Law Society Gazette

## Regulars



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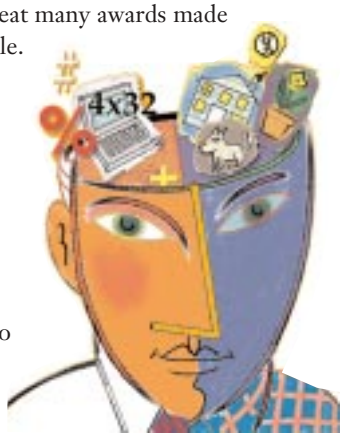
## SPECIAL SUPPLEMENT









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**COMPENSATION FUND PAYOUT**

**The following claim amount was admitted by the Compensation Fund Committee and approved for payment by the Law Society Council at its meeting in September 2002: Michael P McMahon, 5/6 Upper O'Connell St, Dublin 1 – €1,653.83.**

**RETIREMENT TRUST SCHEME**

**Unit prices: 1 September 2002**
**Managed fund: 404.152c**
**All-equity fund: 102.764c**
**Cash fund: 245.432c**
**Pension protector fund –**

**FREE SEMINAR ON ECHR BILL**

**The Law Society is to host a one-day seminar on the *European Convention on Human Rights Bill, 2001* on Saturday 19 October at Blackhall Place. The free seminar is being run in association with the Human Rights Commission and speakers will include justice minister Michael McDowell, human rights commissioner Prof William Binchy, solicitor Muriel Walls, Anna Austin from the Court of Human Rights in Strasbourg and Mr Justice Brian Kerr of the Northern Ireland High Court. For more information, contact Sinéad Ryan of the Law Society's CLE section on tel: 01 672 4802 or e-mail s.ryan@lawsociety.ie.**

# Meeting with tánaiste on PIAB

On 9 September, the Law Society, represented by President Elma Lynch, Director General Ken Murphy, and the chairman of the PIAB Task Force, Ward McEllin, met Tánaiste Mary Harney for an hour in her office. The meeting was an opportunity for the society to formally set out its views on the proposed Personal Injuries Assessment Board, *writes Ken Murphy.*

The society is on record as favouring any proposal to improve the personal injuries compensation system, provided that what is proposed is both fair and economically sensible. However, the society has concerns, based on the report proposing a PIAB published in March 2001, that the PIAB in its composition and method of operation would be biased against claimants and would merely represent an additional layer of cost and delay in the system.

Because the society has not received any detailed information as to how the government's thinking has evolved since March 2001 on precisely how the PIAB would operate, the society at present does not have sufficient information to form a view as to whether the PIAB is in the public interest or not.

Ken Murphy: society formally set out its views on the PIAB

However, the society was able to indicate to the tánaiste some of the features of the PIAB which the society would view as essential if the board is to retain the basic fairness that should characterise any justice system. In the society's view:

a) The PIAB in its composition and method of operation should be free of bias. Such bias is clearly exhibited in the proposals for the PIAB adopted by government in March 2001
b) There should be no reduction in the level of compensation paid to the victims of accidents (caused by the negligence of others), who make application to the PIAB, below the level of compensation that is currently awarded by the courts, and the PIAB awards should vary in line with court awards over time
c) The victims of accidents who make application to the PIAB should be entitled to rely on medical reports from the treating medical practitioners of their choice
d) The PIAB assessment should not consist exclusively of a written procedure; rather, the victims of accidents making application to the board should have a right to be seen and heard at an oral hearing and the right to be represented at that hearing with payment of the cost of that representation
e) There should be no delay in the PIAB issuing assessments, and some statutory period, such as three months, would seem reasonable in this regard
f) There should be a free and untrammelled right of either party to reject the assessment made by the PIAB and proceed to resolve the matter through the courts without any potential for penalty in this regard.

Finally, the society believes that the PIAB should not be introduced in the absence of an unambiguous guarantee from the insurance industry that a significant reduction in insurance premiums would in fact result.

# ONE TO WATCH: NEW LEGISLATION

**The *European Communities (Late Payment in Commercial Transactions) Regulations 2002* (SI 388/02)**

The *Prompt Payment of Accounts Act, 1997* came into effect in January 1998 and required numerous public bodies to pay their suppliers within 45 days or automatically pay interest on the amounts owing. This was an obligation which could not be contracted out of, and was enforced by requiring reporting in accounts and annual reports, as well as by the suppliers themselves.

In June 2000, the European Parliament and the council adopted a directive in similar terms which, however, applies to all undertakings, private and public. *Directive 2000/35/EC on combating late payment in commercial transactions* has been implemented in Irish law by the above regulations, which came into effect on 7 August of this year, under powers conferred by section 3 of the *European Communities Act, 1972*. It repeals sections 4 to 11 of the 1997 act in relation to contracts entered into after 7 August 2002.

The main rationale for the directive is stated in recital (7): 'Heavy administrative and financial burdens are placed on businesses, particularly small and medium-sized ones, as a result of excessive payment periods and late payment. Moreover, these problems are a major cause of insolvencies threatening the survival of businesses and result in numerous job losses'.

The provisions include:

- The default payment date is 30 days after receipt by the purchaser of the invoice, and there are detailed provisions dealing with less straightforward situations of supply and invoicing. After this period has elapsed, interest is automatically payable, without the need for a reminder
- Late payment interest is payable in ordinary commercial transactions at the European Central Bank main refinancing rate plus seven percentage points unless otherwise agreed (this rate to be set in January of each year)

# Insurance 'top of political agenda'

The Law Society has said that the Personal Injuries Assessment Board should not be introduced without an unambiguous guarantee from the insurance industry that a significant reduction in insurance premiums would result. According to Director General Ken Murphy, the society wants to be 'positively engaged with the process', but he repeated his warning that the new proposals could simply lead to an additional layer of cost and increased delays – a concern backed up by the recent report from economist Peter Bacon *(see story below)*.

Murphy was speaking on RTÉ Radio's *News at one* programme, following the announcement by Tánaiste Mary Harney on 20 September that an interim board to oversee the establishment of the PIAB would be put in place within weeks. Harney described the high cost of insurance premiums as 'one of the biggest issues confronting our society' and said that insurance reform was 'at the top of my political agenda, my main political priority over the next 12 to 18 months'.

The tánaiste announced that she had developed an action plan to implement the 67 recommendations contained in the Motor Insurance Advisory Board report and that several different government ministers would be involved in their implementation. 'We are determined to do everything we can politically to drive down the cost of insurance in Ireland for all consumers of insurance. If we don't do it, the cost in terms of the future of this economy are very serious'.

Adding that she intended to 'deal with this issue head on', Harney said: 'It doesn't matter what vested interest may have a particular point of view, the overall public interest and the national interest requires that we implement the recommendations'.

Mary Harney: 'will deal with the issue head on'

Responding to the tánaiste's statement, Ken Murphy said that the Law Society had for years recognised that the system was in need of reform and had 'no objection in principle to the introduction of the PIAB, provided that its means of operation is fair, it makes economic sense and actually does result in cost reduction'.

He also promised that the Law Society would shortly be unveiling its own proposals, based on a report from its expert working group, that could reduce the cost of delivery of litigation within the current system.

## Bacon report on effectiveness of PIAB 'reinforces Law Society's concerns'

The establishment of the Personal Injuries Assessment Board could end up increasing insurance costs rather that reducing them, economist Peter Bacon has warned.

In a new report on the effectiveness of the proposed PIAB, commissioned by the Bar Council, Bacon says that 'the clear conclusion is that the costs arise from problems with the current [personal injury litigation] system, not its design'. He argues that a PIAB approach to compensation is inappropriate for Ireland, which does not have the comprehensive social security system that exists in those countries where a PIAB approach works well. 'We're taking a mechanism from a system we don't have and trying to graft it on to the one we do', he says. And he estimates that it would cost the exchequer nearly €3 billion to bring our social security system up to European standards.

Commenting on the publication of the Bacon report, Law Society Director General Ken Murphy said: 'The Law Society welcomes the publication of this report and looks forward to considering it closely. His analysis reinforces our concerns that the PIAB will add an additional layer of delay and cost to the existing system.

'The Law Society believes that it would be far better to proceed with reforms of the existing system. We are currently finalising our own review of the litigation system and will publish our proposed reforms shortly'.

- If a contract does not stipulate a payment date and the supplier feels that the date proposed by the purchaser is grossly unfair, or the purchaser proposes that the obligation to pay interest should be waived, the supplier can apply to the Circuit Court or to an arbitrator for an order that the terms are grossly unfair to the supplier, that they are unenforceable, and varying the terms or directing the purchaser to pay costs and compensation for any loss, costs or expenses incurred by reason of the terms concerned. Regulation 6(3) lists the circumstances of the case which the court or arbitrator can take into account, including good commercial practice, the nature of the goods or services concerned, whether the purchaser had any objective reason to deviate from the regulations, the relative strength of the bargaining power of each party, and others
- Regulation 8 provides that where contractual terms are drawn up for general use and purport to waive or vary the 30-day payment date or the obligation to pay interest, a representative body may apply to the Circuit Court for an order under these regulations
- Regulation 9 provides that, in addition to any interest payable, a scale of costs set out in the schedule shall also be payable without the need for the supplier to prove they have been incurred
- The regulations apply to all contracts entered into after 7 August 2002
- They do not apply to transactions with consumers (natural persons acting outside his or her trade, business or profession).

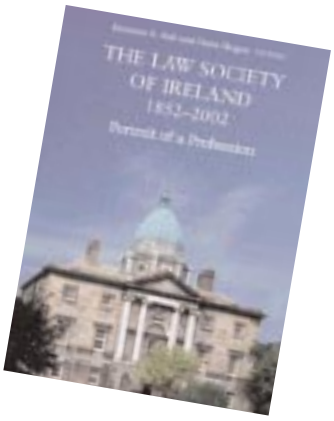
Under section 4 of the 1997 act, the interest penalty could not be waived. The broadening of the legislation to cover all commercial transactions was clearly thought to require more flexibility, but it will mean that payment terms can still be negotiated between purchasers and suppliers. G

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

# New book on history of the profession

A new book detailing the rich history of the solicitors' profession has been published to commemorate the 150th anniversary of the granting of the royal charter of the Law Society as an incorporated body. *The Law Society of Ireland, 1852-2002: portrait of a profession* (Four Courts Press) is edited by Dr Eamonn Hall and Daire Hogan and examines aspects of the history of solicitors and of the Law Society itself.

The initial three chapters, by Daire Hogan, deal with the history of the Law Society up to the middle of the 20th century. Dr Mary Redmond discusses the emergence of women in the profession. Dr Eamonn Hall chronicles some legal issues facing the profession and the society over the last three decades. John Buckley, former judge of the Circuit Court, considers the changes in the society's education and training programmes over the last 50 years and also reviews the society's activities in the field of legal publishing during that period. Law Society librarian Margaret Byrne tells the story of the library and how the desire for a proper library was a key element in the foundation of the society in the middle of the 19th century. And in the last chapter, Director General Ken Murphy looks at how the profession, the Law Society and the country have changed since the centenary of the society's charter was celebrated 50 years ago.




In addition to 48 pages of photographs (many of which have never been published before), the book contains a chronological list of the 8,200 men and women admitted to the roll of solicitors in the period between 1952 and 2001.

The book runs to 304 pages and costs €45. An order form is enclosed with this issue of the *Gazette*.

## Worst case scenario!

A Royal Commission into the collapse of the Australian doctor's insurance company HIH has been proceeding in Sydney, fuelled by allegations of excessive expenses claimed by the company's top executives. The following is part of a cross-examination of the former chief executive, Raymond Reginald Williams, by Wayne Martin QC on day 131 of the hearings:

**Martin:** 'Could you tell us please if, on your frequent first-class trips to London, you booked the seat next to you for your briefcase?'

**Williams:** 'I don't recall specifically. But that may have been the case, on some occasions'.

**Martin:** 'That your briefcase was also travelling first class?'

**Williams:** 'That may have been the case'.

**Martin:** 'Did you express the view to Qantas that this briefcase should be eligible for frequent flier points?'

**Williams:** 'I can't recall that'.

**Martin:** 'And were you subsequently informed that said briefcase would not be eligible for such points on the grounds that it was not, in fact, a person?'

**Williams:** 'That may have been the airline's position on that issue'.

**Martin:** 'Was that briefcase, from that point on, booked under the name of Casey Williams?'

**Williams:** 'Casey Reginald Williams, AM'.

*(With thanks to Michael V O'Mahony)*

# Advice on fee deduction when taking up a High Court lodgment

The attention of litigation practitioners is particularly drawn to the *Supreme Court and High Court (Fees) (No 2) Order 2001* (SI 488 of 2001), writes *Michael V O'Mahony*. The order came into operation on 1 January 2002 and provides (in first schedule, part 4) that where a High Court lodgment into court is being taken up, the Accountant's Office deducts a fee of €0.50 for every €100, where the amount lodged exceeds €1,000, up to a maximum fee of €500 in any case. As the plaintiff is generally the party taking up the lodgment, it means that the plaintiff, as recipient, is the party who bears this fee. Plaintiffs' solicitors should therefore be conscious of this when concluding a High Court case where there has been a lodgment, so that, if appropriate, the entire amount of the payment to the plaintiff is made directly from the defendant to the plaintiff, with it being provided by High Court consent order that the lodgment is paid back to the defendant, who thereby becomes the party who incurs that deducted fee.

## INTELLECTUAL PROPERTY SEMINAR

The Licensing Executives Society is running a morning seminar on *Intellectual property litigation: to litigate or to mediate?* on 15 November at the Guinness Hop Store. Speakers from the UK, USA and Ireland will discuss developments in their respective jurisdictions and strategies on how to best protect your intellectual property. For more details, contact Barry Moore, c/o Tomkins, 5 Dartmouth Road, Dublin 6, e-mail: bmoore@tomkins.com.

## POSTCARD FROM THE PAST

At a special meeting of the Council held on Monday 2 January 1922, at the time of the Dáil debates on the treaty between Great Britain and Ireland, the following resolution was adopted and copies were directed to be sent to Mr Arthur Griffith, Mr Eamon de Valera, Mr Eamon Duggan and to the press: 'We, the Council of the Incorporated Law Society of Ireland, recognising the injury done to the material well-being of the community by public uncertainty and consequent disquietude, do hereby express an earnest hope that the deliberations of the Irish Representatives may result in a decision bringing peace to our country, so that without delay the work of construction may begin, and every citizen be free to take his part in building up the prosperity of the country on which the true interests of the legal profession must be always based'.

Extracted from the *Rough Minute Book of the Meetings of the Council of the Incorporated Law Society of Ireland – 1919-1930*

# The *in camera* rule in family law proceedings

QUESTIONNAIRE

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

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

Aware ☐ Reasonably aware ☐ Not aware ☐

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

Always ☐ Sometimes ☐ Never ☐

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

Frequently ☐ Sometimes ☐ Never ☐

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

Frequently ☐ Sometimes ☐ Never ☐

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

Frequently ☐ Sometimes ☐ Never ☐

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

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

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

c) For referral to the Revenue Commissioners? ☐

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

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

a) Conveyancing? _____

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b) Probate? _____

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c) Tax? _____

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d) Other? _____

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

Frequently ☐ Sometimes ☐ Never ☐

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

Total change ☐ Limited change ☐ No change ☐

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

Should always be available ☐

On a pilot project ☐

Should never be available ☐

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

Yes ☐ Generally ☐ No ☐

**12.** Please provide any personal comments on:

a) The desirability or otherwise of reform in this area

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b) Discriminatory elements of existing law

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c) Any general personal comments in relation to this issue

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# Letters

## In defence of solicitor/client charges

*Name and address withheld*

I refer to the comments in the July/August issue of the *Gazette* condemning the charging of a solicitor/client fee in personal injuries matters. I feel compelled to write this letter anonymously as I do not wish to draw an unjustified audit to my door.

Section 68 of the *Solicitors (Amendment) Act, 1994* allows a solicitor to agree a fee with the client payable out of the damages, provided the agreement is in writing and includes an estimate of the fee the solicitor believes he may recover on a party-and-party basis. Therefore, section 68 does not prohibit the charging of a solicitor/client fee.

Party-and-party costs rarely cover a solicitor's charges in full. In respect of outlay, there are usually deductions in respect of medical reports, as most doctors charge more than the recommended scale. There are also usually deductions in respect of counsel's and engineers' fees. Many insurers will not pay the cost of a Law Society consultation room nor travel expenses incurred by a solicitor. Party-and-party fees do not reflect the number of consultations a solicitor has with a client, which can be very involved – particularly in medical negligence cases. They also do not cover work done in regard to undertakings to financial institutions to assist the client.

Many solicitors take cases on a 'no foal, no fee' basis,

which is in effect a form of free legal aid. Some of these cases are lost, and frequently the solicitor has no hope of recovering even a contribution to the outlay incurred. In the case of medical negligence cases, such outlay can run into thousands of pounds. The charging of a solicitor/client fee enables a solicitor to offer a 'no foal, no fee' service and covers the risk and losses associated with such a service.

Most clients do not expect to receive a service for nothing and are happy to pay a fair solicitor/client fee at the successful conclusion of a case. If the client is fully informed of his rights in regard to the charging of costs, and a solicitor/client fee is properly agreed, then that should be the end of the matter. Solicitors are continually under pressure from rising overheads, and increased competition – particularly in conveyancing – has reduced turnover. The advent of the Personal Injuries Assessment Board will reduce legal costs and consequently solicitors' fee income even further. The solicitor/client fee is therefore an important and justifiable part of practice income.

The Law Society runs for cover whenever there is criticism in the media of solicitors charging solicitor/client fees in personal injury actions instead of defending the solicitors' right to charge. The society has been on the back foot since its inexplicable failure to make a submission to the Motor Insurance Advisory Board, and its current attitude to solicitor/client fees appears to be a knee-jerk reaction to the media criticism which followed the report of the board.

Happy clients are happy to pay and they vote with their feet by returning to their solicitor again and again with new business. The Law Society should realise this before embarking on disciplinary proceedings where fees have been legitimately charged.

## Stop making sense

*From: Oonagh Breen-Walsh, O'Donnell Breen-Walsh O'Donoghue, Solicitors, Cork*

I enclose an extract from replies to requisitions which I recently received from a colleague in connection with the purchase of a site. On checking the replies to requisitions, I couldn't make out the reply to requisition 1.1, and wondered what the letters NTUK stood for. This reply was given to several of the requisitions raised. It was only when I got as far as requisition 27.4 that I realised that the letters were NTVK and that the reply being given was 'not to vendor's knowledge'.

It seems to be the case that textese is now taking over from legalese!

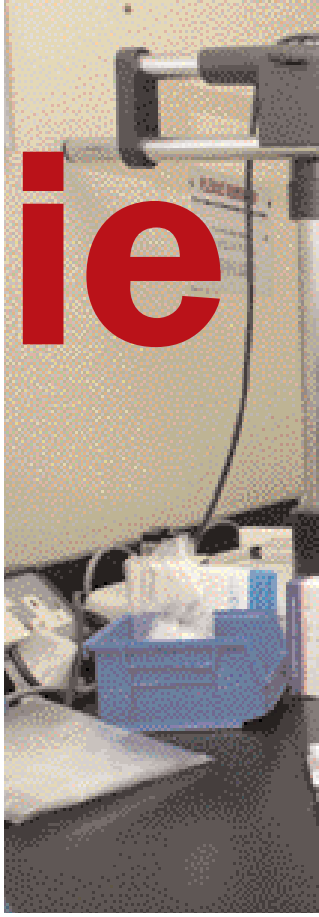
## Finding a middle way

*From: Jennifer Parkin, development manager, Aim Family Services*

I am writing to remind readers of the obligation placed on solicitors to direct clients to mediation in the event of a legal separation being sought.

Mediation is available from a variety of organisations and individuals and allows a couple to separate in a civilised manner and on terms to which they both agree. At AIM, we provide mediation at offices in the centre of Dublin and are happy to take referrals.

# Gene genie



**The director of the State Forensic Science Laboratory, Dr Jim Donovan, retires this month. Pat Igoe pays tribute to the scientist, the man and the job**

Dr Jim Donovan was the first person to hold the role of state forensic scientist in Ireland – a critical position in crime investigation – and after 27 years, he is the longest-serving such director in the world, followed by his Israeli counterpart.

The work of Dr Donovan was recently acknowledged by the minister for justice, Michael McDowell. Speaking at the recent presentation at Green Street Courthouse of the annual report of the Courts Service, Mr McDowell departed from his script to refer to Dr Donovan as a modern-day Irish hero. The scientist had given sacrifice and loyalty to the state that was 'a model for all Irish citizens'.

Dr Donovan is perhaps best known for the four attempts on his life, including that attributed to 'the General', Martin Cahill, in January 1982, when a bomb under his car exploded. He has suffered from the consequences ever since.

His real legacy, of course, is the respect given to forensic science in the courts. Analysis of sometimes tiny samples, from paint marks to body fluids, have been of vital persuasive importance in court in establishing guilt where it lies beyond reasonable doubt.

## Invisible evidence

Jim Donovan, the scientist, worked on the premise that whatever criminals touch in any way, while invisible to the naked eye, can act as a silent and powerful witness against them. He has pioneered the introduction of DNA identification technology, with its 'genetic fingerprinting', which enables his laboratory at Garda Headquarters in the Phoenix Park to make an identification from a minute particle.

In various cases, he explains, the only evidence against a suspect is forensic. This is sometimes the case in 'hit-and-run' road accidents, where the vehicle driver denies being at the scene.

He also recalls the case of a murdered woman, whose body was found in a drain outside Kilkenny. She had been raped and strangled. Her jeans were identified as having strands of fabric on them. After 11 months of research and by process of elimination, the forensic scientists came up with one match, a factory in Dublin city. Eventually, 12 employees gave blood samples, and some of them gave semen samples. As a result, a suspect was arrested and convicted. The pair had met at a bus stop outside the factory and he had offered the woman a lift home. Nobody had seen the two of them together, but the forensic evidence was sufficiently strong to convict.

Dr Donovan is aware of the importance of guilt being established beyond reasonable doubt. He fully agrees that a judge has to caution a jury about the importance of strong evidence and the weaknesses of uncorroborated evidence. However, as a scientist, he is bullish about the extremely high percentage of probability where positive samples are properly obtained in identifying suspects of crime.

## Paying the price

Jim Donovan, the man, has suffered grievously for his chosen career. There have been at least four attempts on his life. In 1980, he was pursued in a high-speed car chase, most probably by members of the INLA because of his work at the trial of Thomas McMahon and Francis McGirl following the killing of Lord Mountbatten and three others at Mullaghmore Harbour in Sligo on 27 August 1979. A second attempt on his life in December 1981 saw a crude petrol bomb planted under his car. He was not injured.

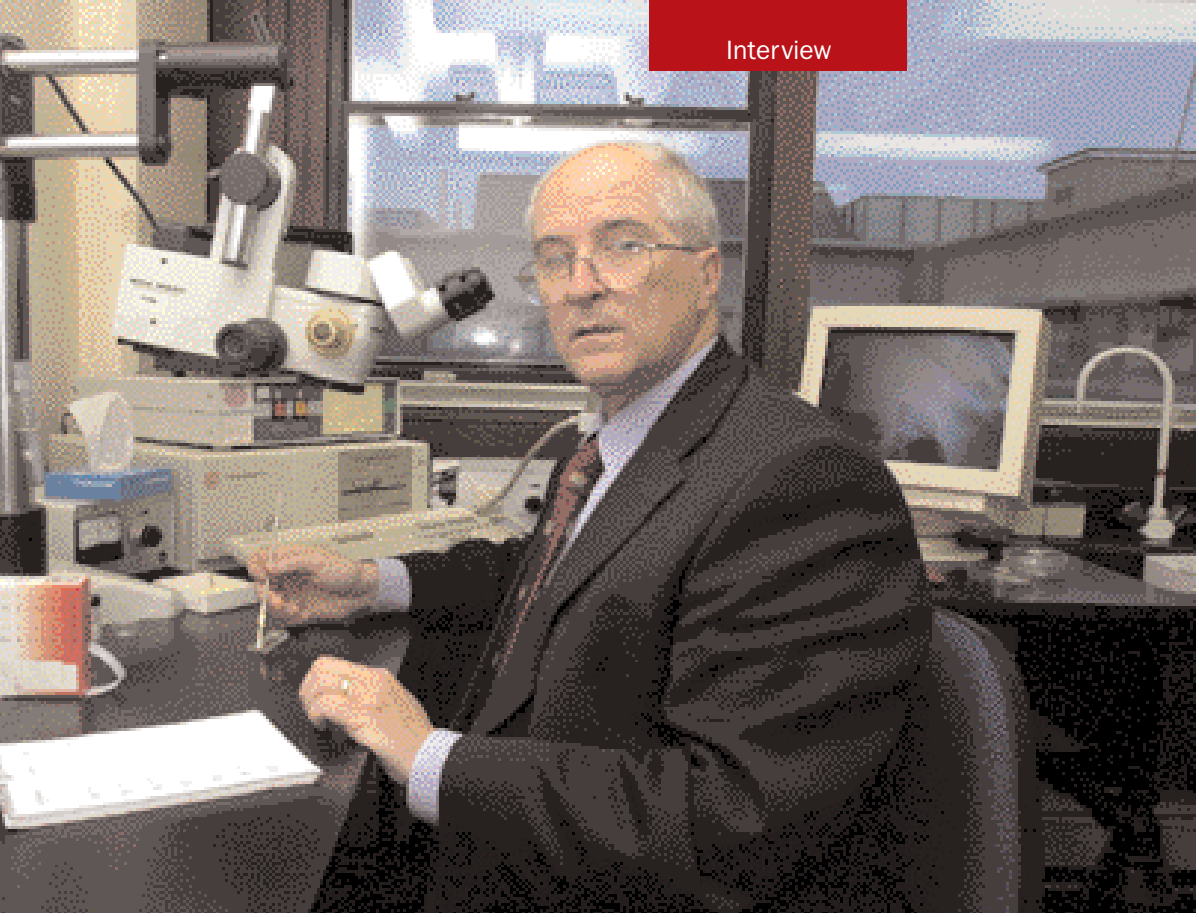
However, the following month, a high-explosive bomb detonated under his car while he was driving at Newlands Cross, at the junction with the Dublin/Naas dual carriageway. He has suffered from the injuries since. Jim Donovan has always remained certain that it was the work of Martin Cahill, and news of Cahill's own death came 'as a great relief' because he no longer felt threatened from that particular quarter. A fourth apparent attempt on his life occurred when the brakes in his car were tampered with during a trial in Cork following the rape and torture of a handicapped girl.

To speak with Dr Donovan is to take an impressive tour through the world of forensic science and its central role in many criminal investigations. He emphasises that forensic scientists are people doing a job. They do not want to find evidence against people. Their role is to scientifically examine evidence and to feed their scientific findings into the system. 'We do not have pre-conceived views', he says. 'We are just the instruments. If the evidence is there, it is our job to find it and to highlight it. That's our role in forensics'.

His job has brought him into close contact with many of the occupants of the dock in the Central Criminal Court. He played a significant role in

**MAIN POINTS**

- **Role of the state forensic scientist**
- **High-profile cases solved**
- **Forensic science in criminal investigation**



Dr Jim Donovan: his legacy is the respect given to forensic science in the courts

identifying convicted rapists and killers John Shaw and Geoffrey Evans after finding teeth identification marks in a gag that had been stuffed into the mouth of one of the victims. He also linked body fluids to the crimes.

In the Mountbatten case, analysis of sand found on the doormats of the suspects' car and on their clothes and shoes was linked to sand where the victims' boat had been moored. In the case of Noel and Marie Murray, both charged with the capital murder of Garda Michael Reynolds in 1975, a container of theatrical glue found in their home was linked to chemicals found on a false beard and wig discarded by the killers at the scene of the chase following the bank raid in Raheny.

## Margins of error

By its nature, forensic science is low profile. It involves scientists with instruments spending much time analysing often minute samples of tissue or body fluids, reporting their findings and even making recommendations in respect of further investigation. Its importance worldwide in criminal investigations is now beyond debate. The uniqueness of an individual's DNA, when introduced in evidence, provides an infinitesimally small margin of error for a court to consider.

Donovan argues that the *Forensic Science Act, 1990* should be amended to enable the gardaí to take what are called buccal cell swabs from inside the mouths of suspects, with or without their consent. 'This is the position in many European countries, including in England', he says.

The samples should then be kept indefinitely in a database. This would enormously reduce the work of forensic scientists and the gardaí, and would significantly reduce the time spent in collecting evidence. Garda time and money could then be used on other matters. He gives an example of about 350 men who were located and sampled by gardaí following the December 1995 murder of Marilyn Rynn as she was returning home to Blanchardstown from a Christmas party. A database would have enabled that work to be done within a few minutes. The innocent would not suffer or be inconvenienced or embarrassed.

Dr Donovan is aware of the civil liberties implications of such moves and agrees that there should be open and healthy debate. 'I respect the viewpoints of those who champion civil liberties. I, too, very much want to live in a state with civil liberties. Ultimately, it comes down to the costs and benefits and where the balance should lie'.

In Europe, investigations are moving towards police bringing to the scene of a serious crime a scientific 'black box' into which evidence could be fed. The results would then be sent electronically to the police laboratory for assessment in the database. This process could reduce to a few minutes what currently takes weeks and months, during which time evidence is lost or destroyed.

There are interesting times ahead as science plays an increasing role in the investigation of crime. In Ireland, however, that will be for other people. The State Forensic Science Laboratory is now a vital part in the state's arsenal in the fight against crime. Jim Donovan has earned his retirement. G

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

***'We are just the instruments. If the evidence is there, it is our job to find it and to highlight it'***

**The new *Criminal Justice (Theft and Fraud Offences) Act, 2001* may actually have done the impossible and simplified the law on dishonesty, writes Byron Wade, but it also raises a number of important questions**

MAIN POINTS

- Development of the law on dishonesty
- Overview of the new act
- New definitions of theft

In general, it may be said that historically the law on dishonesty (meaning theft, fraud, forgery and the like) has been relatively complicated, particularly because of the large number of distinct offences that the law has recognised in this area. Over the years, a great many people have attempted to simplify this law, and the *Criminal Justice (Theft and Fraud Offences) Act, 2001*, which came fully into force on 1 August 2002, probably represents the culmination of those efforts. It probably makes the law on dishonesty as simple as it is ever likely to get.

The new act may be said to be grounded on a different philosophy than that grounding the *Larceny Act 1916* or the *Forgery Act 1913*. The older acts appeared to have been based on the idea of strict and exhaustive definitions of specific situations whereby offences might be committed. By contrast, the 2001 act appears to be grounded on the so-called '*Theft act*' idea, whereby a general definition of dishonest appropriation is provided with relatively little following treatment of specific applications of this. It is also worth noting that for over 40 years Ireland refused to follow the example of England, which had replaced the 1916 act with a *Theft Act (UK)* in 1968. The English courts had run into difficulties of interpretation of the 1916 act that the Irish courts more or less managed to avoid.

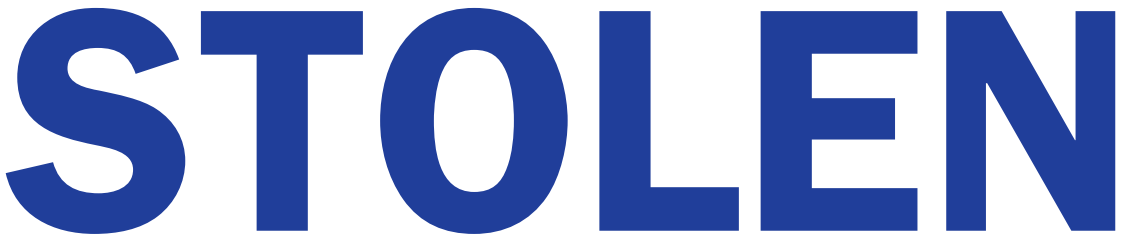
After the usual sections dealing with citation and interpretation, section 3 of the 2001 act repeals much of the previous relevant statutes, including the *Larceny Acts* of 1861, 1916 and 1990 and the *Forgery Act 1913*. Section 3(2) also abolishes the common-law offences of larceny, burglary, robbery, cheating (except in relation to the public revenue), extortion under colour of office, and forgery. This latter provision may be of interest, in that the courts have previously appeared to accept and act on the theory that the previous acts did not create new offences as such, but instead merely prescribed punishments for pre-existing common-law offences (see *State (Foley) v Carroll* [1980] IR 150).

So, strictly speaking, the offences set out in the 2001 act are entirely new, and the law applicable to the older larceny and forgery offences cannot amount to a precedent binding on any court trying the new offences. Of course, in reality, the courts are likely to regard the body of decided case law as being so highly persuasive that they are unlikely to depart from it without great reluctance. Nevertheless, the opportunity of departure from a previously-binding precedent ought to be borne in mind.

### Beg, borrow or steal

Section 4 of the act provides for a new offence of theft, which carries a penalty of up to ten years' imprisonment and/or a fine. This contrasts with the maximum sentence of five years for the old offence of 'simple larceny' under the 1916 act. The new offence of theft effectively takes the place of the older offences of larceny (including all 13 of its previous variations), fraudulent conversion (in all three previous variations) and embezzlement (in both previous variations). So it must be accepted that the 2001 act does accomplish a significant consolidation and simplification, even leaving aside the merit of this.

Section 4(1) provides that, 'subject to section 5, a person is guilty of theft if he or she dishonestly appropriates property without the consent of its owner and with the intention of depriving its owner of it'. This sub-section effectively replaces the definition of 'stealing' found in section 1(1) of the *Larceny Act 1916* and employs different wording. Two differences are worth noting. First, the word 'dishonestly' in the 2001 act means 'without a claim of right made in good faith', whereas in the 1916 act the equivalent provision spelled out that stealing should be committed '*fraudulently* and without a



# MOMENTS

claim of right made in good faith'. Second, the 2001 act baldly describes the relevant *mens rea* as 'intention of depriving its owner of it'. By contrast, the equivalent provision in the 1916 act had been 'intent … *permanently* to deprive the owner thereof' [emphasis added in both cases].

The Oireachtas' decision to omit the italicised words or their cognates must have the effect of simplifying and broadening the definition of actionable stealing. From now on, stealing will be proven even if the accused did not intend to deprive the owner of the thing in question permanently, and/or even if the accused did not have any fraudulent intent. The former omission may have the effect of extending the law of dishonest appropriations to cover 'borrowing' things without the consent of their owners. This is *a fortiori* given that, heretofore, the Irish courts appear to have been

## DEVELOPMENT OF THE LAW

A crude account of the modern law on dishonesty shows how it has been progressively simplified, stage by stage.

The first stage consisted of the original formulation by the common-law courts of the concept of larceny, from the Middle Ages to the 19th century. Over the course of these centuries, numerous esoteric rules developed to deal with the theft of various kinds of property.

The second stage may be said to consist of the enactment of the *Larceny Act 1861*, which consolidated the previous law but failed to simplify it.

The third stage consisted of the enactment of two important acts, namely, the *Forgery Act 1913* and the *Larceny Act 1916*, which together set sanctions for over 30 offences having some element of dishonest appropriation. Until recently, these acts provided the framework for the Irish law on dishonesty.

The fourth stage was the addition of some important amendments to these acts, but without changing the general framework set up by their terms. For example, under the *Criminal Law (Jurisdiction) Act, 1976*, better provision was made for substituting verdicts where the wrong section had been pleaded in larceny cases. Also, the *Larceny Act, 1990* created the new offence of operating a computer with intent to defraud.

The fifth and most recent stage is the 2001 act, which came into force on two separate dates, namely 19 December 2001 as regards parts 5 (counterfeiting) and 7 (investigation of offences) and sections 23, 53, 58 and 60(1); and on 1 August 2002 as regards the rest of the act.

reluctant (compared to their English counterparts) to impose liability for dishonesty which was not clearly covered by the terms of a statute (see *R v Hehir* [1895] 2 IR 709 as against *R v Ashwell* [1885] 16 QBD 190, being opposing authorities on the meaning of 'possession').

### Bang to rights

Section 4(3)(a) and (b) set out statutory presumptions to the effect that a person (holding property as a trustee or otherwise for others) shall be deemed to have stolen property held in such capacity if it is proven that he took it for his own use or it is proven that there is a 'deficiency in the property or a sum representing it' which he cannot explain. This appears to be the first instance of such a statutory presumption being applied to the general law on stealing. (Sections 17(2) and 18(2) of the 2001 act contain similar presumptions regarding the *mens rea* of people found with stolen property, but these provisions are effectively only re-enacting the substance of an older provision in the *Larceny Act, 1990*.)

It may in some cases prove to have decisive effect: it has been held that such presumptions are constitutionally sound (see the Supreme Court cases of *O'Leary v Attorney General* [1995] 2 IR 254 and *Rock v Ireland* [1997] 3 IR 484). It has also been held, albeit in foreign courts, that such presumptions have the effect of placing the defendant under a duty to rebut them on the balance of probabilities. That is, in such circumstances it may not be enough for a defendant merely to raise a reasonable doubt (see *R v Jayasena* [1970] AC 618).

Our superior courts appear not to have dealt with the specific issue of what standard of proof is needed to rebut such a presumption. Legal commentary appears to prefer an easier standard (see Charleton, *Offences against the person*), but the issue remains open. So, because of the interplay of all these factors, it is conceivable that section 4(3) of the 2001 act could make it much easier for the prosecution to secure a conviction in certain theft cases.

### Got to pick a pocket or two

The rest of part 2 provides for the definition and punishment of various offences related to theft as defined in section 4. These include burglary, aggravated burglary, robbery, false accounting, unlawful use of a computer and so on, which will be familiar to practitioners in their essential respects. But new to most practitioners will be the newly-minted offences of 'obtaining services by deception' (resembling, but not identical to, obtaining by false pretences or larceny by a trick).

Section 6 is especially noteworthy in this regard. It creates a broad 'catch-all' offence called 'making gain or causing loss by deception'. In particular, section 6(1) provides that 'a person who dishonestly, with the intention of making a gain for himself or another, or of causing a loss to another, by any deception induces another to do or refrain from doing an act is guilty of an offence'. A punishment of five years' imprisonment and/or a fine is provided as the appropriate sanction.

In respect of this, I would venture three observations. First, this offence may on one view be so vaguely defined as to offend against the provisions of the constitution – a constitutional challenge to its application may not be unlikely. Second, it is the clearest sign yet that the ruling philosophy behind Irish law on dishonesty is a broad-brush approach based on general principles rather than (as previously) on exquisitely defined instances of older offences such as larceny of dogs, wills and so forth. Third, in practice, this offence will and ought to be pleaded last, as being almost in the nature of a saving provision that might fill any unforeseen *lacunae* in the law on dishonesty.

### Make mine a double

The section dealing with forgery effectively takes the place of the *Forgery Act 1913*, which provided for nine offences dealing with forgery of various documents individually described. This part of the new act provides instead for five offences, of which the first four are defined in very similar terms, being respectively making a false instrument (forgery), using it, making a copy of it, and using a copy of it, all with the requisite intent. The fifth new offence concerns possession of equipment for the purposes of forgery. This part again shows a broad-brush approach to an area of the law of dishonesty, which may be said to substitute what is virtually one flexibly-worded offence in place of nine intricately-worded older offences. This part

also provides a clearer and broader definition of 'documents' that may be forged, which now include disks, tapes, credit cards and so on (section 24).

### Swag bag

The other parts of the 2001 act substantially re-enact the pre-existing law governing certain other aspects of the law of dishonesty, with some new additions mostly of a procedural nature. Very briefly, they concern:

- Handling stolen property (part 3)
- Counterfeiting (part 5 – this provides for some new duties for financial institutions)
- Protecting the European Communities' financial interests (part 6 – this appears to be confined in its application to EU officials)
- Investigation of offences by the Garda Síochána (part 7 – the express inclusion of this part ensures that the gardaí should have adequate powers of search and investigation in relation to offences under the act)
- Trial of offences (part 8 – this effectively re-enacts the older law on the substitution of verdicts), and
- Miscellaneous matters (part 9).

At first sight, it would appear that those who drafted and enacted the 2001 act have succeeded in doing something that had not been done properly before: the creation of a rational and neat basis for the law on dishonesty in Ireland. In particular, I welcome the reduction of the 13 or so old kinds of larceny to one clearly-defined offence of theft. The law on forgery has similarly been rationalised.

***'It is the clearest sign yet that the ruling philosophy behind Irish law on dishonesty is a broad-brush approach based on general principles'***

If there are any clouds on the horizon at all, then they may involve the constitutionality of the very vaguely-worded new crime of 'making a gain or causing a loss by deception'. The question occurs: where is one to draw the line in defining *gain*, *loss* and *deception*? The introduction of a presumption regarding theft in certain situations seems, on balance, to be constitutionally sound but could make it much more difficult to conduct a defence in such cases.

On the procedural side of things, the 2001 act should make the work of state solicitors and prosecutors noticeably easier, in that they will no longer have to tread the minefield of the *Larceny Act 1916* when drawing up summonses and indictments in the area of property crime.

And society as a whole should benefit from the new act because it covers more areas of dishonest appropriation by virtue of its flexible wording and updated terminology. But the act's worth must be tested in practice. While this preliminary evaluation is broadly positive, the proof of the pudding is in the eating. G

*Byron Wade BL is a Cork-based barrister.*

# Is the REVENUE compo

**It's pretty rare for an arm of the state to be accused of jumping on the compensation bandwagon, but this is exactly what's happened since the Revenue Commissioners decided to treat many awards made under employment legislation as taxable. Richard Grogan explains**

The Revenue recently sought to tax an award under the *Maternity Protection Act, 1984*. It will equally, it appears, seek to tax awards under the *Employment Equality Act*, the *Parental Leave Act*, the *Adoptive Leave Act* and other pieces of what are often termed 'social legislation'. This new practice is, in my opinion, an incorrect application of the legislation by the Revenue.

An example may help to illustrate the significance of this new approach.

Take the case of an employee who returns from maternity leave and is effectively demoted but paid the same salary. She brings a complaint and receives an award of 20 weeks' pay as compensation, amounting to €50,000. Until recently, the employer would have paid €50,000 and the employee would have received this amount. That was the end of the matter. Now, according to the Revenue, the award is subject to PAYE and PRSI and there are three possible results:

- The employee will receive €28,000. The employer pays €22,000 as PAYE and a further €5,375 for PRSI. The cost to the employer now rises to €55,375
- The employer pays tax on €50,000 on a non-grossed-up basis. This results in the employer paying €50,000 to the employee. A further €27,375 is paid to the Revenue. The net cost rises to €77,375, or
- The employee is deemed to receive €50,000 net after tax. In such a case, the employer pays an additional €44,710 to the Revenue. This raises the cost to €94,710.

## The Revenue's argument

The Revenue bases its argument on section 112 of the *Taxes (Consolidation) Act, 1997* (as amended by section 77 FA 01). This section states: 'Income tax under schedule E shall be charged annually on every person having or exercising an office or employment of profit mentioned in that schedule, or to whom any annuity, pension or stipend chargeable under that schedule is payable, in respect of all salaries, fees, wages, perquisites or profits whatever therefrom and shall be computed on the amount of all such salaries, fees, wages, perquisites or profits whatever therefrom for the year of assessment'.

The Revenue argues that the scope of this section is very wide. In this they are correct. The Revenue view appears to be that compensation awarded to an individual is as a result of, or as a consequence of, holding an office or employment of profit. As a result, the statutory deductions of PAYE and PRSI must be made. The Revenue, as a norm, will now regard an award under, for example, the *Maternity Protection Act* (and presumably similar employment legislation) as arising from the employment. Therefore, it claims that such an award is taxable under section 112 TCA, 1997.

The Revenue's approach is less clear in the case of, say, an employee who is refused promotion on grounds of age and receives an award for discrimination. The Revenue seems to be unclear as to whether such an award relates to the employment that the employee has or to the employment that the employee fails to get. The Revenue may treat this as arising from the latter and therefore as not taxable, but it has not yet given a ruling on this point.

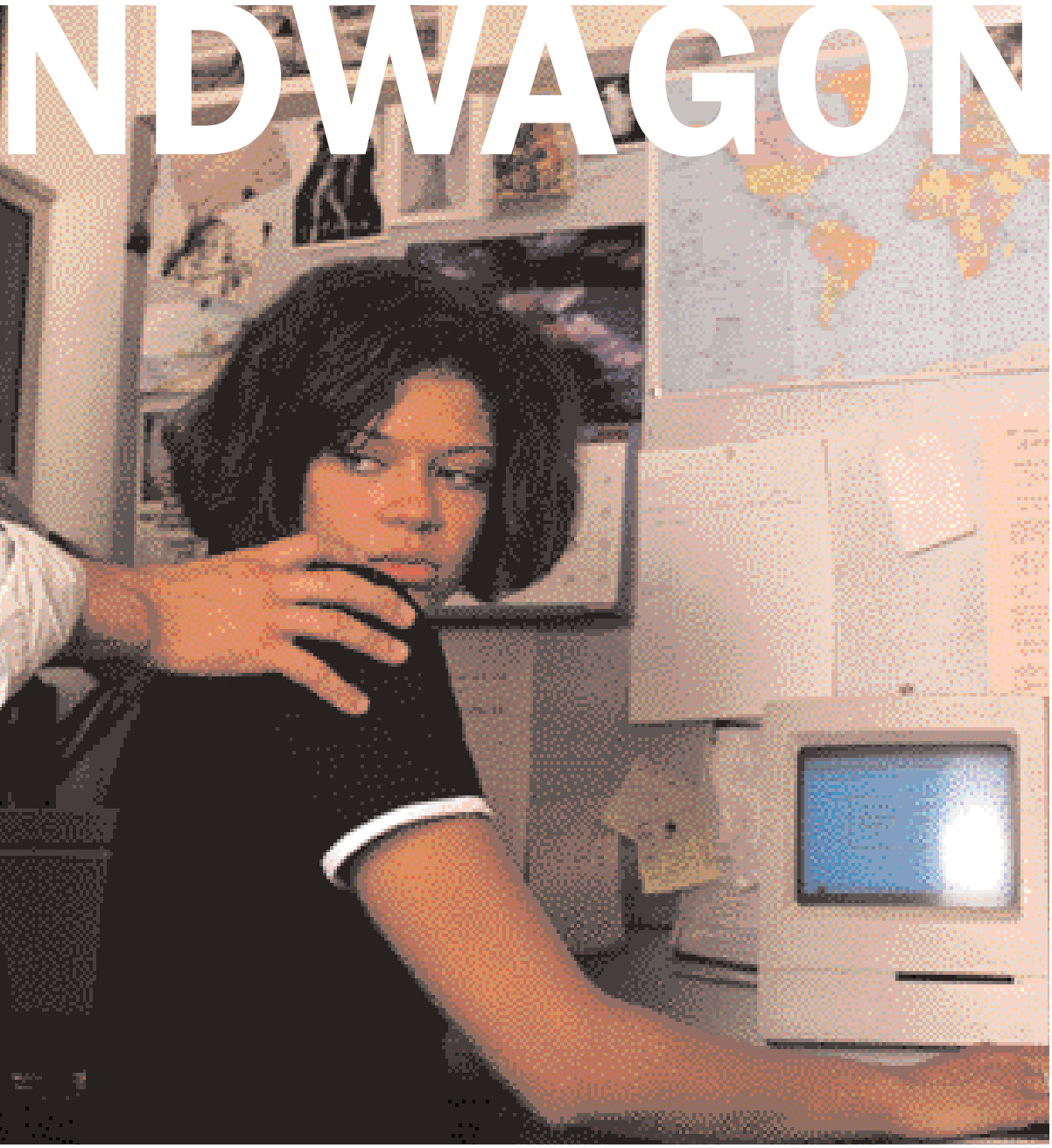
It is also unclear as to how the Revenue treats compensation. Clearly, it is not a salary, fee, wage or perquisite. The only remaining ground is that it is a profit.

The Revenue's contention that PRSI is payable is tenuous. For social welfare purposes, pay – for the purposes of determining remuneration on which

**MAIN POINTS**

- **Revenue taxing compensation awards**
- ***Taxes (Consolidation) Act, 1997*, section 112**
- **Likelihood of litigation**

# jumping on the NDWAGON ?



Hands off: the Revenue seems to think that awards for sexual harassment are fair game

PRSI is calculated – is 'reckonable earnings'. Reckonable earnings are defined as 'earnings derived from insurable employment' (section 2(1), *Social Welfare (Consolidation) Act, 1993*).

If the Revenue argument is correct, then awards of settlement under wrongful dismissal claims would also be taxable. The argument put forward by the Revenue that compensation is taxable is, in my opinion, not tenable. It runs counter to accepted practice and is, more importantly, an interpretation of the legislation that is difficult to reconcile with its wording. For the Revenue approach to be upheld, its argument must be consistent with, and be a logical construction and application of, the taxing statute.

## Interpreting section 112

The approach to the interpretation of tax legislation is well known. The rules in Ireland were laid down in *McGrath v McDermott* (3 ITC 683). This approach followed the reasoning in *IRC v Duke of Westminster* ([1936] AC1). The effect is that a payment of compensation can only be taxable on the plain

## WHAT THE COURTS SAY

In *Hochstrasser v Mayes* (38TC 673 at 685), Upjohn LJ said that 'it is a question to be answered in the light of the particular facts of every case whether or not a particular payment is or is not a profit arising from the employment ... Not every payment made to an employee is necessarily made to him as a profit from his employment. Indeed ... to be a profit arising from the employment, the payment must be made in reference to the services the employee renders by virtue of his office, and it must be something in the nature of an award for services past, present or future'.

This approach was approved in *Shilton v Wilmshurst* ([1991] STC 1988), where Lord Templeman, at page 91, stated in referring to similar UK legislation: 'the section must therefore apply first to an emolument which is paid as a reward for past services and as an inducement to continue to perform services and, secondly, to an emolument which is paid as an inducement to enter into a contract of employment and to perform services in the future. The result is that an emolument *from employment* means an emolument *from being an employee*'.

There is authority for the view that the issue of payment must be looked at from the point of view of the employee. In *Laidler v Perry*, it was held that the purpose was significant. Equally, Upjohn LJ in *Hochstrasser*, quoting *Moorhouse v Dolan* (36TC1), said: 'I hope I will not be thought to undervalue these arguments if I say I regard them as disposed of by the application of the principle that the question of whether a given receipt is a profit of an employment must be decided from the standpoint of the recipient'. Similarly, in *Herbert v McQuade* (4 TC 489), the test is whether, from the standpoint of the person who receives it, it accrues by virtue of the office. A profit, as pointed out by Sterling LJ in that case, accrues by reason of an office when it only comes to the employee in his capacity as an employee. It is only a profit if the employee does not need to fulfil any further or other conditions on his part. Compensation arises where a wrong is done to the employee. The employee does not receive compensation simply by being an employee. The employee receives compensation because of the wrong done.

wording of the statute. The central issue is whether compensation is a profit 'therefrom', that is, from being or becoming an employee.

In determining the tax treatment of compensation to an employee, the test the Revenue should apply is that stated by Lord Reid in *Laidler v Perry* (42 TC 351): 'You must always return to the words of the statute and answer the question: did the profit arise from the employment?' If the compensation arises from anything else, it is not taxable.

It appears that the Revenue has applied a reasoning that compensation is payable 'for being an employee'. It appears to have incorrectly assumed that, because an employee receives an award of compensation 'for' being an employee, this equates to compensation 'from' being an employee. The test that should be applied is whether the compensation or award is payable 'therefrom' – that is, from being or becoming an employee.

### 'Therefrom' art thou?

It is acceptable that a sum representing a contractual consideration for services is taxable. If the payment arises as a result of a term of a contract of employment or in the conditions of employment, it is taxable. A claim for compensation under the *Payment of Wages Act* for the non-payment of wages or a refund for a deduction improperly made is clearly taxable. Equally, an award for underpayment of the national minimum wage or an underpayment of an hourly rate of pay specified in a registered employment agreement is taxable. In all these cases, they arise from the contract of employment; in other words, they arise 'therefrom'. However, this article is considering the issue of compensation awards other than statutory entitlements to salary. The tax position is entirely different in the case of compensation for, say, sexual harassment. It does not arise from the contract of employment. It is not 'therefrom'.

The Revenue approach appears to fail to take account of the fact that not every payment by an employer to an employee is subject to tax. The fact that a payment has a connection with employment is not enough. It must arise 'from' employment. There is ample authority for this view **(see panel)**.

The word 'therefrom' in section 112 TCA, 1997 should be interpreted as only applying to emoluments 'from' being an employee, not 'for' being an employee. The authorities are concerned to distinguish between an emolument from being or becoming an employee, on the one hand, and an emolument that is attributable to something else entirely. If a sum is not paid as a reward for past services or an inducement to enter into employment and provide future services, but is paid for some other reason, then it is not received from the employment – it is not 'therefrom'.

For a charge to tax to arise, it is not the mere existence of a contract of employment that is relevant. A charge to tax applies only to a reward for services rendered (or to be rendered). Compensation is not such a reward. This approach is in line with the views expressed by McGarry J in *Pritchard v Arundale* (47 TC 680, pp689-690): 'In other words, the payment must be made in reference to the services rendered under the office or employment, and as a reward from them and so in that sense "flow" from the office or employment'.

The question that should be asked is whether the payment is made in respect of a contractual provision. If it is, as in the case of an underpayment of salary, it falls squarely within the test posed by Lord Radcliff in *Hochstrasser v Mayes* as 'paid to him in return for acting or being an employee' and Lord Templeman in *Shilton v Wilmshurst* 'from being an employee'.

If it is not wages or salary, it is not paid pursuant to a contractual provision. The mere fact that someone receives a benefit and that person is the holder of an employment does not in itself prove that what was received was a profit from the employment.

An award of compensation is separate from an employment contract. It is not otherwise related to the performance of services if there is no factual purpose to provide an additional award for services. Compensation for sexual harassment is received by an employee who is the subject of the harassment for the same reason that it is paid by the employer: it is compensation to an employee for a wrong. It is not a perk or profit of the employment, nor is it a payment in lieu of a taxable emolument. It is not a payment of

wages, as Lord Browne-Wilkinson held in *Delaney v Staples* ([1992] IAC687), when he said: 'It is not a payment of wages in the ordinary sense since it is not a payment for work done under the contract of employment'.

So can compensation be 'therefrom'? The simple answer is yes, where the compensation is for failure to pay statutory or contractual entitlement to a salary. However, different considerations apply to compensation that is not related to the provision of services. Clearly, many awards made under employment legislation are not remuneration that the employer contracted to pay to the employee.

## Existing practice

If the Revenue contention – that a payment of compensation under the *Maternity Protection Act* and employment equality legislation is taxable – is valid, then equally an award for wrongful dismissal or for loss of earnings in a personal injury claim would be subject to tax. This flies in the face of accepted practice by the courts in Ireland.

The approach by the courts in both personal injury claims and in wrongful dismissal claims was decided in the case of *Glover v BLN (No 2)* ([1973] IR432). In that case, Kenny J held that damages recovered for wrongful dismissal, albeit measured by loss of earnings, are not intrinsically earnings or emoluments. Accordingly, these damages cannot be taxed as income under schedule E. The judge held that the amount of tax that would have been paid must be deducted from the award payable, as 'an award of damages by a court is intended to compensate for the loss he has suffered'. However, he did not consider that damages are remuneration, and therefore presumably are not a profit of employment, when he said: 'The damages are not an award for remuneration that would have been earned … they are intended to compensate the plaintiff because he has not been allowed to earn it'.

In finding as he did, Kenny J followed the English case of *British Transport Commissioners v Gorley* ([1956] AC 185), which had held that the amount of tax that would have been paid must be deducted from the gross earnings in arriving at compensation in personal injury claims. Kenny J's approach continues to be that adopted by the Irish courts in both personal injury cases and in wrongful dismissal cases.

When reviewing employment legislation, and in particular the legislature produced to protect employees, the legislature – instead of setting maximum awards by way of monetary sums – has inserted maximum award by reference to weeks' wages. It is possible that the Revenue is misinterpreting these awards because they relate to a multiple of weekly wages.

In a claim under the *Maternity Protection Act*, for example, or a claim for sexual harassment under the *Employment Equality Act*, the person bringing the claim may have suffered no loss of income. Even so, an award of compensation may be made. Compensation for a wrong to an employee is there to provide redress for unfair or improper treatment. The actual loss is irrelevant. In many cases, there may be no loss.

The fact that in employment law cases, courts and tribunals approach awards on the basis that they are not taxable is admittedly irrelevant. It does, however, give an indication as to the way courts and tribunals treat compensation; that is, they treat it as compensation for a wrong and not an award of lost wages nor as a profit from the employment.

If the approach of the courts is incorrect in wrongful dismissal claims, they may need to review how awards are granted. This would involve a change in the jurisprudence of the courts. The courts would need to award the gross loss and not the net loss. This would add considerably to the cost for employers. In the case of personal injury claims, a similar approach would be required. This would increase the level of awards that a court would need to make. This will simply result in increased insurance costs for employers.

***'If this new practice by the Revenue is to continue, it is clearly an issue that will be litigated upon'***

The approach that the Revenue appears to have adopted in saying that awards are taxable is, in my opinion, contrary to the practice of the courts and tribunals in making awards. The approach is contrary to the rationale behind compensation being paid to employees for a wrong. However, employment law and tax law are separate and must be treated separately. Even so, it appears that on the basis of the reading of the words – given their ordinary meaning – in section 112 TCA, 1997, and in light of the authorities on this point, compensation is not an emolument from employment.

The laws governing the calculation of the effect of a tax liability that arises on damages for loss of earnings or earning capacity is unsatisfactory and controversial. The views of Kenny J in the *Glover* case have been criticised, but until the law on this issue has been changed it remains the law. An attempt by the Revenue to seek to tax an award under the *Maternity Protection Act*, or to claim that an award for sexual harassment under the *Employment Equality Act* is somehow a profit from employment, is, in my opinion, an unsustainable position.

If this new practice by the Revenue is to continue, it is clearly an issue that will be litigated upon. In saying this, however, if the new approach is correct, the issue is likely to be one that will need to be rectified in the finance legislation. If awards under employment legislation are to be taxed, this will have a significant impact upon businesses, resulting in additional costs by way of insurance premiums. Equally, and more importantly, will undermine the whole basis of the social legislation, much of which was introduced to comply with EU directives.

The issue requires clarification sooner rather than later. Pending this, there will be considerable uncertainty as to how professional advisers acting for employers and employees are to approach cases. G

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# Part-time workers and the law

**The *Protection of Employees (Part-time Work) Act, 2001* was enacted in December 2001 and radically reforms the protection given to part-time workers. Michelle Ní Longain details some of its major features**

MAIN POINTS

- Main provisions of the act
- Distinctions between part time and casual
- Practice and procedure

The *Protection of Employees (Part-time Work) Act, 2001* implements EC council directive 97/81/EC concerning the framework agreement on part-time work concluded in June 1997. The directive provides at article 1 that its purpose is to implement the framework agreement. Article 2 of the directive requires member states to bring into force the laws, regulations and administrative provisions necessary to comply with the directive.

The 2001 act substantially mirrors the provisions of the directive and the framework agreement, with some important exceptions. For example, section 5 of the act repeals the *Worker Protection (Regular Part-time Employee) Act, 1991*.


Section 14 of the 2001 act says that a provision in an agreement, whether or not it is a contract of employment and whether or not it was made before the commencement of provisions in the act, will be void if it tries to exclude or limit the application of, or is inconsistent with, any provision of the act.

Section 3 is the interpretation section. 'Conditions of employment' are defined to include remuneration and related matters. They also expressly include conditions for membership of any pension scheme or arrangement. 'Remuneration' includes any consideration, whether in cash or in kind, which the employee receives, directly or indirectly, from the employer and any amounts the employee will be entitled to receive from any pension scheme or arrangement.

Section 7 defines a part-time employee as 'an employee whose normal hours of work are less than the normal hours of work of an employee who is a comparable employee in relation to him or her'. The definition of a comparable full-time employee in section 7(2) differs substantially from that in the framework agreement. Clause 3, paragraph 2 of the framework agreement defines a comparable full-time worker as a full-time worker in the same establishment, whereas the act allows for an *external* comparator, such as an employee who is employed in the same industry or sector as the relevant part-time employee. This is a very broad provision. A similar provision in the *Employment Equality Bill* was removed before its enactment in 1998.

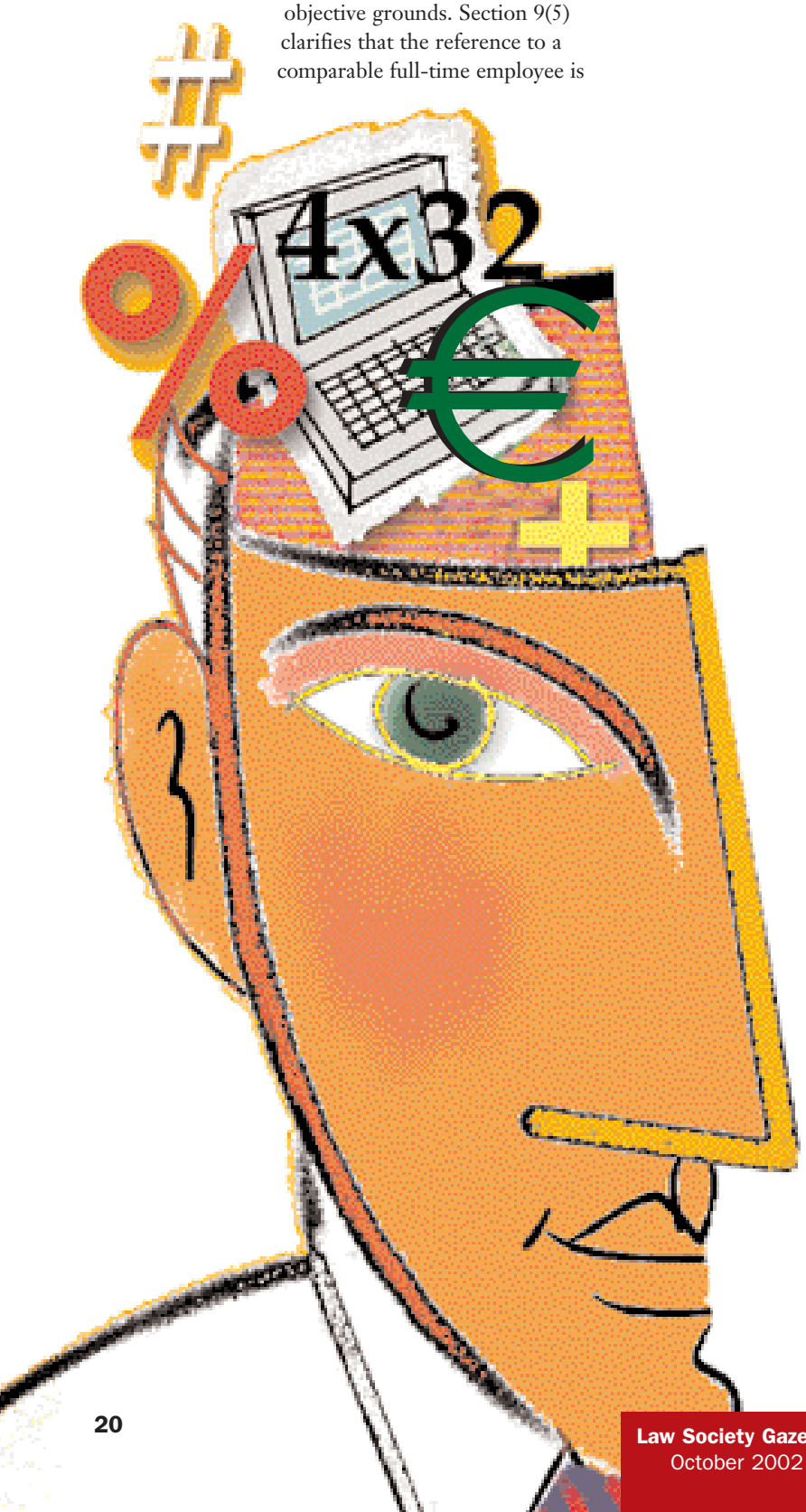
A full-time employee is defined as 'an employee who is not a part-time employee'. The term 'normal hours of work' is defined as 'in relation to an employee, the average number of hours worked by the employee each day during a reference period'. 'Reference period' is defined as a period which complies with the following conditions:

- The period is of not less than seven days' nor more than 12 months' duration
- The period is the same period by reference to which the normal hours of work of the other

employee referred to in the definition of 'part-time employee' in this section is determined, and
- The number of hours worked by the employee concerned in this period constitutes the normal number of hours worked by the employee in a period of that duration.

### Conditions of employment

Section 9 of the act governs conditions of employment for a part-time employee. It provides, with some exceptions, that a part-time employee should not be treated in a less favourable manner than a comparable full-time employee, although section 9(2) adds that a part-time employee can be treated less favourably if this can be justified on objective grounds. Section 9(5) clarifies that the reference to a comparable full-time employee is a reference to an employee either of the opposite or of the same sex as the part-time employee concerned. The gender of the comparator is irrelevant.




Section 10 of the act embodies the *pro rata temporis* provisions from the framework agreement, in that a condition of employment shall be provided to a part-time employee to an extent related to the proportion which the normal hours of work of that employee bears to the normal hours of work of the comparable full-time employee. Section 10(2) clarifies that this provision relates either to the amount of the benefit if it is of a monetary nature or the scope of the benefit if it is not of a monetary nature, and relates only to conditions of employment which are dependent on the number of hours.

### Casual part-time workers

Section 11 deals with part-time employees who work on a casual basis. The 2001 act does not exclude such employees from the terms of the agreement, but provides that a part-time employee who works on a casual basis and who is not a member of a class of employee prescribed by the minister under section 11(7) of the act (no such class of employee has been prescribed) may be treated less favourably than a comparable full-time employee if this less favourable treatment can be justified on objective grounds.

Section 11(4) says that a part-time employee will be regarded as working on a casual basis if (a) at that time he has been in the continuous service of the employer for a period of less than 13 weeks and that period of service is not of such a nature as could reasonably be regarded as regular or seasonal employment, *or* if (b) by virtue of an approved collective agreement, he is regarded as working on such a basis.

For the purpose of defining casual part-time employees, an employee's service is deemed to be continuous unless he has been dismissed or leaves voluntarily (section 11[6]).

### Less favourable treatment

Section 12 of the act contains provisions in respect of objective grounds for less favourable treatment. It has two components. First, section 12(1) provides that an objective ground for less favourable treatment must be based on considerations other than the status of the employee concerned as a part-time employee; the less favourable treatment must be for the purpose of achieving a legitimate objective of the employer; and such treatment must be appropriate and necessary for that purpose. Second, section 12(2) provides that a ground that does not constitute an objective ground for the purpose of section 9(2), which relates to treating a part-time employee in a less favourable manner than a comparable full-time employee, may be capable of constituting an objective ground for the purposes of section 11(2), which relates to casual part-time employees.

Section 12(2) envisages that it will be easier for employers to justify less favourable treatment of part-time employees who work on a casual basis than part-

time employees who do not. It remains to be seen how this provision will be interpreted by the rights commissioners and the Labour Court.

### Opportunities for part-time work

The act does not seem to fully implement the provisions contained in clause 5 of the framework agreement in respect of opportunities for part-time work. It envisages the implementation of these provisions, in that it provides at section 13(1) that the commission may – and, at the request of the minister for enterprise, trade and employment, shall – study every industry and sector of employment for the purpose of identifying any obstacles to people being able to work part-time and make recommendations as to how any such obstacle could be eliminated.

The remaining provisions under section 13(1) relate to how the commission will carry out this task if it chooses to carry it out or is requested by the minister to carry it out, and relate to how it shall report and publish such a study. Currently, there is no obligation on the rights commissioner service to carry out such a study and, until a request is made by the minister or a study is voluntarily carried out by the rights commissioner service, it appears that Ireland will not have fully complied with its obligations under clause 5 of the framework agreement, as it is required to do under article 2 of the directive.

### Penalising employees

Section 15(1) of the act provides that an employer shall not penalise an employee:

- For invoking any right to be treated in the manner provided for by the part of the act dealing with the rights of part-time employees, or
- For having in good faith opposed by lawful means an act which is unlawful under the act, or
- For refusing to accede to a request by the employer to transfer from full-time work to part-time work or from part-time work to full-time work, or
- For giving evidence in any proceedings under this act or giving notice of his intention to do so, or to do any other thing referred to in the above points.

Section 15(2) of the act provides that an employee is penalised if he is (a) dismissed, suffers any unfavourable change in his conditions of employment or any unfair treatment (including selection for redundancy), or (b) is the subject of any other action prejudicial to his employment. Where an employee has refused to transfer from full-time to part-time work or vice versa, action taken by the employer shall not constitute a penalisation if *both* of the following conditions are complied with:

- Having regard to all the circumstances, there were substantial grounds both to justify the employer making the request concerned and the employer takes that action following the employee's refusal, *and*
- The taking of that action is in accordance with the employee's contract of employment and the provisions of any other enactment governing posted workers, to which section 20(2) of the act applies.

Section 15(3) provides that such penalisation of the employee constitutes a dismissal within the meaning of the *Unfair Dismissals Acts*. Redress in respect of that penalisation may not be granted under both the 2001 act and under those acts. In other words, an employee who has one year's service must choose whether to present a complaint to a rights commissioner under the 2001 act or to a rights commissioner or an Employment Appeals Tribunal under the *Unfair Dismissals Acts*. An employee who does not have one year's service does not have the right to claim unfair dismissal before a rights commissioner or an Employment Appeals Tribunal in these circumstances, and can only present a complaint to a rights commissioner under this act. There is no service requirement for a penalisation complaint.

### Practice and procedure

Section 16 provides for the making of a complaint to a rights commissioner. There is a six-month time limit for bringing a complaint. This period may be extended to 12 months if the rights commissioner is satisfied that the failure to present the complaint within the period was due to a reasonable cause. Time begins to run from the date of the contravention of the act to which the complaint relates or the date of termination of the contract of employment, whichever is the earlier.

An employee or the employee's trade union, with the employee's consent, can complain to a rights commissioner that the employer has contravened section 19 or section 15 (the former relates to conditions of employment for part-time employees and the latter prohibits penalisation of employees). If the employee or trade union makes a complaint, the rights commissioner will give the parties an opportunity to be heard and present any evidence relevant to the complaint, will give a decision in writing and will communicate the decision to the party.

Section 16(2) provides that the decision of the rights commissioner can do one or more of the following:

- Declare that the complaint was or was not well founded
- Require the employer to comply with the relevant provision
- Require the employer to pay just and equitable compensation, having regard to all the circumstances but not exceeding two years' remuneration. (Like the compensation provisions of the *Employment Equality Act* and unlike those provisions of the *Unfair Dismissals Acts*, compensation need not be linked to financial loss.)

### Obtaining redress

The provisions in respect of obtaining redress differ substantially between the directive and legislation on

***'The 2001 act contains no provisions empowering rights commissioners to investigate complaints, merely to hear such complaints'***

equal pay for men and women and the directive and legislation on the protection of part-time employees. No judicial remedy is required for part-time employees in the directive. The 2001 act contains no provisions empowering rights commissioners to investigate complaints, merely to hear such complaints. Nor does it contain provisions authorising rights commissioners to carry out preliminary investigations into claims in respect of equal remuneration, but again only to hear complaints in respect of conditions of employment, which include remuneration.

From the wording of the directive, framework agreement and implementing legislation, rights commissioners do not appear to have the power to investigate matters as is done by the director of equality investigations or the Labour Court under the 1998 act and 1975 directive.

I believe that an employer could refuse to allow a site visit by a rights commissioner on the basis of the provisions of the 2001 act, in view of the absence of a power for a rights commissioner to investigate. The commission is now only empowered to give the parties an opportunity to be heard and present evidence relevant to the complaint.

Section 17 provides for a right of appeal from a decision of a rights commissioner. The appeal is to the Labour Court and must be brought by giving notice of the appeal in writing to the Labour Court within six weeks of the date in which the decision to which it relates was communicated to the party. The notice must contain such particulars as are determined by the Labour Court under sub-section 4, which requires the Labour Court to determine the procedures for such a hearing. The Labour Court has not yet published any procedures under this section.

The party initiating the appeal must state his intention to appeal the decision. The Labour Court must give a copy of the notice of appeal to the other party as soon as possible after it receives the notice.

Section 17(5) provides that the minister may, at the request of the Labour Court, refer a question of law arising in proceedings before the court to the High Court for determination. The High Court's determination shall be final. A party to proceedings before the Labour Court may also appeal to the High Court from a determination of the Labour Court on a point of law, and again the High Court's determination shall be final.

Where the decision of a rights commissioner has not been carried out by the employer concerned and no appeal has been brought within the six-week time limit for appeal, the employee may, not later than six weeks after the time limit expires, bring the complaint before the Labour Court. The court will then issue a judgment intended to have the same effect as the decision, without hearing the employer or any evidence other than the terms of the original decision.

If the employer does not implement the Labour Court's determination within six weeks, the Circuit

Court will make an order directing the employer to carry it out. The Circuit Court can do this on application by the employee, by the employee's trade union or by the minister for enterprise, trade and employment.

The Circuit Court can also, if it considers it appropriate, direct the employer to pay the employee interest on the compensation at the rates referred to in section 22 of the *Courts Act, 1981*, where the order relates to the payment of compensation. Interest may be ordered in respect of the whole or any part of the period beginning six weeks after the date on which the determination of the Labour Court was communicated to the parties and ending on the date of the Circuit Court order.

Sections 16 to 18 of the 2001 act do not apply to a member of the defence forces, who therefore cannot bring a complaint to a rights commissioner, appeal to the Labour Court, or seek enforcement of a Labour Court determination from the Circuit Court.

### Collective agreements

The Labour Court has the power to approve a collective agreement under the 2001 act. If the court receives an application for approval of a collective agreement, paragraph 2(2) of the schedule requires it to consult those representatives of employees and employers that it considers to have an interest in the matter.

The Labour Court will not approve a collective agreement unless the following provisions are fulfilled:

a) It is satisfied that it is appropriate to approve of the agreement having regard to clause 2.2 of the framework agreement, which relates to employees who work on a casual basis
b) The agreement has been concluded in the manner usually employed in determining the pay or other conditions of employees in the organisation concerned
c) The body which negotiated the agreement on behalf of the employees is the holder of a negotiation licence under the *Trade Union Act, 1941* or is an excepted body within the meaning of that act
d) The agreement is in a suitable form.

Paragraph 2(4) says that the Labour Court can request the parties to the agreement to vary it if the court is not satisfied that the conditions in (a) or (c) above are fulfilled. If the parties agree to vary it, the court will approve it.

Other paragraphs in the schedule to the 2001 act allow the Labour Court to withdraw approval of collective agreements, and set out the procedures to be followed in making applications for their approval or variation. The Labour Court must publish, in any way it sees fit, details of these procedures (paragraph 6). It must also establish and maintain a register of collective agreements approved by it under this schedule (paragraph 7).

This register must be made available for inspection by members of the public.

### Rights commissioners

It remains to be seen how rights commissioners will carry out their functions under the 2001 act. It is my view that rights commissioners do not have similar powers and obligations to those of equality officers under the *Employment Equality Act, 1998*, which is the existing legislation implementing council directive 75/117/EEC on the approximation of the laws of the member states in relation to the application of the principle of equal pay for men and women. Claims for equal pay under that act are submitted to the Office of the Director of Equality Investigations and investigated by equality officers. These claims can be brought directly to the Circuit Court, as article 2 of the 1975 directive required member states to introduce into their national legal systems such measures as are necessary to enable all employees to pursue their claims by judicial process after possible recourse to other competent authorities.

Article 6 of the 1975 directive requires member states, in accordance with their national circumstances and legal systems, to take the measures necessary to ensure that the principle of equal pay is applied. It also provides that member states must see that effective means are available to make sure that this principle is observed.

### Settlement of disputes

The 1997 directive provides that the prevention and settlement of disputes and grievances will be dealt with in accordance with national law, collective agreements and practice.

Section 79 of the *Employment Equality Act, 1998* is entitled 'Investigations by director or the Labour Court'. It provides that, where a case has been referred to the director or to the Labour Court and is not dealt with by way of mediation, the director or the Labour Court will investigate the case. The minister can make regulations specifying the procedures to be followed by the director or Labour Court in carrying out investigations and setting time limits, but the minister must consult the relevant bodies before any regulations are made (section 79[4]). No such regulations have yet been made, but procedures have been adopted by both the director and the Labour Court.

At the end of an investigation, the director will issue a decision or the Labour Court will make a determination (section 79[6]). If the decision is in the complainant's favour, it will provide for redress or – in the case of a decision on a preliminary issue under section 79(3) (whether different rates of remuneration have been paid on grounds other than prohibited grounds) – be followed by an investigation into the substantive issue.

The *Employment Equality Act* clearly envisages investigation by the appropriate body and, in cases where an employer argues that it is paying different remuneration other than on a prohibited ground, allows the director to investigate this as a preliminary issue. If the preliminary issue is decided in the complainant's favour, an investigation of the substantive issue will take place.

The provisions for the redress of grievances in the 2001 act differ greatly from those in the *Employment Equality Act, 1998*, and in my view it cannot be assumed that claims under the 2001 act will be dealt with in the same way that equal pay claims have been in the past. G

***'It remains to be seen how rights commissioners will carry out their functions under the 2001 act'***

*Michelle Ní Longain is a partner in the Dublin law firm BCM Hanby Wallace.*

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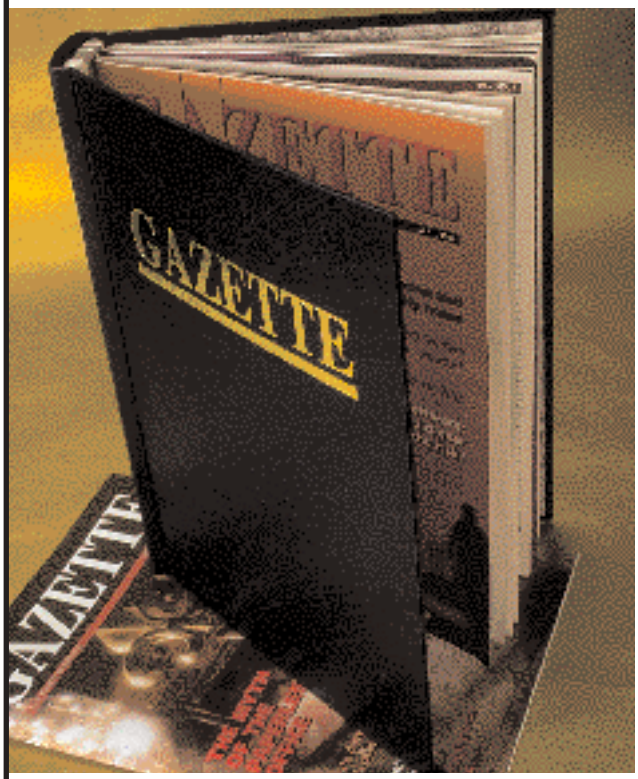


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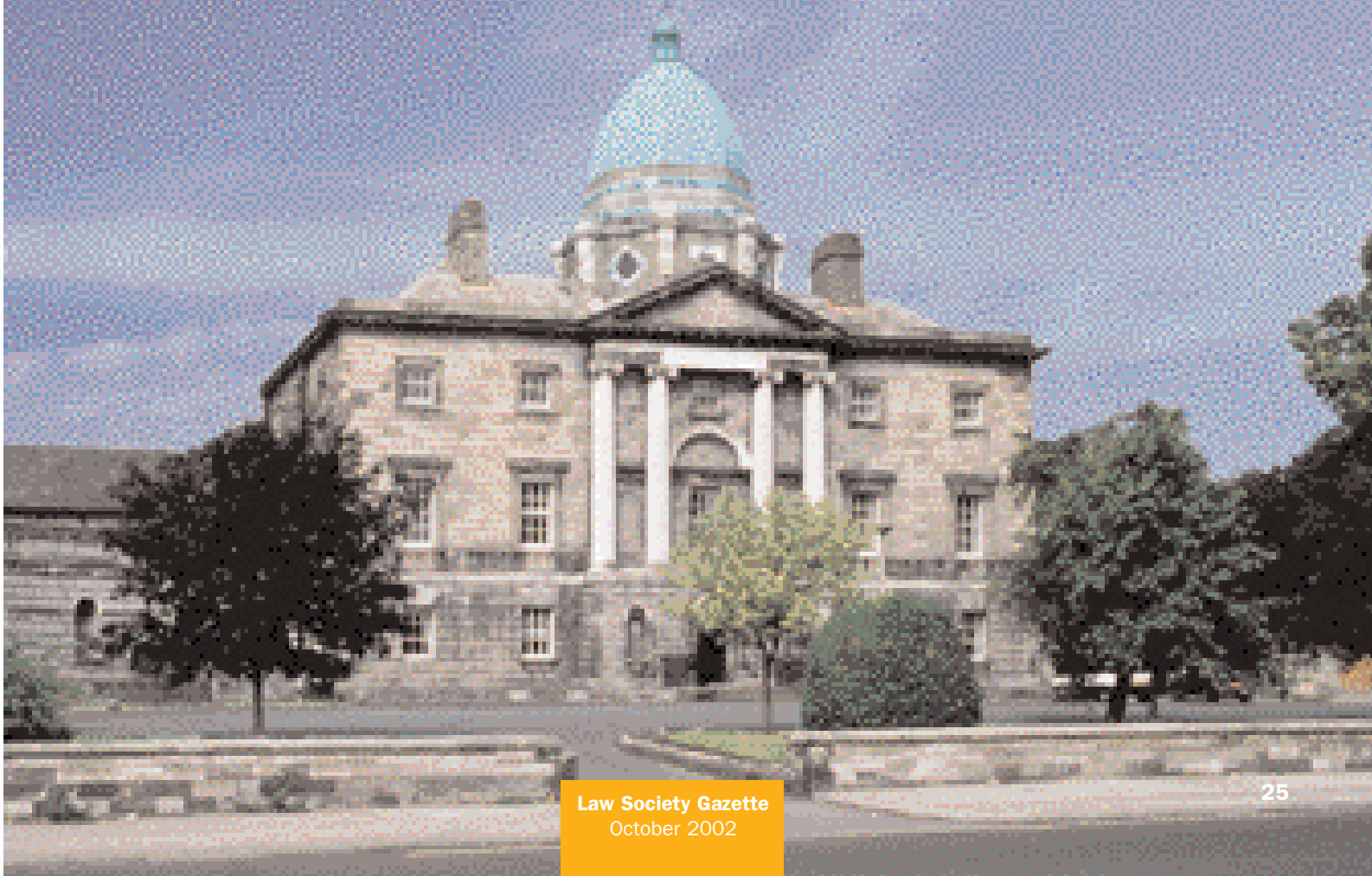
LAW SOCIETY OF IRELAND 150 yrs 1852 - 2002

# THE LAW SOCIETY: progress OF A PROFESSION



## A MESSAGE FROM THE PRESIDENT

This year marks the 150th anniversary of the granting of the Law Society's charter. It has been a year of celebration for the solicitors' profession. I hope it will serve as a reminder to the profession, and to the wider public, of our rich history and our proud record of acting in the public interest. That has always been our role; as a profession, we have always put our clients' interests above our own. I hope you are as proud of this tradition as I am.

Generations of lawyers have contributed to the development of our profession, and more broadly to the development of law and proper legal relationships as the core of an ordered society in this country. Outside their professional lives, many solicitors have also attained prominence in other fields of activity, including international sport, business, literature and politics. Their achievements, and the achievements of the profession as a whole, are detailed in a new book entitled *The Law Society of Ireland, 1852-2002: portrait of a profession.*

I think it is particularly appropriate, at the start of a new century, that the Law Society should have produced such a tribute to the achievements of the profession. As you might expect, a lot of hard work has gone into the preparation of this book, and in this regard particular thanks are due to the book's editors, Dr Eamonn Hall and Daire Hogan, who have also contributed the accompanying article in this month's issue of the magazine. I have no doubt that everyone who reads this book will derive great enjoyment from it.

We have come a long way in 150 years. There may be many challenges ahead, but I have every confidence in our profession's ability to adapt to change, as we have always done. And for that reason, I believe we can look forward to the future with confidence.

Elma Lynch,
President

# Law Society of I

**In this special *Gazette* supplement to commemorate 150 years since the Law Society was granted its charter, Dr Eamonn Hall and Daire Hogan chart the growth and development of the solicitors' profession through the years**


Supplemental royal charter granted to the Law Society in 1888 *(photograph: Roslyn Byrne)*

# reland, 1852 – 2002

The Irish solicitor of today is a successor of the *file* (poet) of pre-Norman Ireland. The *file* was no mere versifier with a command of words, but was knowledgeable in several fields; one particular qualification of the *file* was knowledge of the jurisprudence of Irish law. The profession of attorney and solicitor (one who was appointed to act for another), initially regulated by the courts and subsequently by statute, gradually developed following the establishment of Anglo-Norman rule in Ireland. Pursuant to the *Supreme Court of Judicature Act (Ireland) 1877*, all persons admitted as solicitors or attorneys were henceforth to be called solicitors of the Court of Judicature, although the title of attorney lives on in the designation of the chief law officer of the state as the attorney general.

## The period up to the charter of 1852

Attorneys were among the categories of legal practitioner admitted to the Honorable Society of the King's Inns on its revival in 1607. In 1629, there was a first recital of a crucial new rule to the effect that no-one was to be admitted as an attorney in any of the courts of Dublin unless he had first been admitted to membership of the Society of King's Inns and that existing attorneys who were not already members of the King's Inns were to present themselves for admission early in the next ensuing Hilary Term; otherwise, they were to be struck off. Every attorney was required to keep one week's commons at the King's Inns in each law term. The King's Inns occupied a prominent position in the scheme of regulation of attorneys and solicitors for many years.

The relationship between attorneys and solicitors as a profession with the benchers was an uneasy one, with the attorneys and solicitors considering that their needs were not catered for by the benchers. From time to time, efforts were made by groups to improve the quality of the profession. A Society of Attorneys was formed in 1774 and was the first known association of members of that branch of the profession in the country.

In November 1791, the Law Club of Ireland was established. Little is known of this society of solicitors but, like the society formed in 1774, it appears to have been composed of the better educated or more substantial members of the profession. It had premises at 13 Dame Street, Dublin until 1869 and thereafter at 25 Nassau Street and was dissolved at the end of the 19th century.

The solicitors' room at the Four Courts, c1860 *(collection: Peter Pearson)*

The Law Society of Ireland was established on 24 June 1830 with premises at Inns Quay, Dublin. In November 1830, the committee of the society submitted a memorial to the benchers as to the 'necessity and propriety' of erecting chambers for the use of solicitors with the funds which solicitors had been levied to pay to King's Inns over the years. The committee requested that the hall and chambers for the use of solicitors should be erected away from the King's Inns, and apartments at the Four Courts were allotted by the King's Inns to solicitors in May 1847. However, the adequacy of that accommodation at the Four Courts was to be a bone of contention between the society and the benchers for 30 years.

## 1852 to the First World War

The Law Society was incorporated by royal charter, dated 5 April 1852. The charter referred to founding 'an institution for facilitating the acquisition of legal knowledge', and for the better and more convenient discharging of professional duties of attorneys and solicitors.

The principal events with which the Law Society was concerned on behalf of solicitors in the second half of the 19th century were the inauguration of a scheme for the education of apprentices, the independence of the solicitors' profession from the

**Council of the Law Society, 1951/52**

*Back row, from left:* Thomas A O'Reilly, Derrick M Martin, George G Overend, Ralph J Walker, John F Foley, John J Sheil, John Maher, Cornelius J Daly, Christopher E Callan, Maurice Power. *Middle row, from left:* James R Quirke, Seán Ó hUadhaigh, Louis E O'Dea, Eric A Plunkett (secretary), Gerald J O'Donnell (vice-president), Arthur Cox (president), Desmond R Counahan (vice-president), Patrick R Boyd, Henry J Catchpole, William J Norman, Senator Patrick F O'Reilly. *Front row, from left:* Reginald J Nolan, Dermot P Shaw, Desmond J Mayne, John R Halpin, John Carrigan, Francis J Lanigan, James J O'Connor, Niall S Gaffney, Joseph P Tyrrell, Joseph Barrett, John L Kealy. *Absent from this picture:* Roger Greene, Francis J Gearty, Henry St J Blake, Timothy A Buckley, John J Dundon, Cuthbert J Furlong, Edmund Hayes, Charles MacLaughlin, Alexander S Merrick, Joseph Morrissey, George Murnaghan, John J Nash, James C Taylor, John B McCann

King's Inns and the achievement of an increasing degree of self-government and recognition of its position as the representative and regulatory body for solicitors in Ireland, culminating in the *Solicitors (Ireland) Act 1898*.

Lectures for bar students were introduced by the King's Inns in 1850, but no provision was made for the education of solicitors' apprentices, and in 1855 the Law Society presented a memorial to the benchers calling for examinations to be introduced as a test both for admission to an apprenticeship and subsequently for admission to the profession. The benchers initially declined to take any action, but, after subsequent pressure, eventually introduced a preliminary examination in Latin, history, arithmetic, book-keeping, geography and English composition for prospective apprentices and a final examination before admission to the profession.

Pursuant to the *Solicitors Act 1866*, the Law Society took over responsibility for education of the solicitors' branch of the profession from the benchers, under the supervision of the judges. The 1866 act in effect provided that membership of, or payment of fees to, the Society of King's Inns would no longer be a condition of admission as a solicitor. One link between the solicitors' profession and the benchers had been broken, but others remained. The benchers were still the landlords of the Law Society's buildings at the Four Courts. Subsequently, the benchers agreed to make a lease of an area comprising both the original accommodation and a further area at the Four Courts for a term of 999 years from 1874 at an annual rent of 1 shilling, if demanded.

At the end of the 19th century, the legal functions of the Law Society were substantially increased by the

Eric A Plunkett, Law Society secretary *(centre)* in 1968, with Thomas C Smyth, solicitor, who held the post of assistant secretary with the society from 1963 to 1968, and Joseph Finnegan, solicitor, who succeeded him as assistant secretary from 1968 to 1972. Thomas Smyth and Joseph Finnegan were subsequently called to the bar and appointed judges of the High Court. Mr Justice Joseph Finnegan was appointed president of the High Court in 2001 *(courtesy of Eric Plunkett)*

*Solicitors (Ireland) Act 1898*, which repealed the act of 1866 and transferred control of education and important disciplinary functions from the direct supervision of the judges to that of the society. In 1888, the constitution of the Council of the society was changed by supplemental charter, which provided that the Northern Law Society and Southern Law Association would each be entitled to appoint members to the Council. This was further changed in 1960, when provision was made for the appointment to the Council of three members of the council of the Dublin Solicitors' Bar Association.

### The First World War and its aftermath

The First World War, subsequent political developments and the War of Independence had a considerable impact on lawyers in Ireland and their professional organisations, including the establishment, with corresponding statutory functions in its jurisdiction, of the Incorporated Law Society of Northern Ireland. Many Irish lawyers joined the armed forces. The *Irish law times* published a war supplement in February 1916 and listed 110 solicitors, 71 solicitors' apprentices and 175 sons of solicitors who had enlisted. A memorial to those who died was erected in the Four Courts by the society in July 1921.

The Four Courts were occupied by the volunteers during Easter week 1916; books and furniture were piled in windows as barricades. A number of solicitors' offices in central Dublin were in buildings destroyed by fire in the course of the fighting. The Council of the society passed a resolution assuring the king of its continued loyalty, expressing its 'abhorrence and condemnation of the scenes of outrage and destruction which had taken place', and recommending proper compensation for all who had suffered.

### The period from 1920 to 1960

The end of the Anglo-Irish war, marked by the treaty in December 1921, gave rise to hopes that the unrest of the previous few years would be replaced by a return to normality in legal business. In April 1922, however, the Four Courts buildings were occupied by units of the IRA opposed to the treaty, and the bombardment and capture in June of the Four Courts by government forces resulted in serious damage to the buildings, including the Solicitors' Buildings. In 1899, in what turned out to be a most useful precaution, a fire-proof room for the records of the society had been constructed after it had become the statutory custodian of the roll of solicitors pursuant to the *Solicitors (Ireland) Act 1898*. Despite the destruction of the building in 1922, the contents of the strongroom were afterwards found to be intact. Most of the property of the society was destroyed, however, including all the furnishings and the library. For the rest of the decade, the society's offices were at 45 Kildare Street, a building which the government placed at its disposal.

One innovation which the society strongly opposed in the new Irish state was the requirement for newly-qualified solicitors to be proficient in the Irish language. The society issued a pamphlet to all members of the Dáil and Seanad stating its views on the *Legal Practitioners (Qualification) Bill, 1928*. The society considered that the bill (a) was not wanted either by the public or the profession and was unnecessary, (b) was oppressive, (c) was unworkable, (d) set an impossibly high standard in Irish, (e) must lead to inefficiency, and (f) should not be compulsory.

At the half-yearly meeting of the society in May 1929, the president, Edward H Burne, referred to 'this atrocious measure which in its present form spelt waste of money, brains, energy and time … which was not wanted, and had not been asked for by any, save extreme and foolish idealists, quite ignorant of the necessary high legal education of future solicitors'. Politicians from both government and opposition criticised the attitude of the society, but the society's objections did result in some amendment of the original proposals before the passing of the bill in 1929.

The rebuilding and reopening of the Solicitors' Buildings in 1931, as a part of the overall reconstruction of the Four Courts, gave general satisfaction. They were sited adjoining and slightly to the east of where the former premises stood.

The number of solicitors practising in Ireland increased by about a third in the first decades of independence, rising from 995 in 1924 to a peak of 1,422 in 1943, a number not afterwards attained for almost 30 years. The growth in numbers, in what was generally an economically depressed or stagnant

The Law Society's headquarters since 1978 at Blackhall Place, Dublin. Formerly the Blue Coat School or King's Hospital, the building was designed by Thomas Ivory in 1772. The first stone was laid on 16 June 1773 and the building was completed in 1783 *(photograph: Jacqueline O'Brien; reproduced by kind permission)*

The Law Society library, on the first floor of the Solicitors' Buildings, c1952

The official opening of the Law Society's new headquarters on 14 June 1978. An Taoiseach, Jack Lynch, receives the ceremonial key from architect Terence Nolan of the firm Nolan and Quinlan. Also present is the president of the society (1977/78), Joseph L Dundon *(photograph: Lensmen)*

period, put pressure on the incomes of solicitors. In 1944, the president of the society spoke of overcrowding in the profession and warned young people against 'entering a profession in which they might have to endure respectable starvation'.

The subject of the regulation of the profession and its statutory framework preoccupied the society for much of the 1940s and 1950s, a period during which membership of the society became universal practice among solicitors. The passing of the *Solicitors Act, 1954* was a culmination of efforts extending over many years by the Law Society to amend and update the law on the regulation (more precisely, the self-regulation) of the profession. Following a finding of constitutional infirmity in its provisions for disciplinary measures that could be taken against members of the profession, amending legislation was passed in 1960. The *Solicitors (Amendment) Act, 1960* dealt primarily with the new disciplinary provisions, a re-statement of the basis of the compensation fund and provisions to be implemented at a future date for the furnishing by every solicitor of an accountant's certificate of compliance with the *Solicitors' Accounts Regulations*. The society had considerable dealings and vigorous debate on the matter with Charles Haughey, then at the start of his ministerial career as the parliamentary secretary to the minister for justice. The 1954 and 1960 acts formed the basis of the regulation of the profession for another generation.

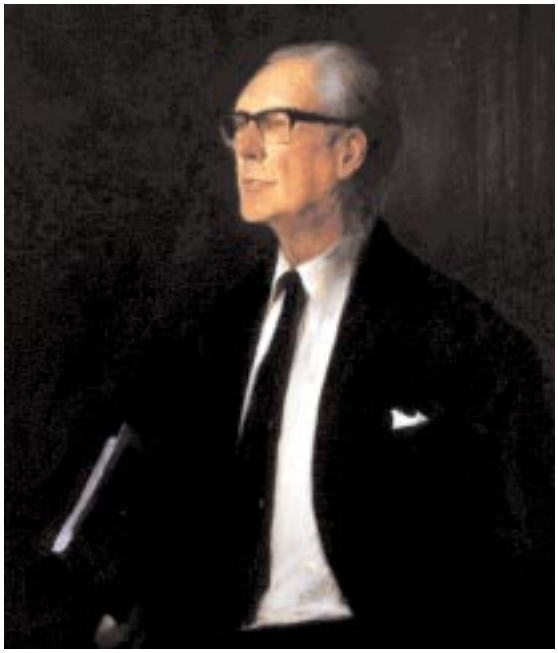
## The modern era

During the last three decades of the 20th century and up to the present, the society, its presidents and directors general have taken an increasingly prominent role as spokespersons and leaders of the profession. A notable feature of secretaries and directors general of the society has been, in general, their longevity in office. Edward Iles held office from 1841 to 1864; John Hawksley Goddard served for 24 years up to 1888; William George Wakely held office from 1888 to 1942, a period of 54 years and – incidentally – is noted for an act of bravery in rescuing the president's chain of office from the Four Courts in 1922 at grave personal risk. Eric Plunkett served from 1942 to 1973; James Ivers from 1973 to 1990; Noel Ryan from 1990 to 1994, and Ken Murphy from 1995 to the present. These seven men have straddled a period of almost 161 years.

## Acquiring Blackhall Place

By the middle of the 1960s, the Solicitors' Buildings at the Four Courts were proving inadequate for the expanding activities of the society. In fact, outside premises were used for lectures for students. A special committee recommended the purchase of the King's Hospital, Blackhall Place, described by Maurice Craig as 'one of the most beautiful and, in its way, original' of Dublin's major buildings. Peter Prentice proposed a motion at a special meeting of the Council of the society on 3 July 1968, seconded by John Jermyn, that the society purchase the King's Hospital for the sum of £105,000. The motion was carried unanimously and a contract was subsequently executed.

Few great projects run smoothly and the Blackhall Place project was no exception. Some solicitors expressed concern about expenditure on the proposed new headquarters. Costs escalated on the project to such an extent that, by late 1971, there was strong pressure from within the society to abandon it entirely. However, under the guidance of Peter Prentice, who was elected president of the society in 1973, and Moya Quinlan (subsequently president of the society), who was appointed to the chair of Blackhall Place premises committee in that year, the Council of the society agreed to proceed. Wednesday 14 June 1978, the official opening of the new headquarters of the society by An Taoiseach Jack Lynch, during the presidency of Joseph Dundon, was an important day in the history of the society.



Portrait of Peter DM Prentice, president of the society for 1973/74, by Thomas Ryan RHA. The portrait, which hangs in the society's council chamber, was presented to Peter Prentice by the Council of the society in appreciation of his initiative and commitment in the acquisition and refurbishment of the society's headquarters at Blackhall Place *(photograph: Gillian Buckley)*

### Women in the profession

In 19th century Ireland and Britain, women were effectively excluded from practising law. It was widely accepted that, at common law, women were under a general disability by reason of their sex to become lawyers. There was no express statutory law prohibiting female solicitors, but it became custom and practice to regard a lawyer's work as not fit for a woman. The *Sex Disqualification (Removal) Act 1919* facilitated women becoming members of the legal profession. The number of women joining the profession grew significantly in the 1960s and 1970s. Today, 40% of solicitors are women.

Elma Lynch, president of the society for 2001/02 *(centre)*, with Moya Quinlan, president for 1980/81, and Geraldine Clarke, senior vice-president for 2001/02 *(photograph: Lensmen)*

Incidentally, the issue of forensic dress for women lawyers raised eyebrows when women first began appearing in court as advocates. There was a view shared by many (including some women solicitors even up to the 1960s) that a woman in court, as in church, should have her head covered. Judge Mary Kotsonouris, solicitor, writer and former judge of the District Court, in her book *Retreat from revolution* (1994), having noted that Judge Eileen Kennedy (a solicitor from Carrickmacross, Co Monaghan) was the first woman judge to be appointed in Ireland in 1963, recounts how Judge Kennedy created another precedent by being 'the first female to sit in a court with her head uncovered'. Judge Kotsonouris, who was a solicitor's apprentice at the time, remembers the 'frisson of excitement at such daring'.

### Supply of solicitors

The 1950s as a decade were generally regarded in Ireland as a period of stagnation. Of the small number of solicitors who qualified in the 1950s, some were forced to emigrate and of these many joined the British Colonial Service. In the period 1955 to 1960, the number seeking admission to the roll of solicitors declined. By 1960, the number of solicitors on the roll was at its lowest for several years. In the period 1960 to 1973, there was relatively little growth in the numbers in the profession. By 1985, however, it was considered that an oversupply of solicitors existed, the extent of which was hard to measure. A 1985 report detailed that a difficult market situation had developed in Ireland in the wake of the recession of 1980 to 1983. Nobody then could foresee the era of the Celtic Tiger, an unparalleled period of growth and considerable demand for the services of solicitors in the 1990s. At the end of 2001, there were 6,478 solicitor members of the Law Society, with 5,914 holding practising certificates. However, the implications of the terrorist attacks on New York and Washington on 11 September 2001, the slowing down in Ireland of one of the longest economic booms in the history of this country, and the rise in unemployment may affect the employment prospects and income of solicitors.

### Solicitor advertising

Advertising by solicitors has been a contentious issue over many years. Indeed, for decades solicitors were strictly prohibited from advertising. A postal ballot in which almost 2,000 solicitors participated in October 1988 resulted in a narrow majority in favour of permitting individual advertising subject to restrictions. The *Solicitors (Amendment) Act, 1994* gave statutory recognition to the acceptability of advertising, although the *Solicitors (Amendment) Act, 2002* makes provision for stricter regulation of the content of advertisements, particularly personal injury advertising.

### Inquiries into the profession

The profession has been the subject of several inquiries in recent times. The National Prices Commission considered the issue of solicitors' remuneration in 1976. This was followed by the Restrictive Practices Commission's *Report of enquiry into the effect of competition of the restrictions on conveyancing and the restrictions on advertising by solicitors* in 1982, and the Fair Trade Commission's *Report of study into restrictive practices in the legal profession* in 1990. The Competition Authority is now undertaking a study of the legal profession in Ireland and its report is awaited.

### Solicitors as judges

The society pressed for many years for a change in the law so as to permit the appointment of solicitors in the Circuit Court and the High Court. The issue had been canvassed in many fora. The Fair Trade Commission in its 1990 report stated that, had the judiciary been within the scope of its study, the commission would have carefully considered whether the restriction upon those eligible for appointment constituted an unfair practice on the grounds, for example, that it was in restraint of trade and excluded new entrants and whether it was contrary to the common good. The *Courts and Court Officers Act, 1995* allowed for the appointment of solicitors as judges to the Circuit Court. In July 1996, the government announced the appointment of solicitors John F Buckley, Frank O'Donnell and Michael White as judges of the Circuit Court. The society welcomed with particular warmth and pleasure the nomination by the government of three distinguished solicitors who would enjoy a place in legal history as the first-ever solicitors appointed directly from practice to serve as judges of the Circuit Court. The *Courts and*

***'It was widely accepted that, at common law, women were under a general disability by reason of their sex to become lawyers'***


The first students to attend a professional practice course in the new Education Centre, autumn 2000 *(photograph: Lensmen)*

*Court Officers Act, 2002* provided that a person shall be qualified for appointment as a judge of the Supreme Court and the High Court if he or she is for the time being a practising barrister or practising solicitor of not less than 12 years' standing. Shortly after its enactment, Michael Peart became the first practising solicitor to be appointed a judge of the High Court. His elevation was warmly welcomed by the profession.

## The 1994 act and the review

The *Solicitor's (Amendment) Act, 1994* gave the society stronger powers to investigate and deal with complaints from the public against solicitors. However, dissatisfaction with some aspects of the structure of the society and its governance led to vigorous debate at the annual general meeting on 24 November 1994. A resolution was passed that the society immediately set up an enquiry to examine the structure of the Council of the society with the objective of better serving the solicitors' profession in modern Ireland and to examine the administration, finances and accounts of the society with a similar objective.

The review group, chaired by Donald G Binchy, came up with 106 specific recommendations. The overwhelming majority of the review group's recommendations were approved at a special general meeting in March and July 1996 and bye-laws were made to give effect to them.

## Education matters

A significant improvement in the education system for solicitors took place in conjunction with the physical location of the society's Law School at Blackhall Place in 1978. From 1986 onwards, the society faced challenges in the courts against its education regulations and the manner in which it had implemented them. The new Law School, built on premises adjoining the existing Blackhall Place headquarters and officially opened by President Mary McAleese on 2 October 2000, must be regarded as one of the greatest achievements of the solicitors' profession in recent times. The Law School was completed on schedule and within budget. The strengthening of the teaching and administrative staff in the Law School has also benefited the profession.

**Lifelong learning:** *from left:* Dr Albert Power, director of education 1993-1999, Professor Richard Woulfe, director of education 1978-1993, TP Kennedy, current director of education, and Professor Laurence G Sweeney, director of training 1977-1992 *(photograph: Lensmen)*

## Law Society library

An important service provided to the members has been the library of the Law Society. Solicitors have had access to a library of their own for over 160 years. The new library in Blackhall Place was also opened officially by President McAleese on 2 October 2000. Apart from extra space, the layout includes a combination of study tables and computer workstations. Significant developments have taken place in recent times in the library, with the provision of electronic information and other services.

Daire Hogan *(left)* and Dr Eamonn Hall, editors of *Portrait of a profession (photograph: Roslyn Byrne)*

Undoubtedly, the profession of solicitor has developed a strong cohesion and indeed a powerful advocate in the form of the Law Society. In many ways, the institutional Law Society has adapted itself to serve the changing needs of solicitors over the past decades. With the growth of government in its many guises, the increasing complexity and regulation of business and life in general and the growing consciousness of legal rights and remedies, and of the importance of law and of the constitution, solicitors have played, and will continue to play, a significant role in Ireland. G

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*Dr Eamonn Hall is the chief legal officer of Eircom and Daire Hogan is a partner in the Dublin law firm McCann FitzGerald. They are the editors of* The Law Society of Ireland, 1852-2002: portrait of a profession, *published to commemorate the 150th anniversary of the granting of the first charter to the Law Society in 1852.*

# Value versus growth

**Should investors look for value or growth in the stock market? David Killen debates the issues**

Davy STOCKBROKERS

**David Killen: historically, value shares have consistently outperformed growth shares in the long term**

Stock market investing throws up many conundrums, but none is more puzzling than the old question of value versus growth and which style should be chosen. Interpretations of what these styles imply differ. Many believe that value investing simply means buying shares in companies that are priced cheaply, either because the underlying businesses are poor or because they have encountered tough times and there is an expectation of a turnaround. The perception also exists that value investors have a bias towards cyclical stocks.

Growth investing, on the other hand, is perceived as buying shares in companies that have predictable growth in earnings, for which investors are willing to pay a premium. For the growth investor, there is the prospect of making capital gains in the future and forfeiting income in the meantime, or investors can take the option of hunting out high-yielding stocks and taking some of the income now.

It would seem that the decision (from a historical point of view) is easier than it looks. Historically, value shares have consistently outperformed growth shares in the long term.

### The evidence

In a recent study of the 100 largest companies in the UK, entitled *Triumph of the optimist* and carried out by investment bank ABN Amro and the London Business School, the returns generated by companies with the highest yields (value stocks) were compared with those from companies with the lowest yields (growth stocks). The report highlighted the fact that, over the past 100 years, value stocks have generated an annualised return of 11.5%, whereas growth-stock companies have come in well behind, at 8.6%. While that might not actually seem like a huge difference over a couple of years, the compounding effect shows the true outperformance. An investment of €1 in value stocks in 1900 would have turned into €61,000 today. Contrast this with the same investment in growth stocks, which today would only be worth €4,700 – 75% less than would have been achieved by investing in a market tracker. Essentially, investors who have followed a value strategy have been well rewarded, with a premium of about 2.7% a year for doing so. While this information is persuasive, the caveat that historical performance is not necessarily indicative of future returns must always be borne in mind.

It is interesting to note that most institutions take an active management decision on whether or not short-term economic conditions are conducive to value or growth investing. Only a small group consistently makes the decision to only or predominantly expose itself to one investment style or another. Not surprisingly, some of the best performing funds are those run with a value style.

### Price-to-book value

A useful method of analysing value and growth stocks is to look at a company's price-to-book value ratio (the price of the stock in relation to the net asset value of the company). Basically, this is how much investors are willing to pay over and above net asset value to buy a share in a company.

Here, value stocks are defined as those with a low price-to-book value, while growth stocks have a high multiple. From this perspective, the evidence is again very much in favour of the value stock. In a 1995 study, *Value versus growth: the international evidence*, academics Eugene Fama and Ken French found that value shares outperformed growth stocks in 12 of the 13 global markets examined during the period between 1975 and 1995. Significantly, there is a difference of 7.68% a year between the average returns on global portfolios with high book-to-market value compared with those that have a low multiple. There are three schools of thought on the explanation for this:

- The first is that investors become overly enthusiastic about the prospects of growth companies and this leads to the underlying stock being bid up to price levels that are unsustainable. The standout example is the dot-com 'boom and bust' scenario where investors paid ever-increasing multiples for TMT stocks on the basis of future deliveries. During this period, there was a marked increase in the performance of funds that were managed with a growth style, while value houses experienced a poor performance as fund flows switched into the growth stocks
- Another explanation is that value stocks with high yields and low earnings multiples are often distressed companies, so investors are being compensated for taking on higher risk
- Finally, in a 1993 'beta and return' paper put forward by Fisher Black, the explanation is that the outperformance occurs completely by chance.

While the explanations may be slightly at odds with each other, one thing is clear: most historical evidence points to a clear outperformance by strict value-style investments over that of growth. A point well worth bearing in mind. G

*David Killen is with the private client research unit at Davy Stockbrokers.*

### JARGON BUSTER

- **Value:** value managers seek companies that represent good value at their current price
- **Growth:** growth managers invest in companies that are expected to show strong earnings growth
- **Price-to-book value:** the price of the stock in relation to the net asset value of the company
- **TMT stocks:** technology, media and telecommunications stocks
- **Beta:** a statistical measure of a share or portfolio's volatility (price fluctuations) relative to the market as a whole.

# Report of Law Society Council meeting held on 12 July 2002

**Congratulations**

The president welcomed and congratulated the Honourable Mr Justice Michael Peart, solicitor and Council member, following his historic appointment to the High Court bench. She said that the profession's trust and pride were with him and, on behalf of the whole profession, she expressed sincere congratulations and best wishes for his future on the bench.

Mr Justice Peart said that he was the happy recipient of a torch to carry on behalf of the solicitors' profession, which he did with pride, apprehension and a great sense of gratitude. He recognised the long-standing efforts within the society to achieve parity of esteem for its members in terms of judicial appointment. He noted that he had received hundreds of letters of congratulations and had been greatly encouraged by their contents. He hoped to maintain his contact with the society and noted that the Law School, in particular, was dear to his heart.

**Personal Injuries Assessment Board**

Ward McEllin reported on a recent meeting with a senior official in the Department of Enterprise, Trade and Employment, at which the political inevitability of the Personal Injuries Assessment Board had been emphasised. It was hoped to secure a meeting with the tánaiste in the near future, in the course of which the society could outline its proposed reforms of the legal system, together with the minimum fundamental elements that would be required in any system designed to provide compensation to victims of accidents, whether through the PIAB structure or otherwise. These included the right to an oral hearing, the right to representation, the right to payment for that representation, the provision of medical reports by the treating doctor, guaranteed access to the courts, an assessment forum free from bias and no decrease in the level of awards.

The director general said that it appeared that the government would publish the PIAB report in the autumn, in conjunction with the announcement of a number of decisions made in relation to its operation. All of the 67 recommendations of the MIAB, including the establishment of the PIAB, were likely to be implemented. He confirmed that the society was in regular contact with the Bar Council and had discussed a number of its proposals for reform of the current system.

Anne Colley queried whether savings would, in fact, be made by the presentation of cases to the PIAB rather than to the courts. If victims were to be properly served by the system, the costs involved in doing so would probably not reduce dramatically, if at all. The proper assessment of clients' cases was the real issue that needed to be defended. The PIAB represented a significant change in the method of defending clients' rights and, if a proper assessment was to be guaranteed, the society should ensure that cases would be properly prepared and, consequently, would be properly resourced and properly funded.

Donald Binchy said that the society could only support a proposition that was fair to clients. Clients approached solicitors because they wanted the benefit of a professional service. If the proposed system would not result in a fair outcome, and was not properly resourced, the society could not and should not support it. He was satisfied that the society had to call for a right to an oral hearing and a right of representation. Payment for this representation would have to be met either by an award of costs or by payment by the client. He believed the society should indicate its support for the majority of the MIAB recommendations, should announce its own proposals for reform and should also call for the appointment of additional judges and the assignment of additional resources.

James McCourt said that, in the past, the society had identified detailed reforms of the legal system, many of which had never been implemented. He believed there were a number of inconsistencies in what was being asked of the profession. It was being asked to be competitive and yet it was being asked to introduce anti-competitive rules in relation to advertising. It was being asked to embrace reform and yet its proposals for reform were ignored. Every time the society addressed one set of criticisms, it was presented with a different set of circumstances to be responded to without delay. It seemed as if there was an agenda of 'change for change's sake'. The current campaign was being run against the 'cost of claims'. However, it could only be viewed as a success if insurance premiums were reduced, and he firmly believed that this would never happen.

**Draft advertising regulations**

James McCourt outlined the principal features of the draft advertising regulations and noted that they reflected the obligations contained in the *Solicitors (Amendment) Act, 2002*, together with provisions contained in the former regulations. Their primary purpose was to prohibit advertising relating to claims for damages for personal injuries, although the act did allow the use of the words 'personal injuries' when they appeared in a list of services provided by a solicitor's firm.

The Council agreed that the draft regulations should be circulated to the local bar associations for their views. Mr McCourt noted that a presentation on the draft regulations would be made at a meeting of the presidents and secretaries of bar associations to be held the following week. Ward McEllin suggested that they might also be placed on the members' area of the website.

**Draft continuing professional development regulations**

Michael Peart outlined the contents of the draft continuing professional development regulations and noted that they reflected proposals that had previously been approved in principle by the Council. In terms of time commitment, the regulations required 20 hours' CPD during the first 30 months and 20 hours over the following two-year period. The remainder of the regulations related to the keeping of records and self-certification.

The Council agreed that the draft regulations should be circulated to the bar associations for their views and should be discussed at the meeting of presidents and secretaries of bar associations to be held shortly. G

# Practice notes

## PROFESSIONAL INDEMNITY INSURANCE (part 1)

**Claims-made basis**

Practitioners should note that professional indemnity insurance is provided on a **claims-made basis** and not on the basis of occurrence coverage. Therefore, it is different to that of road traffic insurance, employer liability insurance or public liability insurance. The relevant cover is the cover that pertains on the date the claim is first made or the insured first became aware of a circumstance likely to give rise to a claim and notified his/her insurer, and not the date of negligence.

The fact that cover is provided on a claims-made basis has particular significance when a solicitor decides to obtain top-up cover for a single transaction, as such cover cannot be obtained on the basis of a single transaction. Therefore, by reason of professional indemnity insurance cover being provided on a claims-made basis, the solicitor should continue to obtain at least the same level of top-up cover indefinitely. Alternatively, the solicitor should decide not to undertake the work necessitating obtaining top-up, as it may be financially prohibitive due to the additional premium which would have to be paid annually.

For example, if a solicitor acts in a conveyancing transaction during the current year for a figure of €3 million, it will not only be necessary for that solicitor to increase his professional indemnity insurance cover to €3 million for the current year, but it will also be necessary to take out at least a similar level of cover for a considerable period of time in the future. The likely increase in the value of the said land/property over time should also be taken into account when renewing cover.

**PII details required by the Law Society**

Solicitors are required to furnish (or cause to be furnished) to the society on a yearly basis confirmation from either their insurer or broker that they have arranged professional indemnity insurance cover. The society is not in a position to issue a practising certificate until it is in receipt of such confirmation of cover.

The confirmation of cover **must** provide the following information:

a) Name(s) of the solicitor(s) to whom cover is being provided
b) Address of practice
c) Name(s) of the insurer(s) providing the cover. If cover is provided by a Lloyd syndicate(s), the number of the syndicate(s) should be stated together with the percentage of cover provided by each participating syndicate
d) State the minimum level of cover, for example, €1.3 million each and every claim
e) Amount of self-insured excess on each and every claim
f) Dates on which cover commences and expires.

(A precedent form of confirmation of cover is available from the society. Actual policies should not be forwarded to the society.)

It should be noted that the society has endeavoured in recent years to obtain the confirmation of cover directly from the insurer/broker but has encountered difficulties with particular brokers in obtaining the confirmation of cover on a timely basis and in the correct format. Therefore, it is necessary for the society to place the obligation and onus on each solicitor to ensure that, when applying for a practising certificate in January 2003, the application form furnished to the society has attached to it the relevant confirmation of cover. As already stated, the society will not issue the solicitor with a practising certificate until such time as the said confirmation of cover is received.

When a solicitor is renewing cover, he/she should ensure their insurer/broker will be in a position to furnish them with such confirmation of cover in early January at the very latest.

**Run-off cover**

There is an obligation on solicitors pursuant to statutory instrument no 362 of 1999 to have run-off cover in place when they cease private practice. This may arise, for example, if they retire, emigrate, move to the corporate sector or are appointed to judicial office. The obligation pursuant to the regulations is to have run-off cover in place for a minimum period of two years. However, solicitors are strongly advised to have run-off cover for a minimum period of six years, as one cannot be sure that the *Statute of limitations* will prohibit all actions even after six years, for instance in the case of a minor or a person of unsound mind.

Run-off cover is required in respect of acts of negligence which may have occurred during the course of private practice but which do not surface, in the form of a claim, until after the solicitor has ceased private practice. Such cover is necessary because the insurance cover which a solicitor has while in private practice only covers claims made during the course of such private practice – that is, professional indemnity insurance cover being provided on a claims-made basis.

Apart from the fact that run-off cover is a legal obligation, it is obviously very desirable for practitioners to ensure that they have this cover as the consequences of a claim could be catastrophic, since the solicitor could become personally liable in the event of a claim arising.

Practitioners considering commencing in practice on their own behalf should consider the cost of run-off cover, as they may decide within a short period to cease practice.

**Firms employing locum solicitors/assistant solicitors**

Firms employing locum/assistant solicitors should make absolutely certain that their existing policy of insurance will cover locum/assistant solicitors. If not, they should take such steps as are necessary to put such cover in place. It might be that some insurers will require no extra premium while others will do so, and they may also require each individual solicitor in the practice to be named on the policy as a condition of cover. It is emphasised, however, that while it is the legal obligation of each solicitor to have cover, prudence should prevail in this matter whereby an employer should satisfy himself/herself that any locum/assistant solicitor in his/her employment is insured. Some locum solicitors may have their own insurance; however, such independent insurance will only cover the locum's liability in the event of negligence and not the liability of the employer on whose behalf and in whose name the work is carried out. Therefore, all employers should ensure that each solicitor in their practice is covered by professional indemnity insurance.

**Changing employment**

The regulations provide that it is the responsibility of the individual solicitor to ensure that professional indemnity insurance cover is in place, not that of the employer.

The solicitor is also required, within a period of not more than 21 days of changing employment, to furnish (or cause to be furnished) written confirmation from a qualified insurer that the solicitor has and maintains the minimum level of cover for the remaining part of that practice year.

While a practising certificate is in place for the calendar year and travels with a solicitor when changing employment, the relevant professional indemnity insurance cover does not travel with the solicitor, as it expires when a solicitor leaves a practice, and therefore a solicitor should ensure that his/her new employer has extended the cover to include him/her.

**The second part of this practice note will appear in next month's issue and will deal with break-in cover, solicitors employed in the public and corporate sectors, worldwide cover, minimum levels of cover, and professional indemnity insurance regulations.**

*PII Committee*

## UNFAIR TERMS IN BUILDING AGREEMENTS

The Conveyancing Committee has received numerous complaints from practitioners to the general effect that some builders' solicitors still insist not only on inserting terms in building agreements which are in breach of the *Unfair Terms in Consumer Contracts Regulations 1995* but persist in refusing to remove such terms when the fact of their being in such breach is pointed out.

Builders' solicitors should be aware that the High Court order obtained by the director of consumer affairs last year contains a specific prohibition on the use, or continued use, of such terms.

The committee will be vigilant to ensure that the use of such conditions is eliminated as far as possible, and, to this end, practitioners are asked that if they meet a persistent refusal to remove such terms, they should bring the matter to the attention of the director of consumer affairs and/or the Conveyancing Committee.

Colleagues are further advised that the continued use of such terms is in breach of the regulations and the order of the High Court. The director has indicated her willingness to issue High Court proceedings against specific builders and solicitors who continue to use the prohibited terms.

**Practitioners are reminded of the futility of inserting such terms, as they are unenforceable.**

*Conveyancing Committee*

## *CRIMINAL JUSTICE (LEGAL AID) ACT, 1962*: INTERPRETERS' FEES

As some confusion appears to have arisen as to the manner in which interpreters should be paid, the Department of Justice, Equality and Law Reform has advised that the following procedure should be followed where a solicitor engages the services of an interpreter for the defence of a client who has been granted legal aid:

- The solicitor should certify an **original** attendance record document for the interpreter at time of consultation and give same to the interpreter
- The interpreter should give the **original** attendance record to the interpreting service provider (or himself, in the case of a sole trader); the service provider (or sole trader, as the case may be) should then send the **original** attendance record accompanied by an **original** invoice for the fee claimed to the solicitor
- The solicitor should then forward both these **original** documents under cover of a CLA 10 claim form (Criminal Legal Aid Claim Form – Solicitor's Expenses) to the Finance Branch in Killarney for payment as a normal disbursement under the CLA scheme.

The above procedures should be followed where the interpreter's services were engaged in the defence of a client to whom a certificate of free legal aid has been granted. Claims for payment of fees for interpreting services where the service has been availed of in a courtroom and where registrars have signed off on the attendance record should be forwarded to the Courts Service for payment. Claims for payment of interpreters' fees incurred by the Probation and Welfare Service should be forwarded to that service for processing.

*Criminal Law Committee*

## LISTING OF CASES IN THE DUBLIN CIRCUIT CRIMINAL COURT

Members are advised that the following notice has been issued by the county registrar:

'Pending the introduction of a comprehensive criminal case tracking system, an **interim system** for the listing of cases for the Circuit (Criminal) Court has been provided.

Accordingly, as and from the commencement of the **Michaelmas Term 2002**, the listing of cases (which was previously performed by the Chief Prosecution Solicitor's Office) will be undertaken by the Court Office.

To facilitate the new system, and provide the best possible service, the Court Office will require reasonable notice (at least five days) of all intended applications (other than urgent matters such as bench warrants)'.

Michaelmas Term commences on 7 October 2002.

*Criminal Law Committee*

## CRIMINAL LEGAL AID SCHEME: *Criminal Justice (Legal Aid) (Tax Clearance Certificate) Regulations 1999*

The Department of Justice, Equality and Law Reform has advised that a solicitor who wishes to have his or her name retained on a legal aid panel is required to furnish a tax clearance certificate to the relevant county registrar(s).

**Current tax clearance certificate expires on or before 30 November 2002**

Solicitors who are on a panel and whose tax clearance certificate expires on or before 30 November 2002 will be required to furnish a tax clearance certificate which has an expiry date after 30 November 2002 to the relevant county registrar by **30 November 2002** in order to retain their name on the panel.

Applications for a tax clearance certificate should be made to the Collector-General's Office in good time. It is important to note, in this regard, that the regulations provide that an application submitted to the collector-general by 15 October 2002 guarantees an existing member's retention on the panel where:

a) Revenue has not made a decision on the application by 30 November 2002, or
b) The application has been refused and an appeal has been made as provided for in the regulations, which has not been determined or withdrawn on 30 November 2002.

**Current tax clearance certificate expires after 30 November 2002**

Solicitors who wish to maintain their name on more than one panel should request the Collector-General's Office to issue the certificate and as many official copies thereof as they require. Solicitors must then furnish the certificate or official copy to each county registrar to remain on that county registrar's panel.

**Issue of application form for tax clearance certificate**

Those practitioners who are currently on the legal aid panels will be issued with an application form directly from the Department of Justice, Equality and Law Reform before 1 October 2002. Panel members who do not receive a form at that time should make enquiries to Courts Policy Division of the department.

*Criminal Law Committee*

SOCIETY OF YOUNG SOLICITORS IRELAND

# AUTUMN CONFERENCE 2002

8 – 10 November 2002 at Kilkenny Ormonde Hotel, Ormonde Street, Kilkenny

SPONSORED BY

Bank of Ireland

## Friday 8 November

20.00 – 21.30 Registration

21.00 Welcome in hotel bar

## Saturday 9 November

10.45 – 13.30
1. Chairman's introduction
2. The proposed Personal Injuries Assessment Board – implications for the solicitors' profession *(Ken Murphy – Law Society director general)*
3. *Pre-nuptial agreements – is there any point? (Louise Crowley – University College Cork)*
4. The *Competition Act, 2002* – an overview *(Massimo De Luca – McCann FitzGerald)*

13.00 ACTIVITIES: health centre, swimming, beauty treatments, golf, walking

19.30 – 20.00 RECEPTION

20.00 'til late BANQUET (black tie): live band, DJ

## Sunday 10 November

12.00 CHECK OUT

## NOTES

1. Solicitors wishing to attend must apply through SYS.
2. Accommodation at the Kilkenny Ormonde Hotel is limited and will be allocated on a first-come, first-served basis, in accordance with the procedure set out below.
3. The conference fee is €245 pps and includes Friday and Saturday night accommodation, two breakfasts, reception, subsidised activities, banquet and conference materials.
4. One application form must be submitted per room per envelope together with cheque(s) for the appropriate conference fee and a self-addressed envelope. All applications must be sent by ordinary prepaid post and only applications exhibiting a post mark dated 17 October 2002 or after will be considered. Rejected applications will be returned in due course. Successful applications will be confirmed by e-mail only.
5. Names of delegates to whom the cheque(s) apply **must** be written on the back of the cheque(s).
6. Cancellations must be notified to paul.murray@williamfry.ie on or before 28 October 2002. Cancellations after that date will not qualify for a refund.

## APPLICATION FORM

PLEASE USE BLOCK CAPITALS. ONE FORM PER ROOM PER ENVELOPE

Name 1 _____ Name 2 _____

Firm 1 _____ Firm 2 _____

e-mail _____ e-mail _____

One contact address _____

_____

_____

Tel: (H) _____ (O) _____

I enclose cheque(s) payable to SYS in the sum of €490, and I enclose a self-addressed envelope.
Application to the chairman, SYS, PO Box 7255, Dublin 4.

# First Law Update

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Compiled by Karen Holmes for FirstLaw

## COMPANY

### Litigation, *locus standi*

*Costs – restoration to register of companies – practice and procedure* – locus standi – *failure to make annual returns – whether appropriate to penalise company seeking restoration to register of companies* – Companies (Amendment) Act, 1982, *section 12B(3)* – Companies (Amendment) (No 2) Act, 1999

The petitioner sought the restoration of a company (Bloomberg) to the register of companies. Bloomberg had been involved in litigation with another company (Philips), which had successfully obtained an order striking out the proceedings on the basis that Bloomberg had ceased to exist. O'Sullivan J, who granted the order in the High Court, also granted liberty to Bloomberg to apply to be restored to the register. In a further judgment, Smyth J in the High Court ordered that Bloomberg be restored to the register subject to conditions relating to the payment of costs by Bloomberg to Philips. Bloomberg appealed against the judgment with regard to the costs issue and also took issue with the *locus standi* of Philips, which had been represented at the High Court hearing.

The Supreme Court (Murphy J delivering judgment, Hardiman J and Fennelly J agreeing) allowed the appeal. Restoration to the register was primarily a matter between the petitioner and the regulatory authority and the minister for finance. In the circumstances, it was within the discretion of the High Court to treat Philips as a notice party to the proceedings. The law in this jurisdiction did not extend to the imposition of a penalty by an award of costs in proceedings which fell to be dealt with on their own merits, and the appeal in this regard would be allowed.

***Bloomberg, In re*, Supreme Court, 12/7/2002** [FL5884]

## COMPETITION

### Discovery, litigation

*Practice and procedure – discovery – competition law – litigation – meaning of term 'necessary' – whether party seeking discovery obliged to identify documents sought – whether documents necessary in order to dispose of action* – Rules of the Superior Courts (2) (Discovery) 1999 *(SI 233)* – Rules of the Superior Courts 1986 *(SI 15), order 31, rule 12*

The parties were involved in proceedings involving alleged breaches of competition law. As part of the proceedings, the plaintiff sought discovery of documents from the defendant. The plaintiff alleged that the defendant had a full knowledge of whether it had participated in activities contrary to competition law and that the plaintiff had only a limited knowledge of the activities alleged. The plaintiff contended that the documents sought were necessary in order to dispose of the action. The defendant contended that the plaintiff's request for voluntary discovery was not in compliance with the *Rules of the Superior Courts* and that the request had not been sufficiently precise. It was also contended that the plaintiff had failed to establish that the documents sought were necessary for disposing of the case and the request amounted to a 'fishing' expedition. It was submitted that the application should be refused.

Lavan J granted the plaintiff's application for discovery. The defendant had a fundamental role with regard to the strategic and economic use of Irish facilities. Given the dominant position of the defendant, a court must look very carefully at a request for discovery. In the circumstances of the case, the defendant would be directed to answer all of the plaintiff's requirements for discovery.

***Ryanair v Aer Rianta*, High Court, Mr Justice Lavan, 25/7/2002** [FL6017]

## CONSTITUTIONAL

### *Certiorari*, refugee law

*Judicial review* – certiorari – *refugee law – criminal law – immigration and asylum – separation of powers – practice and procedure – whether state entitled to deport refugee prior to conclusion of criminal proceedings – whether detention of applicant lawful – whether interference by executive in judicial process* – Refugee Act, 1996 – Immigration Act, 1999

The applicant sought and had been refused refugee status in the state. The respondent notified the applicant that it was proposed to make a deportation order. Prior to the service of the deportation order, the applicant faced criminal charges in the District Court. After a hearing in the District Court, at which charges were adjourned, the applicant was served with a deportation order and arrested on the suspicion that he would not comply with the deportation order. Judicial review proceedings were commenced by the applicant, seeking to challenge his detention on the basis that it was unlawful and *ultra vires* the power of the respondent. It was claimed that the respondent was attempting to interfere with the judicial process, as the District Court proceedings were still on-going at the time of the service of the deportation order.

Mr Justice Smyth refused the application. The existence of court proceedings was known before any deportation order was signed. It was reasonably anticipated at that time by the respondent that the District Court proceedings would be attended to, and no interference in those proceedings was intended. The entitlement to make a deportation order was separate and distinct from matters under the jurisdiction of the courts. The issuing of the deportation order did not concern any of the justiciable issues which were before the District Court. It could not have been the intention of the legislature that applicants seeking refugee status could frustrate the operation of a deportation order by committing a crime. The functions vested in the respondent by the Oireachtas in relation to the making of deportation orders did not amount to an administration of justice by the executive. The relief sought would be refused.

***Okebiorun v Minister for Justice and Others*, High Court, Mr Justice Smith, 9/7/2002** [FL5977]

## CONTRACT

### Conveyancing, land law

*Revenue and taxation – property – contract – conveyancing – specific performance – VAT – sale of business – completion notice – whether value-added tax payable on foot of transaction – whether purchaser*

*entitled to decree of specific performance*

The defendants (the vendors) entered into an agreement to sell a premises to the plaintiff (the purchaser). A dispute arose as to whether value-added tax was payable on foot of the transaction. The vendors had contended that VAT was payable, as the transaction involved the sale of a business. The purchaser disputed this, contending that no VAT was payable unless the vendors had developed the premises, and requested details with regard to this. The vendors relied on the completion notice served by them and, as the purchaser failed to complete within the time stipulated, the deposit was forfeited and the agreement terminated. The purchaser instituted specific performance proceedings against the vendors. McCracken J in the High Court refused the relief sought and declared the agreement for sale rescinded, but ordered the vendors to repay to the purchaser the deposit plus interest.

The Supreme Court (Murphy J delivering judgment, Denham J and Murray J agreeing) allowed the appeal. The solicitors on behalf of the vendor had belatedly recognised that the contract for sale was not a contract for a sale of business and that, accordingly, the basis on which they had approached the potential liability to VAT was entirely erroneous. The purchaser had sought to ascertain, and was unquestionably entitled to know, the facts which gave rise to the contract for sale having become a transaction subject to VAT. The purchaser was entitled to the particulars of the work done, the expenditure involved and proof by way of statutory declaration or otherwise that this expenditure had been incurred and had constituted development within the meaning of the relevant legislation. That request was not addressed by the vendors' solicitors in correspondence. The purchaser was not, at the date of the issue of the plenary summons, in a position to complete the sale because the queries or requisitions in relation to VAT had not been dealt with by the vendors in accordance with their contractual obligations. The trial judge erred in concluding that the purchaser refused to pay value-added tax. The purchaser had expressed and demonstrated his willingness to pay the VAT if it was payable and for that purpose sought evidence – as opposed to opinions or rulings – to enable a conclusion to be reached by the purchaser in that regard. The trial judge was mistaken in declining to make an order that the contract ought to be specifically performed. Accordingly, the matter would be referred back to the High Court to make such further orders or direct such inquiries as might be necessary to give effect to that decision.

***Forbes v Tobin*, Supreme Court, 17/7/2002** [FL5876]

## CONVEYANCING

### Land law, arbitration

*Land law – arbitration – conveyancing – specific performance – contract of sale – practice and procedure – litigation – whether dispute referable to arbitration – whether application for adjournment constituted 'step' in proceedings – whether courts had jurisdiction to grant stay* – Arbitration Act, 1980 – Arbitration Act, 1954

The case concerned the issuing by the plaintiffs of specific performance proceedings against the defendant. The defendant had intended to sell premises to the plaintiffs and accordingly had entered into a contract of sale. However, a dispute arose with regard to the title of the premises. The defendant maintained that the dispute was referable to arbitration as *per* the conditions in the contract of sale. The plaintiffs initiated specific performance proceedings and contended that the scope of their action went beyond the remit of the arbitration clause. In addition, the plaintiffs claimed that the defendant had taken a step in the specific performance proceedings and thus a stay on the court proceedings should not be granted. In the High Court, O'Neill J granted a stay of the specific performance proceedings. The plaintiffs appealed against the decision.

The Supreme Court (Geoghegan J delivering judgment, Keane CJ and Murphy J agreeing) dismissed the appeal. The plaintiffs had signed a contract which stated that the issue in question must go to an arbitrator. If difficult legal questions arose, the arbitrator could state a case to the High Court. In so far as the plaintiffs were claiming that a portion of the property was erroneously included in the contract and would only perform the contract on that basis with an appropriate abatement of purchase price, the matter had been correctly referred to arbitration. The issuing by the defendant of ejectment proceedings against the plaintiffs was not a step for the purpose of the specific performance proceedings. The application brought by the plaintiffs for an adjournment of the motion for judgment was not a 'step' within the meaning of the *Arbitration Act, 1980*. The adjournment was nothing more than a holding operation.

***O'Dwyer and O'Dwyer v Boyd*, Supreme Court, 4/7/2002** [FL5883]

### Landlord and tenant

*Land law – property – conveyancing* – lis pendens – *landlord and tenant – whether plaintiff entitled to register* lis pendens – *whether plaintiff had interest in premises* – Judgments (Ireland) Act 1844

The plaintiff was a tenant in a premises owned by the defendant. The defendant proposed to sell the premises to a third party. The plaintiff instituted proceedings against the defendant, seeking various declarations and injunctions. In partic-

ular, the plaintiff sought a declaration that the plaintiff was entitled to treat with the defendant in any sale of the premises. The plaintiff had registered a *lis pendens* in respect of the folio of the lands in question. The defendant was successful in having the *lis pendens* vacated in a judgment delivered by McCracken J in the High Court, and the plaintiff appealed.

The Supreme Court (Murphy J delivering judgment, Murray J and Geoghegan J agreeing) dismissed the appeal. On the basis of the authorities, it would appear that, in order to register an action as a *lis pendens*, the action must claim an interest in land but that interest claimed need not be in existence at the date on which the proceedings were instituted. If no such interest was claimed, the proceedings could not be registered. Furthermore, those with specified claims to land must register those rights or claims or would otherwise suffer the consequences of failure to register. The plaintiff's only role in the matter, if the premises were placed on the market, would be as a potential and probable bidder. As matters stood, the plaintiff had no proprietary interest in the premises and had no claim against the premises. There was no basis upon which the *lis pendens* fell within the *Judgments (Ireland) Act 1844* and the appeal would be dismissed.

***Cunnane v Shannon Foynes Port Company*, Supreme Court, 8/7/2002** [FL5863]

## CRIMINAL

### Appeal, sexual offences

*Appeal against conviction – sexual offence – trial judge's charge to the jury – statements made by third parties not in presence of accused – exception to general rules of evidence – first opportunity to complain – consistency of testimony – conduct of trial*

The appellant was convicted of rape at the Central Criminal Court after trial by jury. His defence was that the complainant consented to sexual intercourse. The complainant had told two witnesses of her ordeal and the prosecution tendered this as evidence of complaint made by the complainant to third parties when the appellant was not present. The net issue of the appeal was that the trial judge's charge to the jury was unsatisfactory because he omitted to explain the purpose upon which the complaint evidence was admissible in a rape trial, that is, to show consistency of account and not for the purpose of proving the fact of that complaint.

The court cited with approval *People (DPP) v Brophy* ([1992] ILRM 709) on the question of admissibility on the details of a complaint in a prosecution of a sexual offence. Where evidence of a complaint to third parties is made by the prosecution, it is admissible only by virtue of the fact that it demonstrates consistency of conduct by the complainant with the evidence. Therefore, a direction to the jury should be given in all cases where such evidence is tendered. While it was unfortunate that the defence did not draw this to the attention of the trial judge, its failure to do so was not a bar to this application and the court ruled that the jury's verdict was unsound and ordered a re-trial.

***People (DPP) v Acheampong*, Court of Criminal Appeal, Mr Justice Murray, 11/7/2002** [FL5907]

### *Certiorari*, DPP

*Practice and procedure – District Court order – application by DPP – submissions – request for written submissions – prosecuting garda did not present written submission to the District Court – whether District Court judge correct in dismissing prosecution* – Rules of the Superior Courts 1986, *order 84, rule 26(4)*

The respondent District Court judge dismissed a prosecution for drunken driving against the notice party. When the matter

came before the judge, submissions were made on behalf of the notice party, and the respondent requested that they be put in writing and adjourned the case to facilitate this. At the reconvened hearing, the prosecuting garda, while having written submissions at hand, did not give them, preferring to submit them orally. The garda said that he was reluctant to become involved in preparing written submissions generally but intended to hand into court his submissions if directed to. The respondent stated that if that was the garda's position, he would deal with the complaint by dismissing it. The DPP claimed that the District Court judge acted in excess of jurisdiction in dismissing the case.

In the High Court, Mr Justice Ó Caoimh said he was satisfied that the failure of the prosecution to submit written submissions at the time did not entitle the respondent to dismiss the complaint. The court was required to consider the merits of the submission and, if necessary, evidence in support. The order of the District Court was quashed pursuant to order 84, rule 26(4) of the superior courts.

***DPP v Maughan*, High Court, Mr Justice Ó Caoimh, 22/7/2002** [FL5932]

**Election law, fair procedures**

*Judicial review – certiorari – right of election – practice and procedure – fair procedures – whether District Court judge incorrectly dismissed charge – whether application for judicial review out of time – whether accused entitled to right of election on charge* – Rules of the Superior Courts 1986 *(SI 15)*, *order 84*, *rule 21* – Offences Against the State Acts, 1939 to 1985 – Criminal Justice Act, 1999

The second-named respondent (the accused) had been prosecuted on a charge of obstructing members of An Garda Síochána in the course of carrying out their duties. The first-named respondent (the district judge) held that he had no jurisdiction to deal with the matter, as the accused had not been put on his election as to whether he should be tried summarily or on indictment. The director of public prosecutions brought a judicial review application on the basis that the district judge had erred in law and had acted outside jurisdiction in dismissing the charge. It was submitted that the offence in question was one to which the accused had no right of election. The accused denied that the district judge had erred in law and furthermore claimed that the application had not been made promptly in accordance with order 84, rule 21.

In the High Court, Murphy J allowed the application of the DPP. Unless a statute provides for election, it was the sole right of the prosecutor to determine whether a charge should be prosecuted summarily or on indictment. The accused had no right to insist one way or the other. Once time had been extended by McGuinness J to bring the judicial review application, the court had no jurisdiction to examine that matter. In any case, on the basis of the arguments presented and the case law, the DPP was entitled to the extension of time. The district judge, having embarked on the trial, should have proceeded to a decision with regard to the charges proffered. No reasons were given by the district judge as to why the offence was not considered a hybrid offence by the district judge where only the DPP might determine the mode of trial. The applicant was entitled to the relief sought.

***DPP v Judge O'Donnell and Kelly*, High Court, Judge Murphy, 24/7/2002** [FL5964]

**Fair procedures, road traffic**

*Case stated – fair procedures – road traffic offences – onus of proof – failure to provide sample – obligations of An Garda Síochána – whether failure to properly inform accused of consequential penalties* – Road Traffic Act, 1961 – Road Traffic Act, 1994

The accused had been arrested pursuant to s49(8) of the *Road Traffic Act, 1961* as amended due to an alleged failure to provide a sample as provided for under section 13 of the *Road Traffic Act, 1994*. In the District Court, it was accepted by the garda that the accused had been informed of the fines and the terms of imprisonment applicable but had not informed the accused of the consequential disqualification from driving for a period of two years. It was submitted by counsel for the accused that, on this basis, the prosecution had not proved its case. The District Court judge submitted a case stated for the opinion of the High Court as to whether the provisions as set out in the *Road Traffic Act, 1994* had been complied with.

Ó Caoimh J answered the case stated as follows. There was no obligation on the relevant member of the Garda to inform the accused of the consequential disqualification order that would be made in the event of a conviction. The accused had been appropriately informed of the penalties for the failure or refusal to provide a sample. The accused had not been misled as to the penalty attaching to the

offence. The District Court judge was correct in his opinion that section 13 of the *Road Traffic Act, 1994* had been adequately explained to the accused. ***Director of Public Prosecutions v Murphy*, High Court, Mr Justice Ó Caoimh, 22/7/2002** [FL5917]

## DAMAGES

### Licensing, property

*Compensation – damages – statutory interpretation – licensed premises* – restitutio in integrum – *evidence as to value – whether compensation should be based on reinstatement or on market value* – Grand Jury (Ireland) Act 1836 – Malicious Injuries Act, 1981

The applicants had sought compensation under the *Malicious Injuries Act* for the burning down of a public house which was owned by the first-named applicant company in which the other applicants had shares. The applicants had been awarded a sum of £261,850 in the Circuit Court. The respondent appealed against the amount awarded as being excessive. The applicants appealed on the basis that the Circuit Court judge had mistakenly made a deduction from the amount eventually awarded. One of the issues arising was whether the amount of compensation payable was based on reinstatement or on the market value of the premises.

Geoghegan J reduced the amount awarded, holding that it was clear from a reading of the authorities that there was no hard and fast rule that either basis for the assessment of damages was the correct one. In this case, the Circuit Court judge had been incorrect in adopting a reinstatement basis for assessing compensation. At the time of the fire, the applicants were intent on selling the premises and there was no insurance nor was there a liquor licence in force. Evidence as to an offer for the premises that a third party was prepared to make was disregarded, as the third party was unaware that the property was uninsured. A post-fire sale, which included a caravan park, had in fact taken place which raised £152,000. In the circumstances, an award of £100,000 would be a fair award, which would be converted into euros. The order of the Circuit Court would be set aside and the amount would be awarded to the first-named applicant only.

***Point Inn and Others v Donegal County Council*, High Court, Mr Justice Geoghegan, 8/5/2002** [FL5976]

## EMPLOYMENT

### Disciplinary procedures, dismissal

*Allegation of gross misconduct – return to work after extended sick leave – claimant worked with a competitor company – disciplinary hearing – suspension – dismissal – whether dismissal unfair* – Unfair Dismissal Acts, 1977-1993

The claimant had been out for two years on sick leave and returned on a phased basis. He had been initially diagnosed with RSI and later it was re-diagnosed as frozen shoulder. He claimed that the respondent company had held up his return to work until his condition had been re-certified. He claimed that the respondents had put him under pressure as to whether he was fit to work and had received phone calls from them while on sick leave. On returning to work, he decided to look for alternative employment and did a shift with a competitor newspaper to be assessed by them as to whether he was suitable for them. He claimed that journalists sometimes worked for competitors but conceded it was not common practice. The respondent learned that he had done this and initiated an investigation and convened a disciplinary hearing on 22 May. The claimant was accompanied by an NUJ representative. At the hearing, the CEO of the respondent stated that she considered his action in working for a competitor newspaper as gross misconduct. The claimant claimed that the respondent's CEO indicated her intention to dismiss him. The claimant offered no explanation at the hearing, preferring to respond in writing. The claimant was suspended on full pay pending further investigation. The claimant sent in his written explanation on 30 May and, in a letter dated 1 June, he was informed of his dismissal. The respondents denied that they indicated their intention to dismiss the claimant at the disciplinary hearing. They considered an employee working for a competitor newspaper as a breach of contract and gross misconduct.

The Employment Appeals Tribunal held that there was clear evidence that the claimant was dismissed by the respondent's letter of 1 June 2001 after being on suspension for seven days. There was supporting evidence to show that the respondents intended to dismiss the claimant before calling the disciplinary hearing on 22 May 2001 and at the meeting indicated their intention to dismiss him. In all the circumstances, there was a total disregard for procedures and the dismissal was, accordingly, unfair. The tribunal awarded a total of €69,999 in compensation.

***EAT – Miller v Post Publications Ltd*, Employment Appeals Tribunal, 28/7/2002** [FL5918]

## NEGLIGENCE

### Duty of care, occupier's liability

*Tort – negligence – occupier's liability – duty of care owed by hospital to people accompanying patients – extent of duty of care owed to invitees – whether duty of care owed to plaintiff by doctor performing procedure on plaintiff's wife*

The plaintiff had brought his wife to the hospital managed by the first defendant, where the second defendant performed a minor operation on his wife's lip. While standing up and watching the procedure performed on his wife, the plaintiff fainted, hitting his head, which he claimed subsequently caused a loss of taste and smell. He alleged that the defendants were negligent in asking him to assist in the procedure or, alternatively, in allowing him to assist or watch while standing up.

In the High Court, Murphy J dismissed the claim, holding that there was a delicate balance involved in allowing accompanying persons with patients. There was a risk to anyone going to hospital of being upset or sharing the trauma of treatment but, in such circumstances, the balance was in favour of the patient. Accordingly, patients were to be considered as being in a different category to accompanying parties or visitors. The primary duty of care was to the patient, and visitors were not entitled to the same duty of care. Moreover, there was a distinction in the liability of the treating doctor with regard to the exercise of this duty and the liability of the hospital as an occupier to those who are necessarily on the premises. The duty of care owed to the patient in this case was the duty of care of an occupier towards an invitee. It followed that there was no basis for any action by the plaintiff against the second defendant. The net issue, therefore, related to the provision of the seat or support by the first defendant to the plaintiff.

***Sheehan v Midwestern Health Board & Anor*, High Court, Mr Justice Murphy, 1/9/2002** [FL6010] G

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# *Law Society Gazette* Yearbook and Diary 2003

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

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# Eurlegal

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

## The new competition regime: *Competition Act, 2002*

The *Competition Act, 2002* was signed by the president on 10 April and is designed to significantly overhaul the existing Irish competition system and, in part, to implement some of the recommendations of the Competition and Merger Review Group (CMRG) report of May 2000.

A commencement order was signed on 13 May, specifying that the non-merger provisions of the act enter into force on 1 July and that the provisions of the act dealing with mergers come into force on 1 January 2003.

The act replaces the 1991 and 1996 *Competition Acts* and the *Mergers, Takeovers and Monopolies (Control) Acts, 1978 to 1996*. The act contains many features that mark a significant change to the competition law regime in Ireland.

### Merger control

The act introduces significant changes to the Irish system of merger control, the principal ones of which are summarised below.

**1.** The substantive test for examining a merger or acquisition under the act is whether or not 'the result of the merger or acquisition would be to substantially lessen competition in markets for goods or services in the state'. This test, which is that adopted in the US, has been chosen rather than the EU test, which is whether or not the merger will create or strengthen a dominant position as a result of which competition will be significantly impeded in the common market or a substantial part of it. The reason given by the Department of Enterprise, Trade and Employment for using the US as opposed to the EU test is that most practitioners regard it as a 'superior test' and it is the preferred test in a number of other countries, such as Australia and Canada. The EU test was that recommended by the CMRG report. The commission, in its green paper on the review of council regulation EEC no 4064/89 on the control of concentrations between undertakings (OJ 1990 L257 p4) (the *Merger regulation*), has initiated a debate on whether or not the EU test should be replaced by the substantial lessening of competition test.

**2.** The thresholds for notifying a merger under the act are that, in the most recent financial year, the worldwide turnover of each of at least two of the undertakings involved must not be less than €40,000,000 and the turnover in Ireland of at least one of the undertakings involved must be not less than €40,000,000. The asset-based test contained in the *Mergers Act* does not feature in the new act. This represents a significant increase in the thresholds from those applicable under the *Mergers Act*. Under the *Mergers Act*, a merger or takeover is notifiable if, in the most recent financial year, each of at least two of the enterprises involved in the proposal, one of which carries on business in Ireland, has a turnover not less than €25,394,761 (formerly £20,000,000) or gross assets of not less than €12,697,380 (formerly £10,000,000).

**3.** The act requires that each of at least two of the undertakings involved in the merger or acquisition carry on business 'in any part of the island of Ireland', which clearly includes Northern Ireland. The *Mergers Act* requires that at least one of the enterprises involved in the proposal must carry on business in the state.

**4.** The merger or acquisition must be notified to the Competition Authority (CA) within one month after the conclusion of the agreement or the making of a public bid in a public offer situation.

**5.** The act provides that the vendor is not deemed to be involved in the merger or acquisition by virtue only of its being the vendor of any securities or other property involved in the merger or acquisition, that is, it is only the turnover derived from the target as opposed to the vendor's retained business that is counted on the vendor's side. The *Competition Acts* contained no specific exclusion for the activities of the vendor.

**6.** The CA will have one month in the first-phase examination to decide whether or not to approve the merger or to carry out a full investigation into the merger in a second-phase examination. The latter must be completed within a period of four months from the date of receipt of the notification. This parallels the procedure under the EU *Merger regulation* and follows the recommendation of the CMRG report. A practical downside of this is that the CA will have one month within which to make a decision in the most straightforward of cases. At present, the minister for enterprise, trade and employment is obliged to respond in such cases 'as soon as practicable', which often means a period of between one and two weeks.

**7.** The notification must be lodged to the CA, as opposed to the minister, and it is the CA that will effectively become the competent body regarding mergers. It should be noted that, under the act, the minister will retain jurisdiction in relation to 'media mergers', defined as mergers or acquisitions in which at least one of the undertakings involved carries on the business in Ireland of the publication of newspapers or periodicals consisting substantially of news and comment on current affairs, or of providing a broadcasting service or providing a broadcasting services platform. The act specifically provides that the minister may take a different decision to that of the CA, taking account only of the following 'relevant criteria':

- The strength and competitiveness of media business indigenous to Ireland
- The extent to which ownership or control of media businesses in the state is spread among individuals and other undertakings
- The extent to which ownership and control of particular types of media business in Ireland is spread among individuals and other undertakings
- The extent to which the diversity of views prevalent in Irish society is reflected through the activities of the various media businesses in Ireland, and
- The market share held by any of the undertakings involved in the media merger concerned or by any individual or

other undertaking who has an interest in any such undertaking.

**8.** The definition of merger or acquisition will broadly reflect the definition of concentration in the EU *Merger regulation*. The act specifically brings joint ventures that perform on a lasting basis all the functions of an autonomous economic entity within the ambit of the merger control system. This parallels the EU model under the *Merger regulation*.

**9.** Under the *Mergers Act*, an exemption is provided for corporate group situations but is very limited, in that it applies only to transactions between two or more bodies corporate each of which is a wholly-owned subsidiary of the same body corporate. The act specifically excludes from the definition of merger or acquisition transactions where all the undertakings involved are under the control, directly or indirectly, of the same undertaking. As a result, transactions between companies within a corporate group are not notifiable. Clearly, the exemption in the 2002 act is much wider than that provided for in the *Mergers Act*. However, 'control' in this context is not defined and will need clarification.

**10.** The act contains a new exemption regarding the temporary holding of securities. It exempts the acquisition of control in circumstances where control is constituted by the undertaking's holding, on a temporary basis, securities acquired in another undertaking and any exercise by the undertaking of voting rights in respect of those securities while the control that subsists is for the purpose of arranging for the disposal, within a period of one year of which control is acquired (or such other period as the CA allows), of all or part of the target undertaking or its assets or securities, and not for the purposes of determining the manner in which any activities of the target undertaking are carried on, being activities that could affect competition in markets for goods or services in Ireland.

**11.** The notification must be lodged within seven days of the conclusion of the agreement. The *Mergers Act* requires that a notification be made within one month of an offer capable of acceptance having been made.

**12.** Under the act, the CA is obliged to publish a notice of receipt of the notification within seven days of receiving it. There was no requirement to publish the receipt of a notification under the *Mergers Act*.

**13.** The act contains certain transitional provisions in regard to mergers or takeovers notified under the *Mergers Act*. More particularly, the act specifies that when a merger or takeover has been notified to the minister in accordance with section 5 of the *Mergers Act* before the merger provisions of the new act are brought into force, the merger or takeover so notified shall continue to be dealt with under the *Mergers Act* even after the merger provisions of the new act come into force.

## General competition law framework

Some of the main features of the new competition law system introduced by the act are outlined below.

**1.** The act abolishes the system for the grant of licences by the CA under section 4(2) of the *Competition Act, 1991*, under which the CA exempts an agreement, decision or concerted practice that falls within the prohibition in section 4(1) of the 1991 act. The 2002 act provides a similar gateway as was provided for in the 1991 act and specifies that an agreement, decision or concerted practice that satisfies certain conditions that are very similar to those contained in the 1991 act will fall outside the scope of the prohibition. As a result, it will no longer be necessary to invoke the exclusive jurisdiction of the CA in order to obtain a license, and it will be up to the parties to satisfy themselves that the conditions specified in the exemption to the prohibition are properly satisfied.

It should be noted that the act effectively retains the current system for the grant by the CA of category licences, under which the CA specifies that a defined category of agreements, decisions or concerted practices satisfies the conditions for an exemption. The act refers to this exemption as a declaration by the CA as opposed to a license. The 1991 act provided for the issue by the CA of category certificates that apply to a defined category of agreements, decisions or concerted practices and which specified that an agreement, decision or concerted practice which falls within the terms of a category certificate is not in breach of the prohibition. The CA has indicated that it effectively intends to continue this system by using its powers to issue non-binding guidance notices under the act. All existing category licences are to continue in force as declarations under the new act, and all existing individual licences and certificates (both individual and category) are revoked by the act.

**2.** The act specifically provides that a merger or acquisition that is notifiable under the merger control provisions of the act is not (together with any agreements which are ancillary to the merger or acquisition) in itself caught by the provisions dealing with the prohibition on restrictive agreements, decisions and concerted practices or the provisions governing the abuse of a dominant position. This provision finally removes the anomaly which existed in Irish competition law resulting from the CA decision in the *Woodchester Bank Limited/UDT Bank Limited* case (decision 6, 4 August 1992), in which it was held that a merger that is notified and approved under the *Mergers Act* may be subject to review under section 4(1) of the 1991 act. As a result, the act introduces a single system of merger control in Ireland separate from the general provisions of competition law similar to that existing under EU law.

It should be noted that mergers and acquisitions that do not exceed the thresholds would still be subject to review under the provisions prohibiting restrictive agreements, decisions and concerted practices and abuse of a dominant position. The act specifically provides that, in the case of a merger or acquisition that does not exceed the thresholds, any of the undertakings involved in the merger or acquisition may on a voluntary basis notify the CA of the sub-threshold merger or acquisition. The notification of a sub-threshold merger or acquisition under the voluntary system would specifically exclude the merger or acquisition from the provisions governing restrictive agreements, decisions and concerted practices and abuse of a dominant position. As a result, if there is any doubt as to whether or not a transaction is caught by the prohibition on restrictive agreements, decisions and concerted practices or the prohibition on abuse of dominant position, the notifying parties will typically be advised to notify the transaction under the voluntary system. This will create a rather anomalous position under which mergers or acquisitions (not notified under the sub-threshold voluntary system) that do not exceed the above thresholds will be subject to the general system of competition law that is designed to control the behaviour of undertakings in the market, whereas mergers and acquisitions that exceed the relevant thresholds, or sub-threshold mergers that are notified under the voluntary system, will be subject to a merger control system that is designed to regulate the structure of the relevant market.

**3.** The act will make it an offence under Irish law to enter into or implement an agreement or make or implement a decision or engage in a concerted practice that is prohibited by article 81(1) of the *EC treaty* and an offence to abuse a dominant position contrary to article 82 of the treaty.

**4.** With regard to the criminal regime for competition law offences, the act provides for the introduction of two categories of restrictive agreements, decisions and concerted practices, which are known as 'hardcore' offences and 'non-hardcore' offences. A hardcore offence involves an agreement between competing undertakings, a decision by an association of competing undertakings or a concerted practice engaged in by competing undertakings, the purpose of which is to:

- Directly or indirectly fix prices with respect to the provision of goods or services to persons not party to the agreement, decision or concerted practice
- Limit output or sales, and/or
- Share markets or customers.

The term 'competing undertakings' is defined as undertakings that provide or are capable of providing goods or services to the same 'applicable market', and applicable market is defined as a market comprising the provision of goods or services that are regarded by those to whom they are provided as interchangeable with, or substitutable for, each other by reason of the goods' or services' characteristics, prices and intended use or purpose.

Non-hardcore offences are those involving agreements, decisions or concerted practices caught by the prohibition but which do not fall within the category of agreements, decisions or concerted practices giving rise to hardcore offences.

A number of significant changes have been made for hardcore offences. First, there is a rebuttable presumption that an agreement, decision or concerted practice has as its object or effect the prevention, restriction or distortion of competition in trade in goods or services in Ireland or in a part of Ireland for the purposes of the Irish legislation and has as its object or effect the prevention, restriction or distortion of competition within the common market in the context of article 81(1) of the *EC treaty*. Second, the 2002 act increases the possible jail term for hardcore offences from two years under the *Competition Act*s to five years for convictions on indictment. The reason behind this is in part to make the offence an 'arrestable offence' for the purposes of section 4 of the *Criminal Justice Act, 1984*, which allows a member of the Garda Síochána to make an arrest without a warrant under certain circumstances and for the person to be detained for an initial period of six hours, which can be extended for a further period of six hours. Third, the limits on fines on undertakings and individuals for convictions on indictment has been increased from £3,000,000 to €4,000,000 for individuals and up to the same level for undertakings found guilty on indictment, subject to the higher ceiling (if applicable) of 10% of the turnover of the undertaking in the most recent financial year (the latter exists under current legislation). Fourth, fines for summary convictions for individuals and undertakings are increased from £1,500 to €3,000.

The act removes the provisions allowing for the imposition of jail sentences for non-hardcore offences.

**5.** One of the defences, known as the 'ignorance' defence, that existed under the *Competition Act*s has been removed. This defence stipulated that it is a good defence to prove that the defendant did not know, nor in all the circumstances of the case could the defendant reasonably be expected to have known, that the effect of the agreement, decision or concerted practice would be the prevention, restriction or distortion of competition in trade.

**6.** Similar to the *Competition Act*s, the 2002 act provides the CA with extensive powers of investigation, including the power to make dawn raids. A significant feature of the act is that it confers on the CA the additional power to enter, if necessary by force, any dwelling occupied by a director, manager and other member of staff of an undertaking involved, where there are reasonable grounds to believe that records are being kept that relate to the business activities of the undertaking. This provision is in line with the EU commission's proposal in the context of the EU competition rules as set out in the proposal for a council regulation on the implementation of the rules on competition laid down in articles 81 and 82 of the treaty and amending regulations EEC no 1017/68, EEC no 2988/74, EEC no 4056/86 and EEC no 3975/87 (OJ 2000 C365 p284). The constitutionality of this provision will need to be examined in the light of article 40.5 of the Irish constitution, which specifies that the dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.

**7.** The act introduces a number of presumptions regarding the production and sending of documents, namely:

- A document that purports to have been created by a person is presumed, unless the contrary is proved, to be created by that person and any statement contained therein was made by that person, unless the document expressly attributes its making to some other person
- A document that purports to have been created by a person and addressed and sent to a second person is presumed, unless the contrary is proved, that the document was in fact created and sent by the first person and received by the second person and that any statement contained therein was made by the first person and came to the notice of the second person, unless a document expressly attributes its making to some other person
- A document that is retrieved from an electronic storage and retrieval system is presumed, unless the contrary is proved, to have been written by the person who ordinarily uses that electronic storage and retrieval system in the course of his or her business, and
- An authorised officer who removes one or more documents from any place and gives evidence in proceedings that, to the best of his/her knowledge and belief, the material is the property of any person, the material is presumed, unless the contrary is proved, to be the property of that person, and if the authorised officer gives evidence that, to the best of his/her knowledge and belief, the material is material that relates to any trade, profession or any other activity carried on by the person, the material is presumed, unless the contrary is proved, to be material that relates to that trade, profession or other activity carried on by that person.

**8.** Provision is made for the initiation of proceedings by an aggrieved person in the Circuit Court or the High Court. Under the *Competition Act*s, such proceedings could only be initiated before the Circuit Court in respect of cases involving abuse of a dominant position.

**9.** The *Competition Act*s provided the minister with the right of action before the courts. This function is transferred to the CA under the 2002 act.

**10.** The *Competition Act*s specify that, in the context of the provisions governing abuse of a dominant position, the undertaking must occupy a dominant position in Ireland or a 'substantial part' of Ireland. The equivalent provisions in the 2002 act apply to an undertaking in a dominant position in Ireland or 'any part' of Ireland. This is likely to cause difficulty in practice, at least initially, given its potentially wide scope, and it is expected that case law will construe this in such a way as to limit its sphere of application.

**11.** Under the act, the courts have the power to require the adjustment of a dominant position in the manner and within a specified period by the sale of assets or otherwise as the court

may specify. In other words, under the act, the courts have the power to apply structural remedies in abuse of dominant position cases.

**12.** The act specifically provides that information that in the opinion of the director of corporate enforcement or a member of the Garda Síochána or such other person as may be prescribed by the minister, which may relate to the commission of an offence under the act, may be disclosed by such a person to the CA.

**13.** The act specifies that a person shall not be liable in respect of the communication by that person to the CA of his or her opinion that an offence related to a prohibited agreement, decision or concerted practice or abuse of dominant position is being committed, or that any other provision of the act that prohibits an undertaking from doing a particular thing or things has not been or is not being complied with, unless it is proved that the person making the communication has not acted reasonably and in good faith in forming that opinion and communicating it to the CA. Furthermore, an employer is obliged not to penalise an employee for having formed such an opinion and communicated it to the CA if the employee acted reasonably and in good faith. G

*Marco Hickey is a solicitor with the Dublin law firm LK Shields.*

# Recent developments in European law

## COMPETITION

On 13 February, the commission adopted a new notice on immunity from fines and reduction of fines in cartel cases. It came into force on 14 February and modifies earlier 1996 rules. Its objective is to encourage companies to bring undetected cartels to the attention of the commission. The first cartel member to provide sufficient information on a previously unnoticed cartel, leading to a dawn raid, or who supplies evidence that is material in leading to a successful prosecution, will enjoy complete immunity from fines. The 'whistle-blowing' company is required to co-operate with the commission on an on-going basis. Other cartel members are also encouraged to give evidence, with the offer of a reduction of fines. Fines can be reduced by up to 50% if the information provided was previously unknown. Reductions are also dependent on the timing of the disclosure and the quality of the content.

## FREEDOM TO PROVIDE SERVICES

Case C-145/99 *Commission v Italy*, 7 March 2002. The commission had brought an action against Italy for imposing restrictions on the right of EU lawyers to establish in Italy. The Italian rules provided that such lawyers could not open up offices in Italy if they already had offices in their home state. The ECJ held that this prohibition was contrary to article 49 of the treaty, which prohibits restrictions on the freedom to provide services. Even where the provision of services is temporary, service providers are entitled to equip themselves with appropriate infrastructure, such as an office. The court also held that Italy had failed to properly implement directive 89/48 on the mutual recognition of diplomas for lawyers. Candidates are given little idea of the contents of the examination, and this is contrary to the idea of fairness.

## LITIGATION

### *Lugano convention*

*Ace Insurance SA-NV v Zurich Insurance Co and Anor* ([2001] ILPr 41, Court of Appeal). Zurich had entered into a re-insurance agreement with Ace, incorporating the terms of the original contract. It included the 1998 Non Marine Association service-of-suit clause in favour of the US courts and a claims co-operation clause. Zurich subsequently assigned part of its business, including this insurance policy, to the second defendant, an American insurance company. Prior to the assignment, Zurich had settled a claim under the policy. It then sought to rely on the re-insurance agreement. There was a dispute as to whether it had informed the re-insurers about the original claim in accordance with the claims co-operation clause and whether the original claim was justified in the circumstances. The claimants brought proceedings in London, seeking a declaration of non-liability. They later added the second defendant and raised further issues relating to their liability based on the absence of their consent to the assignment. The defendants commenced proceedings in Texas and contested the jurisdiction of the English courts, relying on the service-of-suit clause and *forum non conveniens* principles. At first instance, Longmore J granted a stay of proceedings, relying in particular on the service-of-suit clause.

On appeal, the applicability of the *forum non conveniens* principle was argued, as the first defendant was domiciled in a *Lugano convention* state. The Court of Appeal (Rix LJ) held that *forum non conveniens* was not inconsistent with the application of the convention. It was bound by its earlier decisions in *Re Harrods (Buenos Aires) Ltd* ([1992] Ch 72) and *Eli Lilly and Company v Novo Nordisk A/S* ([2000] ILPr 73). It had been argued that the defendant had submitted to the jurisdiction of the English courts under article 18 of the *Lugano convention*. This allows defendants to submit to a court's jurisdiction by entering an appearance. It upheld the decision of Longmore J and rejected the appeal. The service-of-suit clause was a critical factor in the exercise of the court's discretion. However, the court noted that the service-of-suit clause could not be relied on in the context of *forum non conveniens* until service of the foreign proceedings had taken place. The length of time that proceedings had been pending in England prior to service of the foreign proceedings was a relevant consideration in the exercise of the court's discretion. The service-of-suit clause did not seek to establish the competence of a court that would not have jurisdiction under the normally applicable procedural rules. In principle, therefore, the jurisdiction of a foreign court seized pursuant to such a clause remained open to challenge.

## TORT

Cases C-52/00, C-154/00 and C-183/00 *Commission v French Republic, Commission v Hellenic Republic* and *González Sánchez v Medicina Asturiana SA*, 25 April 2002. In 1985, the EU adopted the *Directive on strict liability for defective products*. This introduced an EU-wide scheme of strict liability for defects in products. The question before the court was whether the directive allowed member states a margin of discretion when implementing the directive. The ECJ held that this was a harmonising measure and that there was no legal basis for member states adopting or maintaining provisions differing from it. The directive provides for a regime of strict liability. The person injured by a defective product can seek reparation directly from the producer if the victim proves the existence of damage, a defect in the product and a causal link between that defect and the damage. However, damage is only covered if it exceeds €500. The directive is a result of a complex process in which conflicting interests are balanced. The threshold of €500 reflected the desire of the EU to avoid an excessive number of actions brought by people who had been victims of defective products but who had suffered only minor property damage. Victims are free to use remedies in contract or tort for damage less than €500. Greece and France had not included this threshold in their implementing legislation. Both states had, therefore, failed to fulfil their obligations to implement correctly. The French legislation had also provided for the liability of a supplier, and allowed him in turn to bring proceedings against the producer. This had the negative effect of increasing the number of actions brought and is what the directive seeks to avoid. G

SADSI
Solicitors Apprentices Debating Society of Ireland

# A second bite at the cherry

The government has chosen Saturday 19 October as the date for the second referendum on the *Nice treaty*. Many trainees living away from home could not vote in the first referendum because it was held mid-week. However, you will now have a second chance to make your voice heard in the forthcoming vote, as this time it will be on a weekend.

We urge all trainees who are registered to vote to exercise their democratic right. If you are still unsure how to vote, have a look at *www.refcon.ie*.

*Eamonn Kelly, education rep*

**Bar association**
Julie Brennan and Derval Markey enjoying the SADSI results party in the Q Bar on 23 August

# You can bank on it

SADSI and Ulster Bank are delighted to announce a new, restructured banking package aimed at trainee solicitors. Along with preferential lending rates and credit card and cheque book facilities, Ulster Bank is offering all trainees the chance to get advice on pensions, mortgages and any other financial queries that they may have. Please contact your local branch in this regard.

We are all aware of the financial woes faced by trainees, from that 'end of the month feeling' as we wait to be paid or the struggle endured by some to get paid while on the PPC1 and PPC2 courses. We are currently in on-going discussions with Ulster Bank with a view to creating new products tailored for trainee solicitors, which we shall hopefully bring to your attention over the coming months. To this end, SADSI would be delighted to hear from all trainees who have any ideas about facilities that they think would be of benefit to them. The best idea, e-mailed to 2002@sadsi.ie, wins €100.

*Donncha O'Conchuir, honorary treasurer*

# Controlled feedback

As you are all aware, the FE-1 and PPC1 results are now out. SADSI would like to invite all trainees and prospective trainees to submit any comments that they may have to any of your SADSI representatives or, alternatively, e-mail 2002@sadsi.ie.

All communications and correspondence will be treated in strictest confidence. However, the main issues may be communicated to the Law Society as part of a feedback exercise, which will further improve the examination process that we all have to face. We look forward to hearing your views.

*Áine Matthews, vice-auditor*

# 2002 SADSI ball promises to be best ever

Make sure to mark Saturday 2 November in your social diary, as this year's SADSI ball should be the best ever! The evening will begin with a drinks reception in the Conrad Hotel at 7pm. This will be followed by a five-course banquet and music from the super Kaye Twins. Then we will have a DJ and bar extension. And it doesn't end when the music stops – Leeson Street is just around the corner for those of you with any energy left or, if you would prefer, the Conrad have very kindly offered all SADSI members a discount on rooms. Contact Lisa O'Dowd, reservations manager, at 676 5555. Tickets, priced a mere €50, will go on sale in mid-October and will be available from all SADSI committee members and in Blackhall Place on certain dates. There will be a number of surprises throughout the night. If you have any ideas or suggested sponsors, I would love to hear from you. If you want contact details for any SADSI reps, e-mail 2002@sadsi.ie.

*Julie Brennan, eastern rep*

## Solicitors v trainees Gaelic football match

The third game in this annual event is due to take place in the near future at the Guinness Iveagh Grounds in Crumlin. Past players will note that the Iveagh Grounds are an excellent venue, having the added benefit of floodlights to facilitate evening matches. The referee, jerseys and sponsorship for a post-match reception at the grounds are being organised, and further details of the time and date for the match will be supplied in due course. We hope that the game will be played before the end of October, so that does not leave much time for those interested to dust off their boots and get in shape for a crack at winning the Law Society/SADSI Challenge Cup. Apprentices be warned: the solicitors will not be an easy touch, so get training!

## A level playing field for solicitors?

The annual Law Society v King's Inns soccer match is currently being planned, with a view to the game being played at Blackhall Place on a Saturday in late October or early November. Details such as pitch availability, sponsorship and a venue for a post-match reception are now being finalised. Further details will be furnished in relation to the event in due course. Those interested in playing this match, and indeed the Gaelic match, should contact 2002@sadsi.ie.

*Noel Devins, sports officer*

## 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 4 October 2002)*

Regd owner: Rose Fitzsimons, Drumfomina, News Inns, Ballyjamesduff; folio: 26020; area: 5.056 acres, 9.812 acres, 6.843 acres; lands: Drumfomina, **Co Cavan**

Regd owner: James Finbarr Tobin and Ann Tobin; folio: 8373F; lands: a plot of ground situate in the townland of Mountain Common and barony of Ibane and Barryroe; **Co Cork**

Regd owner: David and Mary O'Regan; folio: 25565F; lands: part of the townland of Ballinaspigmore in the barony of Cork known as no 63 Halldene Drive in the city of Cork, shown as plan 63 edged red on the registry map OS A2 to OS 74/13; **Co Cork**

Regd owner: Deasy & Co; folio: 57461; lands: a plot of ground situate in the townland of Ballycureen and in the barony of Cork; **Co Cork**

Regd owner: Edward White; folio: 15107f; lands: a plot of ground situate to the southside of Boreenmanagh Road in the parish of St Nicholas and the county borough of Cork; **Co Cork**.

Regd owner: Niall McCole and Claire McCole, Narin, Portnoo; folio: 22853F; area: 0.146 hectares; lands: Narin, **Co Donegal**

Regd owner: William Grehan; folio: DN14994F; lands: a plot of ground known as 2 Dromard Road situate on the south of Dromard Road in the parish and district of Crumlin; **Co Dublin**

Regd owner: Noel Flynn; folio: DN64360F; lands: property known as 392 Carnlough Road situate in the parish of Finglas and district of Cabra; **Co Dublin**

Regd owner: Rory J Moore and Teresa Moore; folio: DN95613f; lands: property known as 95 Seapark Drive situate in the parish of Clontarf and district of Clontarf; **Co Dublin**

Regd owner: Alan Moran; folio: DN62479L; lands: property situate in the townland of Tonlegee and barony of Coolock, **Co Dublin**

Regd owner: Anthony Murphy; folio: DN46973F; lands: property situate in the townland of Kilnamanagh and barony of Uppercross; **Co Dublin**

Regd owner: Patrick Lee and Edel Finin; folio: DN60117F; lands: property known as 80 Brookwood Avenue, situate in the parish of Clontarf and district of Killester; **Co Dublin**

Regd owner: Margaret Keaveney; folio: 21888F; lands: townlands of Clooncon East and Cloncon South and barony of Ballymoe; **Co Galway**

Regd owner: Adelaide Hillis: folio: 7343F; lands: townland of Tarmons and barony of Iveragh; area: 0.456 acres; **Co Kerry**

Regd owner: Fergus Dalton; folio: 1573; lands: townland of Moortown and barony of Ikeathy and Oughterany; **Co Kildare**

Regd owner: Patrick and Irene McEvoy; folio: 13089F; lands: Eaglehill and barony of Offaly West; **Co Kildare**

Regd owner: Joseph O'Malley and Anne Reidy; folio: 2069F; lands: townland of Briska More and barony of Pubblebrien; **Co Limerick**

Regd owner: Noel Collins; folio: 18734; lands: townland of Logavinshire and barony of Pubblebrien; **Co Limerick**

Regd owner: South Liberties GAA Club; folio no: 9262F; lands: townland of Raheen and barony of Clanwilliam; **Co Limerick**

Regd owner: Henry Ellis, Clonellan, Drumlish; folio: 12049; area: 13.147 acres, 12.887 acres; lands: Cloonellan, **Co Longford**

Regd owner: Kathleen Lee, Upper Soran, Ballinalee, Co Longford; folio: 1435F; area: 0.544 acres; land: Soran; **Co Longford**

Regd owner: Sean Lambe, Rosmackea, Dundalk; folio: 8981F; lands: Dunmahon; area: 2.415 hectares; **Co Louth**

Regd owner: Owen Andrew O'Malley; folio: 1464F; lands: townland of Carrowmacloughlin and barony of Murrisk; area: 1.05218 hectares; **Co Mayo**

Regd owner: James Blackburn, Carrowbarra, Smithboro, Co Monaghan; folio: 9368; **Co Monaghan**

Regd owner: Thomas Brennan, Drumdesco, Tydavnet; folio: 14185; lands: Mullaghmore North; area: 0.7385 hectares; **Co Monaghan**

Regd owner: Anthony Boland, folio: 17604; lands: townland of Owenykeevan/Tawnamaddoo and Carrownrod and barony of Tireragh; area: 18.167 hectares; **Co Sligo**

Regd owner: Michael Joseph Duffy, Knockrower, Killavil, Ballymote, Co Sligo; lands: townlands of Knockrawer and Ballyfahy and barony of Corran; area: 12.14056 hectares; **Co Sligo**

Regd owner: Centenary Co-operative Creamery Society Limited; folio: 10794; lands: townland of Curraduff and barony of Ikerrin; **Co Tipperary**

Regd owner: Edward and Tobias Mahar; folio: 38120; lands: townland of Tullow and barony of Owney and Arra; **Co Tipperary**

Regd owner: Leonie Reynolds, 9 The Square, Haddington Road, Dublin 4; folio: 12346F; lands: Irishtown; **Co Westmeath**

Regd owner: Patrick Stafford (deceased); folio: 17351; lands: Battlestown and barony of Shelburne; **Co Wexford**

Regd owner: George Langrell and Claire Langrell; folio: 13489F; lands: Borleagh and barony of Gorey; **Co Wexford**

Regd owner: Martin Flood (deceased); folio: 19653; lands: Clondaw and barony of Ballaghkeen North, **Co Wexford**

Regd owner: Aidan Byrne and Anne-Marie Byrne; folio: 8339F; lands: Churchtown and barony of Forth; **Co Wexford**

Regd owner: the Rural District Council of the Gorey Rural District County Wexford; folio: 4799; lands: Garrydaniel and barony of Ballaghkeen North; **Co Wexford**

Regd owner: John Kelly; folio: 7700; lands: townland of Crehelp and barony of Talbotstown Lower; **Co Wicklow**





## WILLS

**Blake, William Francis (Liam)** (deceased), late of 6 Church Street, Enniskillen, Co Fermanagh. Date of death: 23 August 2002. Would any person having knowledge of the whereabouts of a will of the above named person, please contact John Quinn, Solicitor, 14 Belmore Street, Enniskillen, Co Fermanagh BT74 6AA, tel: 028 6632 6008 or fax: 028 6632 2592

**Caul, Seamus** (deceased), late of 4 Harbour Hill, Cobh, Co Cork formerly of 17 Seatown, Terrace, Swords, Co Dublin. Would any person having knowledge of a will made by the above named deceased who died on 16 June 2002, please contact Murphy English & Co, Solicitors, 'Sunville', Cork Road, Carrigaline, Co Cork, tel: 021 4372425 or fax: 021 437 3978

**Dinan, Mary**, late of 27 Ardpatrick Road, off Navan Road, Dublin 7 and Ballyshannon, Co Donegal. Would any person having knowledge of a will made by the above named who died on 25 July 2002, please contact F Hutchinson & Co, Solicitors, Tirconnell Street, Ballyshannon, Co Donegal, tel: 072 52422 or fax: 072 52849

**Dinan, William (Billy),** late of 27 Ardpatrick Road, off Navan Road, Dublin 7. Would any person having knowledge of a will made by the above named who died circa 1990, please contact F Hutchinson & Co, Solicitors, Tirconnell Street, Ballyshannon, Co Donegal, tel: 072 52422 or fax: 072 52849

**O'Leary, Catherine (otherwise Kathleen)** (deceased), late of 132 Oliver Plunkett Street, Cork, and formerly of Clonakilty, Co Cork. Would any person having knowledge of a will made by the above named deceased who died on 5 August 2002, please contact Frank Buttimer & Company, Solicitors, 19 Washington Street, Cork, tel: 021 427 7330 or fax: 021 427 2496

**O'Shea, Mary** (deceased), late of 23 Byfield Park, Mayfield, Cork. Would any person having any knowledge of a will executed by the above named deceased who died on the 29 August 2002, please contact Philip Wm Bass & Co, Solicitors, 9 South Mall, Cork, tel: 021 427 0952 fax: 021 427 7882, ref: JM/MO'G/O.3006

**Quinn, Beatrice Teresa** (deceased), late of 20 Daly Park, Belleek, Co Fermanagh and formerly of 77 Haslemere Avenue, Boston Manor, Hanwell, London. Date of death: 30 May 2002. Would any person having knowledge of the whereabouts of a will of the above named person, please contact John Quinn, Solicitor, 14 Belmore Street, Enniskillen, Co Fermanagh BT74 6AA; tel: 028 6632 6008 or fax: 028 6632 2592

**Reddington, Patrick** (deceased), late of Cregboy, Claregalway, Co Galway. Would any person having knowledge of a will executed by the above named Patrick Reddington who died 20 May 2002, please contact Blake & Kenny Solicitors, 2 St Francis Street, Galway

## EMPLOYMENT

**Part-time solicitor required**, min five years' PQE, general practice, apply in writing with CV to Louise Moloney & Company, Solicitors, 53 Kilbarrack Road, Dublin 5

**Qualified solicitor available** for support/entry-level role. If you are looking for a motivated person with excellent research, writing and administrative skills, I would welcome the opportunity to discuss my qualifications with you. Please e-mail nylevi@eircom.net

**Solicitor** with experience of general practice, particularly conveyancing, probate and litigation, available for locum position. Reply to **box no 100**

**Solicitor required** with two years' PQE in conveyancing and probate. Applications with CV to Donal Farrelly & Co, Solicitors, Tullagh House, High Street, Tullamore, Co Offaly

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**Locum solicitor** required for Dublin city office, December 2002/January 2003, fax: 662 5770 or e-mail peterd@indigo.ie

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**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

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

**Personal injury claims**, employment, family, criminal and property law specialists in England and Wales. Offices in London (Wood Green, Camden Town and Stratford), Birmingham and Cardiff. 'No win, no fee' available for accident and employment claims, legal aid for family and criminal cases. Contact Levenes Solicitors at Ashley House, 235-239 High Road, Wood Green, London N22 8HF, tel: 0044 20 8881 7777. Alternatively, e-mail us on info@levenes.co.uk or visit our website at *www.levenes.co.uk*

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# WHERE THERE'S A WILL THIS IS THE WAY...

When a client makes a will in favour of the Society, it would be appreciated if the bequest were stated in the following words:

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

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

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irish cancer society

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## TITLE DEEDS

**In the matter of the *Landlord and Tenant (Ground Rents) Acts, 1967-1994*: notice of intention to acquire fee simple**

To any person having an interest in the freehold estate as successor in title to Henry Earl of Thomond in the hereditaments and premises situate at 2 Burrin Street, Carlow, in the county of Carlow, being the property demised by a lease dated 21 January 1913 and made between Frederick Humfrey, Marion Humfrey, Kathleen Mary Gordon, Marjorie Harriet Humfrey and Ruth Lorna Deans of the one part and Patrick Byrne of the other part for the term of 99 years from 29 September 1912 at the yearly rent of £10.50.

Take notice that the applicants, John J Lambert and Anne Lambert, have made an application to the county registrar for the county of Carlow for the acquisition of the freehold interest in the aforesaid property, and that any party asserting that they hold superior interest in the aforesaid property are called upon to furnish evidence of title of the aforementioned property to the below named within 28 days from the date of this notice.

In default of any such notice being received, it is the intention to proceed with the application before the county registrar for the county of Carlow to make an order whereby the fee simple interest title to the aforementioned property will be vested in the said applicants, John J Lambert and Anne Lambert, on the basis that the person or persons beneficially entitled to the superior interest including any freehold reversion in the aforementioned property are unknown or unascertained.

*Date: 6 September 2002*
*Signed: PJ Byrne & Co, Solicitors, Athy Road, Carlow*

**In the matter of the *Landlord and Tenant (Ground Rents) Acts, 1967-1994*: notice of intention to acquire fee simple**

To any person or persons for the time being entitled to any interest in the freehold estate of the following property: all that and those the premises now known as 10 Maryborough Street, Graiguecullen, Carlow, in the county of Carlow, being the property demised by a lease dated 3 January 1913 and made between Elizabeth Ann Durbin of Harston in the county of Cambridge and Adeline Susan Lippincott Grimshaw of Friars Hill, Wicklow, in the county of Wicklow, of the one part and Elizabeth Kelly, Letitia Kelly and Catherine Kelly all of 3 Avenue de Chalets, Paris of the other part for a period of 99 years from the 1 of November 1912 subject to the yearly rent of £2.

Take notice that Hannah Haughney of 6 Sleaty Street, Graiguecullen, Carlow, in the county of Carlow, has made an application to the county registrar for the county of Carlow for the acquisition of the fee simple interest in the aforesaid property and all intermediate interest therein and that any party asserting that they hold superior interest in the aforesaid property are called upon to furnish evidence of title of the aforementioned property to the below named within 28 days from the date of this notice.

In default of any such notices being received, Hannah Haughney intends to proceed with the application before the county registrar for the county of Carlow to make an order whereby the fee simple title to the aforementioned property will be vested in the said applicant, Hannah Haughney, on the basis that the person or persons beneficially entitled to the superior interest including any freehold reversion in the aforementioned property are unknown or unascertained.

*Date: 6 September 2002*
*Signed: PJ Byrne & Co, Solicitors, Athy Road, Carlow*

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

Take notice that any person having an interest in the freehold estate of the following properties: 84 Summerhill, Dublin – all that and those the messuage, hereditaments and premises known as number 84 Summerhill in the city of Dublin held under indenture of lease dated 19 December 1892 made between James Mooney of the one part and John Slator of the other part for the term of 134 years from 1 December 1892 and subject to the yearly rent of £3.12s and therein described as 'all that and those that piece of ground next adjoining the premises known as number 83 Summerhill containing in front to Summerhill 18 feet and in the rear 18 feet and in depth from front to rear 50 feet be the said admeasurements more or less bounded and described as in the map thereon endorsed and coloured red situate in the parish of Saint George and in the county of city of Dublin' which said premises are now known as number 84 Summerhill in the city of Dublin; 87 Summerhill, Dublin – all that and those the premises known as 87 Summerhill, Dublin held under indenture of lease dated 12 July 1898 and made between Catherine Whelan of the one part and Margaret Bridgman of the other part for the term of 129 years from 12 July 1898 at the yearly rent of £4.75p and therein described as 'that piece or plot of ground containing in front to Summerhill 20 feet or thereabouts in the rear the same number of feet and from front to rear 62 feet be the said admeasurements more or less together with the house and premises now erected thereon known as 87 Summerhill bounded and described as on the map thereof hereon endorsed situate in the parish of Saint George and the county of city of Dublin'.

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

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

*Date: 18 September 2002*
*Signed: McGonagle Solicitors (solicitors for the applicant), 13 Upper Ormond Quay, Dublin 7*

**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 Neil Tohill**

Notice to any person having any interest in the following properties: 66 Rathgar Avenue, Dublin 6 – formerly or otherwise known as 66 Rathgar Avenue in the parish of Rathfarnham, barony of Rathdown and county of Dublin, held under a lease dated 12 December 1921 between George McLean of the one part and Thomas Joseph Devine of the other part of number 65 Grosvenor Rd, Rathmines in the county of Dublin, for the residue unexpired of a term of 850 years from 16 September 1862 at the annual rent of £5; 67 and 67a Rathgar Avenue, Dublin 6 – formerly or otherwise known as 'Rose Cottage', Rathgar Avenue in the township of Rathmines and Rathgar in the county of Dublin, held under lease dated 10 July 1874 between John Conroy of the one part and Madame Mary Guilgault and UO Leony Guilgault of the other for the term of 200 years from 20 July 1874 subject to the annual rent of £23.

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

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

*Date: 19 September 2002*
*Signed: Patrick J Maher (solicitor for the applicant), Merton, 11 Dundrum Road, Dublin 14*