aimed at dividing national and European markets among producers on the basis of quotas, agreeing prices for products, allocating projects and manipulating tendering procedures and forcing other producers from the sector. In the case of the Swedish undertaking (the only substantial undertaking not in the cartel), the cartel's tactics hindered its activities. The commission imposed fines amounting to approximately **€**92 million on the participating undertakings. The undertakings appealed to the CFI, arguing a misapplication of EU competition law. The CFI dismissed the appeal. Generally, the CFI upholds fines applied by the commission. In this case it reduced the fines imposed on two of the undertakings, in one case to reflect its cooperation with the commission.

CONSUMER LAW

Case C-168/00 *Simone Leitner v TUI Deutschland GmbH & Co KG*, 12 March 2002. The Leitner family booked a package holiday with TUI. During their stay, a child (Simone) became ill due to food poisoning caused by food served in the club. The illness lasted throughout the entire holiday and beyond and completely ruined the family holiday. Simone brought an action for damages against TUI in Austria for compensation for the damage suffered. The Austrian court awarded her damages only for the physical pain and suffering caused. It dismissed the remainder of the application based on the damage caused by loss of enjoyment of the holiday. There is no express provision in Austrian law for compensation for damage of that kind. A reference was made to the ECJ as to whether the 1990 *Directive on package travel, holidays and tours* confers on consumers a right to compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package holiday. The directive refers to 'damage other than personal injury'. The ECJ pointed out that the purpose of the directive is to eliminate disparities between the national laws and practices of the various member states in the area of package holidays. Some states provide compensation for non-material damage. This inconsistent practice caused significant distortions of competition, as non-material damage occurs frequently in this field. The directive is designed to protect consumers and, in connection with tourist holidays, compensation for non-material damage arising from the loss of enjoyment of a holiday is of particular importance. For these reasons, the directive implicitly recognises the existence of a right to compensation for damage other than personal injury, including non-material damage.

FREE MOVEMENT OF PERSONS

Case 224/00 *Commission v Italy*, 19 March 2002. The commission brought an action against Italy, claiming that certain provisions of the Italian highway code involve discriminatory treatment based on the place of registration of the vehicle. The code provides that in the event of a breach punishable by a fine, the driver may within 60 days make a reduced payment of an amount equal to the minimum fine or bring an appeal before the prefect. However, if the vehicle is registered in another member state, the offender may immediately pay the minimum fine or give a guarantee (in the form of a security of surety document) corresponding to twice the minimum fine in order to avoid immediate confiscation of his driving licence or the impounding of his car as a precautionary measure. The ECJ based its decision on the general principle of equality, which prohibits all discrimination (overt or covert) on grounds of nationality. It held that the difference in treatment was a difference in treatment between Italian nationals and those of other member states. This difference in treatment leads to the same result as discrimination based on nationality. Italy had argued that the legislation was justified as there was no mechanism to ensure the payment of fines in member states other than Italy. The ECJ held that the amount fixed by the Italian code was disproportionate. The security is twice the minimum amount fixed in the case of immediate payment. This has the effect of encouraging offenders to pay the fine immediately and to waive their legal right to a period of time in which to decide to contest the alleged infringement before the prefect. Italy could have ensured the payment of fines by offenders from other states just as effectively if it had provided for the lodging of a security in an amount equal to the minimum fine.

Case C-255/99 *Proceedings concerning the minor Anna Humer*, 5 February 2002. Anna Humer is the child of Austrian nationals. The couple divorced in 1989 and the mother has had custody of the child since then. In 1992, the mother moved to France with her daughter. She worked there. The father remained in Austria. In November 1993, under a court settlement, the father assumed an obligation to make monthly maintenance payments in favour of his daughter. In 1998, Anna Humer applied in Austria to the state for advances on maintenance payments for a period of three years – she claimed that her father's payments were several months in arrears. The court of first instance dismissed her application as she was not ordinarily resident in Austria, as required by Austrian law. The appeal court ruled in her favour. The matter was referred to the ECJ in order to determine whether the Austrian legislation was compatible with EU law. The ECJ considered whether an advance on maintenance payments is a family benefit within the meaning of EU regulations on the social security of migrant workers and members of their families. It held that it did. The purpose of the payments was to ensure that mothers would be able to raise their children, even where there were difficulties with payments from the father. A child is a member of the family of a worker, even if, following a divorce, the child no longer lives with that parent. The right to free movement would be adversely affected if such a grant or the amount of family benefit was to depend of their place of residence. The fact that a person is living in another member state cannot act as a barrier to the grant of a family benefit in cases where the conditions governing the grant of that benefit are otherwise satisfied.

LITIGATION

Brussels convention

Case C-37/00 *Hebert Weber v Universal Ogden Services Ltd*, 27 February 2002. Mr Weber is a German national employed by Universal Ogden Services, a company incorporated under Scottish law and established in Aberdeen. Mr Weber's contract of employment had been terminated by Universal. Weber had worked as a cook. From July 1987 until September 1993, part of his work was carried out on mining vessels or on mining installations stationed over the Dutch continental shelf. The Dutch court did not establish the exact dates or time period that he worked in the continental shelf area. Weber argued that he had worked principally in this area and on mining installations and ships flying the Dutch flag. This was contested by Universal. Weber had sued in the Dutch courts, arguing that his employment had been terminated unlawfully. Universal argued that the Dutch courts lacked jurisdiction to try the case. The case was referred to the ECJ. The Dutch court asked whether work carried out on the continental shelf of a state could be regarded as equivalent to work carried out in that state for the purposes of the convention. It also asked for guidance on the interpretation of the words that an employee is to be regarded as having carried out his work 'habitually' in a state. Must account be taken of the entire period of his employment or is only the most recent period of employment relevant? The ECJ pointed out that article 5(1) applies only where a contract of employment has a connection with the territory of at least one contracting state. There is no guidance in the convention on the questions of continental shelves. Therefore, it examined the rules of public international law and the provisions of the *Geneva convention*. The convention provides that a state has sovereign rights over its continental shelf for the purposes of exploring it and exploiting its natural resources. The state is entitled to construct installations on the shelf for this purpose. Furthermore, the International Court of Justice recognised the sovereignty of the coastal state over its continental shelf in the *North Sea Continental Shelf* cases. Therefore, work carried out on an installation above the continental shelf could be regarded as work carried out in the territory of that state. The ECJ then turned to consider the second question. It sought to establish the place where the employee spends most of his working time engaged on his employer's business. Article 5(1) must be interpreted as meaning that where an employee performs the obligations under his contract of employment in several states, the place where he habitually works is the place where, or from which, he performs the essential part of his duties vis-á-vis his employer. All of an employee's term of employment is to be taken into account in establishing the place where he carries out the most significant part of his work and where his contractual relationship with his employer is centred. If there are two or more places of work of equal importance or if none of the places where an employee works can be regarded as having a sufficiently permanent and close connection with the employment to be regarded as the main link to determine jurisdiction, it is necessary to avoid a multiplication of the courts having jurisdiction over a single legal relationship. Article 5(1) is not to be interpreted as conferring concurrent jurisdiction on the courts of each contracting state in whose territory the employee carries on some of his work. Where the above criteria do not result in a single state having jurisdiction, the employee can sue the employer in the state where the business that engaged him is situated or in the court of the state of the employer's domicile.

SERVICES

Cases C-157/99 *Geraets-Smits v Stichting Ziekfonds VGZ* and *Peerbooms v Stichting CZ Groep Zorgverzekeringen* ([2001] ECR I-5473). Two Dutch applicants underwent medical treatment in Germany and Austria. Dutch legislation required prior authorisation from an insured's sickness insurance fund before medical treatment abroad would be paid for by the fund. The grant of such authorisation is subject to the conditions that the treatment must be regarded as normal in the professional circles concerned and the insured person must require that treatment. The ECJ held that the Dutch legislation did not breach articles 29 and 50 of the *EC treaty*, but said that this was only insofar as the two conditions were interpreted in a certain manner. Firstly, the requirement that the treatment be regarded as normal should be interpreted so that authorisation cannot be refused on that ground where the treatment is sufficiently tried and tested by international medical science. Secondly, authorisation cannot be refused on the ground of lack of medical necessity only if the same or equally effective treatment can be obtained without undue delay at an establishment having a contractual arrangement with the insured's sickness insurance fund.

STATE AID

Case C-36/00 *Kingdom of Spain v Commission of the European Communities*, 21 March 2002. Spain sought an annulment of a 1999 commission decision relating to the unlawfulness of aid given by it to publicly-owned shipyards. In 1997, the commission had authorised aid for the restructuring of the yards. This allowed for special tax credits up to a maximum of 58 billion pesetas for the period 1995-1999. Before 1995, the yards had belonged to a company which was part of a group and was able to offset its losses against profits made by other companies in the group, according to the Spanish rules on tax consolidation. From 1995, the yards formed part of a state holding company which was unable to offset losses. For that reason, the commission authorised state aid in the form of the tax credits. In 1997, the yards were transferred to another company which was able to take advantage of the consolidation rules. As a result in 1998, the yards obtained a tax credit corresponding to their losses in 1997, but also a special tax credit. The commission argued that this was incompatible with its initial decision and that the sum resulting from the special tax credit plus interest should be recovered. Spain countered that it was approved aid and also disputed the commission view of the purpose and calculation of the aid. The ECJ examined whether the tax credits could be considered as new aid. It held that the commission was entitled to find that the conditions enabling the grant of aid were no longer satisfied and the tax credit in 1998 was no longer in accordance with the earlier authorising decision. It therefore dismissed the Spanish application. G

Controlling interest

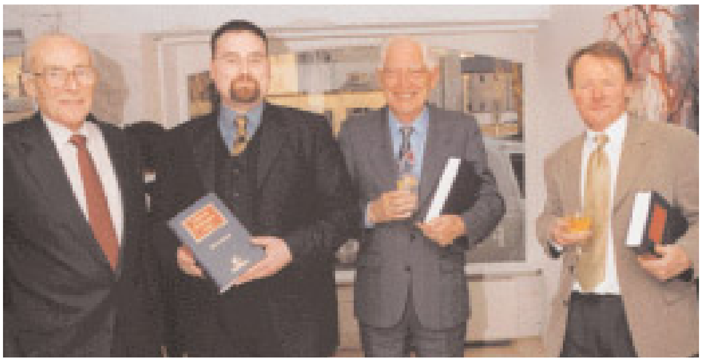
The Law Reform Committee recently held a public seminar on the expiry of rent control, which will happen in relation to most successor tenants on 25 July and in relation to original tenants of rent-controlled properties on their or their spouses' deaths, if occurring after that date.

The seminar was chaired by Judge John Buckley, formerly of the Circuit Court, and the speakers included Áine Ryall of UCC, Fintan McNamara of the Irish Property Owners' Association, Threshold's Kieran Murphy, Clare Kelly of the Legal Aid Board, Peter Healy from the housing allocation section of Dublin County Council, and Brian O'Raghallaigh of the Department of Social, Community and Family Affairs.

The seminar covered the legal position in relation to formerly rent-controlled dwellings and possible rights under the normal landlord and tenant legislation. It addressed some legal uncertainties, the people affected, possible limited measures to assist those who are most vulnerable, the alternatives available to those who will be affected and may not be able to pay market rates, and what help will be available from the Legal Aid Board. The seminar particularly highlighted the need for more information and assistance for those who are most vulnerable.

A legal position paper and a report on the seminar are available from Alma Clissmann at the Law Society, e-mail: a.clissmann@lawsociety.ie.

Pictured at the rent control seminar are *(from left)* Brian O'Raghallaigh of the Department of Social, Community and Family Affairs; Law Society President Elma Lynch; Judge John Buckley; and Eamonn McCarthy of the Department of the Environment



Last orders

Pictured at the recent launch in Cork of *Liquor licensing law* by Michael McGrath and published by Butterworths are *(from left)* Judge AG Murphy, guest speaker; Ciarán Toland, Butterworths' legal editor; Edward Gleeson SC; and Don McCarthy BL

Ordinance survey

Galway solicitor Desmond Fitzgerald has produced a detailed map showing the locations of each of the 200 District Courts in Ireland. Pictured at the presentation of the draft version of the map to the Law Society in April are *(from left)* Law Society President Elma Lynch, Desmond Fitzgerald and director general Ken Murphy. The map will cost approximately €70 and can be obtained from Desmond Fitzgerald, tel: 091 503 823 or e-mail: desfitz@iol.ie

Spring in their step

Pictured at the spring outing of the Lady Solicitors' Golf Society are *(from left)* Muriel Walls, captain of the society; Hilary Muldowney, winner of the Patrick O'Connor Trophy; and Mary Murphy, the society's incoming captain. The society's next outing will be in September. Anyone wishing to join should contact Muriel Walls on tel: 01 829 0000

Serious business

Pictured at the first-ever Inter*Trade*Ireland North/South business forum are *(from left)* Bernard Doherty of Matheson Ormsby Prentice, Fergal McCormack of FPM Accountants, and MOP's Michael Irvine

Annual Dinner of the Law Society 2002

In good company
Chief Justice Ronan Keane *(left)* with Law Society President Elma Lynch and Lord Mayor of Dublin Michael Mulcahy

Movers and shakers
Tánaiste Mary Harney with *(from left)* John Coyle of the Judicial Appointments Advisory Board, Michael Lynch and Circuit Court judge Pat McCartan

The Philip C Jessup International Law Moot Court Competition

A Law Society team recently represented Ireland at the international finals of the Philip C Jessup International Law Moot Court Competition in Washington DC. Although formulated prior to the 11 September attacks, the subject of the moot court was particularly relevant to international law issues that have subsequently arisen: freedom of expression, terrorism, luring, Internet regulation and cybercrime.

This year the Jessup competition, which is the largest moot court competition in the world, broke its own record to become the largest moot ever held, with over 1,500 individuals and 386 teams from over 65 different countries participating. Out of the 386 teams, 75 (including the Law Society team) progressed to the international finals in Washington. The Law Society team was among the 16 qualifiers selected to progress to the final rounds, finishing ninth overall.

Team players
Pictured *(from left)* are Rosemary O'Loughlin, of O'Donnell Sweeney; TP Kennedy, the Law Society's director of education; Jonathan Tomkin, of McCann FitzGerald; Eoin Cullina, of William Fry; Colm Fahy, of Ivor Fitzpatrick; and Jill Callanan, of LK Shields

The team would like to extend its sincere thanks to its coach and mentor, TP Kennedy, for his invaluable and insightful guidance, encouragement, and enthusiasm. The team members would also like to thank their respective employers, who were most generous in their personal encouragement and practical assistance. Finally, the team would like to thank its sponsors for their generous support, without which participation in the competition would not have been possible: the Law Society of Ireland, LK Shields, Solicitors, McCann FitzGerald, Ivor Fitzpatrick, O'Donnell Sweeney, William Fry, the Dublin Solicitors' Bar Association, Mason Hayes & Curran, Paul Gallagher SC and Paul Gardiner SC.

SADSI

Solicitors Apprentices Debating Society of Ireland

Guest speaker debate

The inaugural guest speaker debate of 2002 took place on 13 March, on the motion that *Ireland has a justice system to be proud of*. Opening the debate for the proposing side, Pieter Lavert BL said that, relative to the US, Ireland has indeed a justice system of which it can be proud. The Irish system, in his view, benefits greatly from having a non-political, independent prosecution service. Opening the opposition case, Professor Ivana Bacik of TCD's law school focused on the Irish criminal justice system. Director general Ken Murphy, concluding the remarks for the proposition, spoke of the honourable profession that is the law, an ideal to which we may all aspire. Liam Herrick, chair of the ICCL, spoke of the double standards in Ireland, pointing as an example to the government's insistence on a police ombudsman in the North while not yet introducing a similar post in the South. After the main exchanges, there was a lively and interesting floor debate.

SADSI would like to thank the speakers, Law Society Senior Vice-President Geraldine Clarke for chairing, as well as McCann FitzGerald and LK Shields for their kind sponsorship. Any trainee interested in taking part in a maiden speakers' debate should contact 2002@sadsi.ie.

Ronan Feehily, debating co-ordinator

Pictured at the debate are *(from left)* the ICCL's Liam Herrick, TCD law professor Ivana Bacik, Pieter Lavert, Director General Ken Murphy, Senior Vice-President Geraldine Clarke and SADSI's debate co-ordinator Ronan Feehily and auditor Martin Hayes

TRAINEE SOLICITORS' LAW DIRECTORY

Just a reminder to all trainees who have just completed the 2001 PPC1 and who have not yet submitted their details for the *Trainee solicitors' law directory* to please e-mail their details to 2002@sadsi.ie. Details should include your name; the name, address, telephone and fax numbers of the firm you are indentured to; your e-mail address and any area of special interest. The directory will be distributed to all those who attended the 2001 PPC1 in the near future.

Onwards to Victory on the rugby pitch

The Irish Solicitors' Apprentices Team rugby XV beat their counterparts from the King's Inns 21-5 in what was an epic and enthralling encounter on 23 March.

Hosted by the King's Inns, the match took place in UCD before a huge crowd of supporters, who witnessed a fine display of open and free-flowing rugby from both teams. Early in the match, second row Dermott McKeown, who had scored the opening try of the game, was forced to withdraw from the field to receive stitches for an injury believed to have been inflicted by one of his own team. Although lacking Dermott's power and pace in the row, the team were not disheartened. More tries followed from the apprentices, with one notable missed opportunity as Mick Forde was robbed of the ball on the line by Inns' outhalf Peter Maughan.

The Inns replied to the apprentices' onslaught with a well-worked try beginning deep in their own half, but could not sustain their momentum to dispel the apprentices, with players like Daragh McElligot, Brendan Gill and Patrick Martin putting in huge performances. John O'Donovan was a commanding presence at outhalf while the partnership of Rody Corrigan and Ronnie Cleary in the centre proved too much for the Inns to handle. Tackling from both teams was fearless and sniping runs from Chris Kitson, John Woodcock and Mick Neary added to the apprentices' tally. At the final whistle, the trophy kindly supplied by the King's Inns was handed over by Inns captain Alex Brennan for safe keeping until next year. Many thanks for the success of the day go to our sponsors Donnybrook Laundry, who provided jerseys, and to SADSI, who helped out with post-match refreshments. Thanks also to Hugh Byrne of the King's Inns.

Christian Victory (captain)

APPLICATIONS FOR ADDITIONAL CREDIT

As you are all aware, regulation 8(d) of the *Education and training regulations 2001* provides for a maximum credit of four months for work done prior to trainee solicitors attending part 1 of the professional practice course. For those of you who have already secured a three-month credit and wish to apply for a credit of one month more, you may do so by writing to the apprenticeship officer at the Law School, setting out clearly:

- The PPC1 you attended
- The dates you attended the office pre-PPC1, and
- A copy of the letter granting you three months' credit.

Both the trainee solicitor and the training solicitor must sign this letter. If you have not yet applied for credit, application forms are available from the Law School reception. 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 3 May 2002)

Regd owner: Patrick Rudden; folio: 12266; lands: Claragh (parts) and Drumbrawn (part); area: 15.1812 acres and 0.45 acres; **Co Cavan**

Regd owner: James Murdock and Irene Murdock; folio: 3201F; lands: Tonyhull; area: 0.563 acres; **Co Cavan**

Regd owner: John and Maureen Spence; folio: 14855F; lands: a plot of ground being part of the townland of Ballyvolane and parish of St Anne's Shandon and the county of Cork; **Co Cork**

Regd owner: Preference Products (Cork) Ltd; folio: 46194F; lands: a plot of ground being part of the townland of Courtstown situate in the barony of Barrymore and the county of Cork; **Co Cork**

Regd owner: David and Martina McNulty; folio: 16464F; lands: a plot of ground being part of the townland of Listarkin situate in the barony of Carbery West (east division) and the county of Cork; area: 1.781 acres; **Co Cork**

Regd owner: John Anthony Morning; folio: 29858F; lands: Drumoghill; area: 0.500 acres; **Co Donegal**

Regd owner: James McIntyre, James Andrew McIntyre and Mary McIntyre; folio: 26891F; lands: Ballymore lower; area: 1.432 hectares; **Co Donegal**

Regd owner: Dermot Boyle; folio: DN17260L; lands: property situate on the north side of Ardmore drive in the parish of Artaine, district of Artaine West; **Co Dublin**

Regd owner: Charles and Catherine D'Arcy; folio: DN56016L; lands: property known as no 30 Ballyneety Road, situate in the parish of St Jude and district of Kilmainham; **Co Dublin**

Regd owner: David O'Connor; folio: DN17733F; lands: a plot of ground situate in Tyrconnell park in the parish of St Jude and district of Kilmainham; **Co Dublin**

Regd owner: Franey Hardwood Products Limited; folio: DN73490L; lands: property situate at Baldoyle Industrial Estate in the parish and district of Baldoyle; **Co Dublin**

Regd owner: Dermot Hugh Scanlan (tenant in common owner – 9/12th share); folio: DN18370; lands: property situate in the townland of Hampton Demesne and barony of Balrothery East; **Co Dublin**

Regd owner: Andrew and Avril Perrin; folio: DN124637F; lands: property known as site no 14, Glencairn Heights, the Gallops; **Co Dublin**

Regd owner: Ronan Tormay and Blanaid O'Brien; folio: DN89174F; lands: property situate in the townland of Seatown West and barony of Nethercross; **Co Dublin**

Regd owner: Timothy Enright; folio: 1885; lands: townland of Tarmon East and barony of Iraghticonnor; **Co Kerry**

Regd owner: Brendan Lardener and Caoimhe Canning; folio: 12712F; lands: townland of Monread South and barony of Naas North; **Co Kildare**

Regd owner: McGee Celbridge Limited; folio: 2292F; lands: townland of Oldtown and barony of Salt North; **Co Kildare**

Regd owner: Patrick Walsh; folio: 522R; lands: Monachunna and barony of Kells; **Co Kilkenny**

Regd owner: Patricia Townsend; folio: 3090; lands: Mornin; area: 3.1566 hectares; **Co Longford**

Regd owner: Michael Devine; folio: 10743; lands: Ballinalee or Saintjohnstown; area: 0.375; **Co Longford**

Regd owner: Bridie Hannon; folio: 4839; lands: townland of Devlis and barony of Costello; area: 5.5871 hectares; **Co Mayo**

Regd owner: Patrick Marren; folio: 5330; lands: Tankardstown; area: 81.5125 acres; **Co Meath**

Regd owner: Michael Noel Quinn; folio: 13415; lands: Tullintlisny (part); area: 14.30 acres; **Co Monaghan**

Regd owner: Frank Nolan; folio: 12786; lands: Enaghan and Ballykeane and barony of Philipstown upper; **Co Offaly**

Regd owner: Michael Prendergast; folio: 31304; lands: townland of Cornaseer, Moyvannan and Carrowmurragh and barony of Athlone South; area: 13.723 hectares; **Co Roscommon**

Regd owner: James Jones; folio: 9268; lands: Kellybrook (part); area: 109.562 acres; **Co Westmeath**

Regd owner: Michael Moran (deceased); folio: 2870F; lands: Kereight and Lambstown and barony of Bantry; **Co Wexford**

Regd owner: Sean Ralph (deceased); folio: 3182; lands: Tombrack and barony of Scarawalsh; **Co Wexford**

Sole practitioner
with growing practice
in border area
seeks solicitor for
PARTNERSHIP or
PURCHASE

Box no 59

Regd owner: Bridget Roddy; folio: 6837; lands: townland of Lemonstown and barony of Talbotstown lower; **Co Wicklow**

WILLS

Byrne, James (deceased), late of 2 Liam Leech Terrace, Drogheda, Co Louth. Would any person having knowledge of a will made by the above named deceased who died on 20 April 1990, please contact Messrs B Vincent Hoey and Company, Solicitors, Fair Street, Drogheda, Co Louth, tel: 041 983 1001 or fax: 041 983 9060

Gardner, Gerald (deceased), late of Kill, St Ann, Castlelyons, Fermoy, Co Cork. Would any person having knowledge of a will made by the above named deceased who died on 31 October 2001, please contact Coakley Moloney, Solicitors, 49 South Mall, Cork, tel: 021 427 3133 or fax: 021 427 6948, reference JM

Hickey, John (deceased), late of 65 Sycamore Road, Finglas East, Dublin 11. Would any person having knowledge of a will made by the above named deceased who died on 22 January 2002, please contact Messrs Gaffney Halligan and Co, Solicitors, 413 Howth Road, Raheny, Dublin 5, tel: 01 831 4133 and fax: 01 831 4908

EMPLOYMENT

Solicitor required for busy practice in North West. Two to three years' experience in conveyancing and probate desirable. Excellent terms and conditions. Please reply to **Box no 50**

Apprentice solicitor considered by practice in South East. Mature candidate with business experience preferred. Please reply to **Box no 51**

Solicitor available for locum/permanent position in Galway city area from August/September 2002. Main experience in conveyancing and litigation but all positions will be considered. Apply in strict confidence to **Box no 52**

Busy Dublin 4 general practice seeks **post-PPC1 apprentice or newly-qualified solicitor** for probate, conveyancing and litigation work. Attractive salary for suitable candidate. Please reply with CV to **Box no 53**

Newly-qualified solicitor, experienced in litigation, seeks employment in Cork city. Please reply to **Box no 54**

Assistant solicitor required for busy Midlands practice. Might suit recently-qualified solicitor with experience in all aspects of general practice. Attractive salary and excellent work conditions to suitable applicant. Reply with CV to **Box no 55**

Busy Midlands practice requires an apprentice solicitor for immediate start. Reply with CV to **Box no 56**

Solicitor in Dublin city centre firm seeks to relocate to Meath/Louth/Kildare area. 2½ years' PQE in conveyancing and commercial law. Wishes to broaden experience in general practice and to possibly develop a niche in commercial law area. Replies to **Box no 57**

Mullingar, Co Westmeath: solicitor required for full-time position; litigation/conveyancing/probate. Great opportunity with long-term possibilities for the right candidate. Contact Sally-Ann O'Donnell or Paddy Crowley at 044 40887/8 or send CV to JJ Macken, Bishopsgate Street, Mullingar, Co Westmeath

Due to expansion, Bohan Solicitors, 3 Inns Court, Winetavern St, Dublin 8 require **a qualified solicitor** with three to four years' general experience, particularly in litigation and conveyancing. No tax experience required. Attractive salary and conditions offered to suitable applicant

Conveyancing solicitor required for one-off assignment. Would suit retired person. Please contact Patrick O'Neill, Patrick O'Neill and Co, Solicitors, 57 Shelbourne Road, Ballsbridge, Dublin 4, tel: 01 6608 267 or e-mail: info@ponsolicitors

County Tipperary: conveyancing, probate and general practice; one to three years' PQE. Contact Butler, Cunningham and Molony, Templemore (Paddy Cadell)

Solicitor required for busy well-established **Longford** practice – two to five years' PQE desirable. Excellent terms and prospects for the right candidate. Contact Catherine Corcoran, HR Manager, Ryan Glennon and Company, Charleston Road, Ranelagh, Dublin 6, e-mail: ccorcoran@ryanglennon.com, tel: 01 496 5388

Assistant solicitor required for busy general practice. Some experience preferable. Please apply to Patrick Noonan and Company, Solicitors, Upper Bridge Street, Athboy, County Meath, tel: 046 32107

Locum solicitor required immediately for conveyancing for in-house legal department based in Dublin city centre. For further details, please contact telephone number (01) 701 5930 or send your details to Box no 58

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 and 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 and 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

Ordinary seven-day publican's licence for sale in County Limerick. Price: €80,000. Contact: Denis Linehan and Co, Solicitors, Rathgoggin South, Charleville, Co Cork, tel: 063 89667 and fax: 063 89885

Estate of Patrick Clifford (deceased), late of Faha, Killarney, Co Kerry and 57 Grandon Close, Harolds Cross, Dublin 6. Would any person being a blood relation of the above mentioned deceased who died on 10 May 2001 or having knowledge of any such relations, please contact Padraig J O'Connell, Solicitors, Glebe Lane, Killarney, Co Kerry, tel: 064 33278 or fax: 064 34284

Busy solicitors' practice for sale, Dublin South area. All enquiries to Fred Taylor, Messrs Pannell Kerr Forster, 17 Percy Place, Dublin 4, tel: 6606 444

City centre. Merchants Quay (opp Four Courts). Merchant's Court. Excel modern ground floor office suite in three rooms, 81 sqm. **Available immediately.** Short term. Rent **€**22,855.29 pa. Fully fitted, heating, air cond etc. Four car spaces. Full details from North's Estate Agents, tel: 01 433 2222

Attention all golfers! Mount Juliet Tournament 17-22 September. Beautiful three bedroom house in picturesque Inistioge village, close to Thomastown and all amenities of this very scenic area to let for week of tournament. For details and terms, please contact **Box no 59**

TITLE DEEDS

Nora O'Sullivan (deceased), late of 1 Seaview Park, Ballybunion, Co Kerry. Would any person having knowledge of the whereabouts of the title documents of properties held in the name of the above named deceased known as no 2 Seaview Park (previously known as no 2 Seaview Terrace) Ballybunion in the county of Kerry, please contact Anne L Horgan and Co, Solicitors, 3 Convent Road, Blackrock, Cork, tel: 021 435 7729, e-mail: ahorgan@alh.ie

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 Bolger

Take notice that any person having any interest in the freehold estate of the following property all that and those the hereditaments and premises formerly known as no 4 Emmet Road and now known as no 130 Emmet Road, Inchicore in the city of Dublin held under an indenture of lease dated 27 November 1964 and made between Helen Holland of the one part and Launderette (Dublin) Limited of the other part for a term of 120 years from 25 March 1964 subject to a yearly rent of **€**25.39 and the covenants on the part of the lessee to be performed and conditions therein contained.

Take notice that John Bolger 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 property and any party ascertaining that they hold a superior interest in the property or any of them are called upon to furnish evidence of title to the aforementioned property to the below name 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 under the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the property are unknown and unascertained.

Date: 9 April 2002

Signed: Aidan M Deasy and Co, Solicitors, 34 Upper Fitzwilliam Street, Dublin 2

In the matter of the *Landlord and Tenant Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978* and in the matter of property situate at Sweetman's Avenue, Blackrock, Co Dublin: an application by Sean O'Donovan

Take notice that any person having any interest in the freehold estate of the following property: all that and those firstly the hereditaments and premises formerly known as numbers 11, and 13 Sweetman's Avenue and now known as number 11 Sweetman's Avenue in the parish of Monkstown, barony of Rathdown and county of Dublin, and secondly the hereditaments and premises formerly known as numbers 7A and 9 Sweetman's Avenue and now known as number 9 Sweetman's Avenue in the parish of Monkstown, barony of Rathdown and county of Dublin, being part of the hereditaments and premises comprised in indenture of lease dated 25 May 1808 and made between John Allen of the one part and Patrick Nowlan of the other part.

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

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

Date: 19 April 2002

Signed: Cahill and Co, Solicitors, 23 Lower Lesson Street, Dublin 2.

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 Fiona Bolger

Take notice that any person having any interest in the freehold estate of or superior interest in the following property: all that and those that plot or piece of ground situate in the parish of St Peter and city of Dublin fronting to Mackies Place and bounded on the south east by Mackies Place aforesaid to the south west by number 3 Mackies Place on the north west by a Stable Lane and on the north east by number 5 Mackies Place and which said heriditaments and premises are now known as number 4 Mackies Place subject as to the roadway called Mackies Place to all existing rights held under indenture of lease dated 23 June 1939 and made between Alice Bannon and Kathleen Bannon of the one part and Luke Carey of the other part for a term of 99 years from 25 March 1939 and yearly rent of **€**6.35. Take notice that the applicant Fiona Bolger intends to submit an application to the county registrar in the city of Dublin for the acquisition of the freehold interest and any intermediate interest in the aforesaid premises and any parties asserting that they hold a superior interest in the aforesaid premises are called upon to furnish evidence of title to the aforementioned premises to the below named before 16 August 2002.

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

Date: 17 April 2002

Signed: Nuala MacKenzie and Co, solicitors for the applicant, Main Street, Kill, Co Kildare