Law Society Gazette

Regulars

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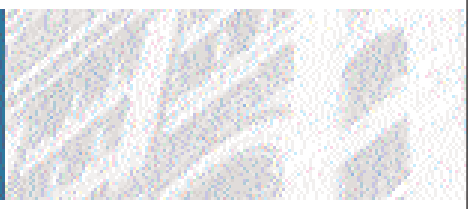

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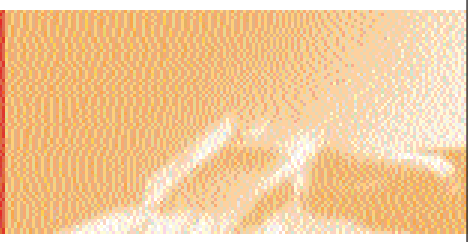

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Nothing but the same old story

Oscar Wilde once said that the only thing worse than being talked about is not being talked about. I'm not entirely sure that Oscar got that right. He might have felt differently had he been a solicitor rather than a playwright. Once again we have found ourselves under public scrutiny, and not just on one front but on two. We have been the subject (along with seven other professions) of a report from the Competition Authority's independent consultants, Indecon, and – less benignly – of a widely-publicised *Prime Time* documentary on RTÉ television.

A good story to tell

You will find a detailed analysis of the Indecon report on page 5 of this issue, but suffice it to say that the Law Society welcomed the Competition Authority's decision to study the provision of professional services, including our own. We have always believed that the solicitors' profession has a good story to tell on competition and have been pleased to get the opportunity to tell it. Early in the process, we retained expert legal and economic advice and the society's response has been co-ordinated by a very hardworking and able task force, to whose members I wish to pay tribute. I do not believe I am breaking a confidence in saying that Indecon informed the members of the task force that the society's 220-page submission, with supporting documentation, was by far the most impressive submission made to it in the course of this study. I have no doubt but that our engagement with Indecon ensured that many false impressions were dispelled and thus falsely based recommendations avoided.

Having said that, there are of course recommendations in the Indecon report with which the Law Society would disagree and we certainly believe we have very cogent reasons for doing so in the public interest. We look forward to the next stage in the process of dealing with this Competition Authority study.

By contrast, the *Prime Time* documentary took a different – and, sadly, more hackneyed – approach. The programme noisily proclaimed that it was going to 'blow the lid' on Ireland's 'compo culture'. It also trumpeted that it was aware of 20 or 30 solicitors that knowingly encourage and process false personal injury claims. Let me state this as bluntly as I can: anyone who brings a fraudulent claim should go to jail. That includes any solicitor who knowingly assists in bringing a fraudulent claim.

Propaganda war

This is merely another salvo in the on-going propaganda war being fought by vested interests such as IBEC and the Irish Insurance Federation. The underlying objective is to undermine the rights of ordinary citizens, who have been injured through the negligence of others (usually members of those same vested interests), to seek compensation for their injuries. These victims must not be intimidated to prevent their recovering the compensation to which they are entitled. I can assure you that the Law Society will fight tooth-and-nail to make sure that this assault on a fundamental right does not succeed.

But I do think it is important to nail one of the subliminal messages that seemed to be contained in the *Prime Time* 'scoop'. The programme appeared to imply that the Law Society turns a blind eye to fraudulent claims and to those who help to bring them. Let me put the record straight. The Law Society believes that the law should be changed so that those who bring fraudulent personal injuries claims are prosecuted and convicted. We want to see the full weight of the law brought against anyone who brings or knowingly assists in bringing such claims. We believe a new specific criminal offence should be created to cover the bringing of such claims. We believe that the tiny number of spurious and invented claims is having a disproportionate effect on the personal injuries compensation system.

We said as much in a press release that we issued two months ago but which news outlets by and large chose to ignore in favour of rehashed allegations and their own version of spurious claims.

For the solicitors' profession, sometimes it's nothing but the same old story. But we won't stop trying to put the record straight.

Geraldine Clarke,
President

'I have no doubt but that our engagement with Indecon ensured that many false impressions were dispelled and thus falsely based recommend-ations avoided'

First meeting of society's public relations officers

On taking office last November as president of the Law Society, Geraldine Clarke made the profession's public relations one of her top priorities, *writes director general Ken Murphy*. In this she touched a cord with members everywhere.

She re-established the society's Public Relations Committee (which had been abolished four years previously) under the chairmanship of Donald Binchy. Among the ideas adopted at the first meeting of the new committee was one which I had proposed to the Council last year. The idea is that each bar association should nominate a public relations officer, first, to avail of every opportunity to promote the profession through the media generally, although especially through the local radio and print media in the bar association's part of the country and, second, to act as a liaison person on public relations matters with the society.

The idea is to encourage the bar associations to play a much greater role in public relations on behalf of the profession.

Public faces: the first meeting of the newly-appointed public relations officers
Seated (*left to right*): Michele O'Boyle (Sligo), Marian O'Donovan-Mackey (Cavan), director general Ken Murphy, chairman of the Public Relations Committee Donald Binchy, president Geraldine Clarke, junior vice-president John Fish, Geraldine Conaghan (Donegal and Innisowen) and Jackie Durcan (Mayo); standing (*left to right*): Rosemarie Loftus and Jerome O'Sullivan (both from the Public Relations Committee), Ronan Connolly (Clare), Kieran Boland (Kilkenny), John O'Sullivan (Carlow), James McCourt (Dublin), Tom Murran (Waterford), Maura Derivan (Tipperary), John O'Connor (Public Relations Committee), Karl Carney (Wicklow), Collette McCarthy (West Cork) and Brian O'Sullivan (Midlands)

The society will seek to be of assistance to the public relations officers in three ways. It will arrange for them to undertake training in media skills. It will copy any society press releases or briefing materials by e-mail at the same time as they are sent to the media. It will hold meetings of the public relations officers to seek and share ideas on how media and public relations matters can best be handled.

Public relations officers will not be spokespersons for the Law Society. They will represent the bar associations or simply themselves as individual solicitors, expressing their own views based on their own experiences.

Almost all bar associations have now nominated public relations officers (in many cases it is the bar association's president). An excellent first meeting of the public relations officers was held in Blackhall Place recently. It was agreed that the public relations officers should seek opportunities to explain the law and the hugely important role that lawyers play on behalf of their clients in a whole range of areas, contentious and non-contentious. Encouraging and assisting the bar associations to play a role in dealing directly with the media will share the burden and recognise that it is impossible for the society to deal with all of the media all of the time on behalf of the profession.

From November to the end of March, the president and I have visited and met the members of the bar associations of Tipperary, Sligo, Leitrim, Kilkenny, Mayo, Roscommon, Waterford, Dublin, Louth, Galway, Limerick, Kerry and Meath. The public relations officers idea has proved very popular at every meeting.

Public relations is a much wider concept than media relations. Ultimately, we need to encourage every solicitor to recognise that he or she has a personal role to play in seeking to improve the profession's public image.

DSBA to launch new website

The Dublin Solicitors' Bar Association (DSBA) is set to roll out a new website this month. Association president James McCourt told the *Gazette* that the site will feature a number of interactive elements that will allow members and others to contribute to content.

'There will be options to allow us to conduct polls of members on various issues and to get their views on-line', he said. 'It will also allow us to put on contributions from members and from outside'.

He added that the DSBA would be inviting contributions as soon as the site is launched. It will also include a wide range of practical content such as updated standard form documents and news stories.

The new website is currently going through the final stages of design, and McCourt predicted that it should be launched early this month.

No major surprises in Competition Authority study

The Law Society has welcomed the recent report on competition in the profession, but has stated that some elements of it do not strike the right balance between competition and protecting the public.

Indecon International Economic Consultants produced the report following a survey carried out for the Competition Authority. Law Society director general Ken Murphy said that the society agreed with many of the report's findings, 'not least the extremely positive assessment' of its regulatory and education systems. He pledged that the society would study the report carefully.

Murphy said that the society believed in competition and in protecting the public. But he noted there were some areas where Indecon got the balance between the two wrong.

In the area of entry to the profession, Indecon found no evidence to suggest that the society's educational and training requirements were used to restrict or damage competition. The consultants stated that they believed the current educational and training requirements are not disproportionate to achieving their intended goals of ensuring minimum standards of competence and professionalism among newly-qualified solicitors.

Murphy welcomed the finding, but questioned whether a suggestion that training be provided outside Dublin was really practical since the concentration of solicitors needed – over 500 teach on the course at present – would be available elsewhere.

He also rejected assertions that the rules governing entry by lawyers from other jurisdictions and from the bar could restrict entry. 'The society cannot be said to have a restrictive policy on recognition of appropriate qualifications in circumstances where the solicitors' profession here is open to 110,000 solicitors qualified in England and Wales and a further 2,000 from Northern Ireland', he said.

Pictured at the launch of the Indecon report were *(left to right)*: Declan Purcell, member of the Competition Authority, Dr John Fingleton, chairman of the Competition Authority and Alan Gray of Indecon

He pointed out that the reason entry from the bar was restricted to those members who had more than three years' post-qualification experience was because barristers' practical training starts after qualification. Practical training is a pre-qualification requirement for solicitors.

Murphy also questioned an Indecon claim that it doubted whether standards would fall if the market was opened up to specialised licensed conveyancers. He pointed out that the introduction of this system in England and Wales and Scotland was 'a damp squib' in terms of market impact. 'Indecon acknowledges that the market share by licensed conveyancers is no more than 5% in England and Wales, and in Scotland, which is more comparable to Ireland in terms of size, the number of licensed conveyancers is currently two', he said.

The Law Society welcomed Indecon's recommendation that the ban on solicitors forming limited liability partnerships be dropped. At the same time, because of the obvious dangers of conflicts of interest, it wants the prohibition on solicitors forming multi-disciplinary partnerships with non-lawyers to remain. Murphy pointed out that in the recent landmark *NOVA* ruling, the European Court of Justice said such a ban was in the public interest, even if it was anti-competitive.

The authority stated that the report represents the views of Indecon, not the authority's own views.

INDECON REPORT'S MAIN POINTS

Entry

The Law Society's monopoly on the provision of professional practice courses for trainee solicitors is likely to restrict entry.

The requirement that solicitors whose second or subsequent place of qualification is Northern Ireland or England or Wales have three years' post-qualification experience in that jurisdiction before entering the roll of Irish solicitors may act as a barrier to entry.

The requirement that barristers have three years' post-qualification experience before transferring to practise as solicitors is likely to act as a barrier to entry.

Conduct

With the exception of personal injuries, the restrictions on comparative advertising and the prohibition on making unsolicited approaches to clients or the public in any area of law is likely to restrict normal competitive behaviour in the market.

Demarcation

The restrictions on solicitors based in Northern Ireland and England and Wales, and on lawyers from other EU states, offering conveyancing, trust and probate services in Ireland are likely to restrict competition in these particular services in Ireland.

The absence of licensed conveyancers reduces competition in this segment of the market.

Organisational form

The prohibition on solicitors forming limited liability partnerships and companies hinders the profession in competing internationally and may reduce economic efficiency.

The prohibition on solicitors practising with other professions is likely to reduce competition and dynamic efficiency (for example, innovation in legal and financial services).

HARDIMAN BLAMES THE MEDIA

The lack of legal experts in the Irish media leaves us with coverage that emphasises the result instead of the process, according to Mr Justice Adrian Hardiman. Launching *Criminal procedure* by Professor Dermot Walsh, Hardiman criticised the lack of specialist legal journalists in the Irish media. 'Legal coverage tends to emphasise the result and not to explain the process or the reasoning', he said. 'In the case of important written judgments, a felt need for immediate assessment often does not leave time to read what is being commented on'. He added that cases like *Sinnott* and the Abbeylara judgment, which raise fundamental questions about the powers of government, legislature and the courts have these aspects ignored while the media concentrates on individual facts.

STATUTES ON CD-ROM

All acts of the Oireachtas, statutory instruments and chronological tables from 1922 to 2001 are available on a CD-ROM for just €35 from Government Publications Sales Office, Sun Alliance House, Molesworth Street, Dublin 2, and by mail order from Government Publications, 51 St Stephen's Green, Dublin 2. It is also available on the attorney general's website (*irlgov.ie/ag*).

Cork court crisis solved on the double

The Courts Service has allocated two temporary visiting judges to the Cork circuit to help ease a bottleneck in family law cases. According to Southern Law Association (SLA) spokeswoman Fiona Twomey, the number of family law cases awaiting hearing has doubled over the last year from approximately 500 to 1,000, and the average waiting time from notice of trial to trial date stands at an unacceptable 18 months.

She told the *Gazette* that the appointment of two visiting judges effectively resulted in an extra four-week family law session in Cork Circuit Court.

The extra hearings began on 11 March and will run until the Easter vacation. Catherine Delahunt and Patricia Ryan have both presided over family law sessions since the extra time was allocated. Others were expected to have filled in by the end of the four-week period.

The SLA, the Cork Family Law Association and Cork Circuit Court judge Patrick Moran had been seeking the extra resources for some time. Moran himself took on extra family law work to help ease the pressure.

Fiona Twomey paid tribute to the Courts Service and the Circuit Court Office for responding to their request. 'It is working. The extra four-week session is proving to be very helpful', she said.

Cork courthouse 'no quirk of fate'

The Courts Service has issued a statement contesting a report in last month's *Gazette* that Cork Corporation's decision to allocate €25 million for the refurbishment of the city's Washington Street courthouse came about by a 'quirk of fate'.

'The funding for this project, like all the major developments associated with us, came about as a result of much hard work by the board, the executive of the service, the minister and his officials', the statement said.

RETIREMENT TRUST SCHEME

Unit prices: 1 March 2003
Managed fund: 359.764c
All-equity fund: 80.842c
Cash fund: 249.081c
Long bond fund: 107.846c

ONE TO WATCH: NEW LEGISLATION

Unclaimed Life Assurance Policies Act, 2003

This act (no 2 of 2003) is a sequel to the *Dormant Accounts Act, 2001* and was commenced by the minister for community, rural and gaeltacht affairs on 6 March (SI 92/03). Its first objective is to set up a system whereby owners of policies are notified of their interests, by post, newspaper advertisements and notices. The second objective is to ensure that the benefit of unclaimed policies is transferred by the insurance companies to the dormant accounts fund, where any surplus which is not needed to provide for future claims and management expenses is available for community purposes as set out in the *Dormant Accounts Act*. The rights of policy holders will not be affected.

Life assurance policies are a more complex proposition than savings accounts because they can be so varied, often tailored to suit individual needs. They typically comprise some risk cover and an investment element, which will itself be subject to conditions. The contract of assurance sets out the conditions under which claims can be made and by whom, either the policy owner if the policy has matured or the beneficiary if payable on a death. The legislation provides for the encashment value to be separated from the insurance element, which remains the responsibility of the insurance company.

The legislation applies to unclaimed policies in respect of which monies are payable in the state to a policy holder who has a correspondence address in the state. There are two criteria for dormancy, depending on the type of policy (section 6). If the policy is for a specified term, it becomes dormant five years after the maturity date or the date of last communication from the policy holder. If it is for an unspecified term, it becomes dormant 15 years after the last communication from the policy holder. The act does not apply to a policy which forms part of the assets of an occupational pension scheme, a group permanent health insurance or disability benefit scheme or a sponsored superannuation scheme (as defined).

Sections 8 and 9 set out the notice procedure. Insurance

PIAB timetable set

The Personal Injuries Assessment Board (PIAB) legislation is due before the Oireachtas by the autumn, tánaiste Mary Harney revealed recently. She told the joint Oireachtas committee on enterprise and small business that the cabinet will see the heads of the bill by the summer. She added that she intended putting the legislation 'before the houses in early autumn and have it enacted by the end of this year so the PIAB can be established on a statutory basis'.

Harney made it clear that the government intended that lawyers should not be involved in the assessment board process. Responding to a question from Ollie Wilkinson TD, she said the PIAB would be a piece of infrastructure 'that might not require as many lawyers as is the norm in other places', and added: 'Lawyers should not necessarily be involved every time somebody seeks to make a claim'. The tánaiste stressed that it would not be a forum for advocacy.

Harney: PIAB legislation ready by autumn

In addition, she told the committee that that justice minister Michael McDowell intended introducing perjury legislation. 'The intention is that people will be pursued for perjury in case of fraudulent claims', she said.

Commenting on Harney's remarks, Law Society director general Ken Murphy said: 'Solicitors look foward to seeing the tánaiste's bill. It may give us a real insight for the first time into precisely how the PIAB is intended to operate. However, what is astonishing to us is the fact that the PIAB project has reached this advanced stage, on the tánaiste's acknowledgment, without a proper cost-benefit analysis being conducted. Political needs, rather than economic sense, appear to be driving the PIAB initiative'.

Conveyancers warned on property VAT changes

The Law Society's Probate, Administration and Taxation Committee has said it wants to draw the attention of practitioners to section 4(3a) of the *VAT Act, 1972* and the amendment to it introduced by section 113 of the *Finance Act, 2003*. Section 4(3a) has been in operation since 25 March 2002. Failure to deal properly with VAT issues on the granting of a lease and the assignment or surrender of a lease of property subject to VAT can have serious consequences for clients disposing of or acquiring such property, the committee warns. If you are in doubt about any matter relating to section 4(3a) or any other provision dealing in VAT and property, you should consult a practitioner with expert knowledge. After the enactment of the *Finance Act, 2003*, an article on the implications of the *VAT Act, 1972*, section 4(3A) as amended will be published on the Law Society's website and later in the *Gazette*.

COMMISSION WANTS SENTENCE AND FINE REVAMP

The Law Reform Commission has recommended that offenders should only be sentenced to prison terms of more than six months after a jury trial. In its latest report, *Penalties for minor offences*, the commission urges district judges to 're-think' sentencing along those lines, but stops short of recommending legislation for this. The report also proposes that district judges be required to give written reasons for imposing custodial sentences. It calls for legislation to allow fines to be increased for wealthier offenders and to require that corporations found guilty of regulatory offences be subject to maximum fines of three times those imposed on people.

LAWYER SETS MARATHON GOAL FOR CHARITY

Solicitor Cormac O'Ceallaigh plans to run three marathons in a total of ten hours and 30 minutes to raise money for a number of charities. He began with the Rome marathon in March and will end in Dublin in October. The charities for which he is raising cash are Festina Lente Equestrian College and Cavan Monaghan Down's Syndrome Association. O'Ceallaigh is a partner in the Dublin law firm Sean O'Ceallaigh & Co.

companies are required to write to policy holders annually each October with details of the unclaimed policy (if over the value of €500), notifying the holder that the policy may be claimed and that, if not, the net encashment value will be transferred to the dormant accounts fund. If the policy holder has given instructions not to be directly contacted or if the value is under €500 or direct contact has failed to achieve results, the insurance company must publish two advertisements in national newspapers and in the *Iris oifigiuil* in early October, and display notices on its premises containing prescribed information. The minister has issued regulations under section 9 (SI 93/03).

If no communication is received before the next 31 March, the net encashment value of the policy must be transferred to the fund without further notice by 30 April following, accompanied by a summary report, even if no funds are transferred. Each insurance company must keep a register of unclaimed policies in respect of which monies are transferred, so that the proceeds of policies transferred to the fund can be traced. According to Minister McCreevey in the Dáil, it is very difficult to estimate the amount and value of dormant funds held. This will only become evident in May 2004, when the proceeds of the first transfers arrive with the National Treasury Management Agency, which is the fund manager.

Section 15 deals with processing of claims by people who realise that they have unclaimed policies, the proceeds of which have been transferred to the fund. The intention is that they should be able to claim the full value of the policy, plus any interest accruing, less management costs.

Part 3 sets up mechanisms to ensure that the act is complied with. It requires each insurance company to file an annual certificate of compliance with the requirements in the act. Inspectors may be appointed to ensure compliance, and have appropriate powers. There are provisions to protect the anonymity of policy holders in most circumstances. G

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

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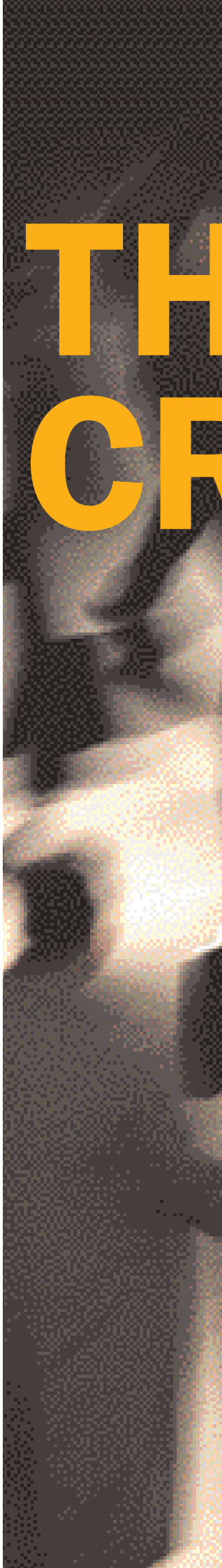

Child abduction is a growing problem both here and internationally. In this country, for example, the tensions between Muslim Sharia law and our own domestic law have led to an increase of cases. Geoffrey Shannon explains the current international framework for handling child abduction cases and suggests how the law could be reformed

MAIN POINTS

- ***Hague convention* 1980**
- **Impact of Sharia law**
- ***Brussels IIA regulation***

In the last ten years, Ireland has been at the centre of over 1,400 child abduction cases. The Department of Justice's Central Authority (the body that handles child abduction cases) dealt with 72 incidents last year alone. Child abduction occurs when a child is taken, without permission or consent, from a parent who has legal custody of the child. Not surprisingly, both Irish and international law contain provisions that aim to secure the return of the child to the jurisdiction of his habitual residence as soon as possible.

Since 1980, the international approach to child abduction has been governed by two main legal instruments, the *Hague convention on the civil aspects of international child abduction* and the *European convention on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children* (known as the *Luxembourg convention*). Both of these were signed into Irish law on 1 October 1991 by the *Child Abduction and Enforcement of Custody Orders Act, 1991.*

The most important difference between the two conventions is that an applicant must have a court order to invoke the *Luxembourg convention*. Under the 1980 *Hague convention*, it is not necessary to have a formal court order; the emphasis is on a breach of custody rights.

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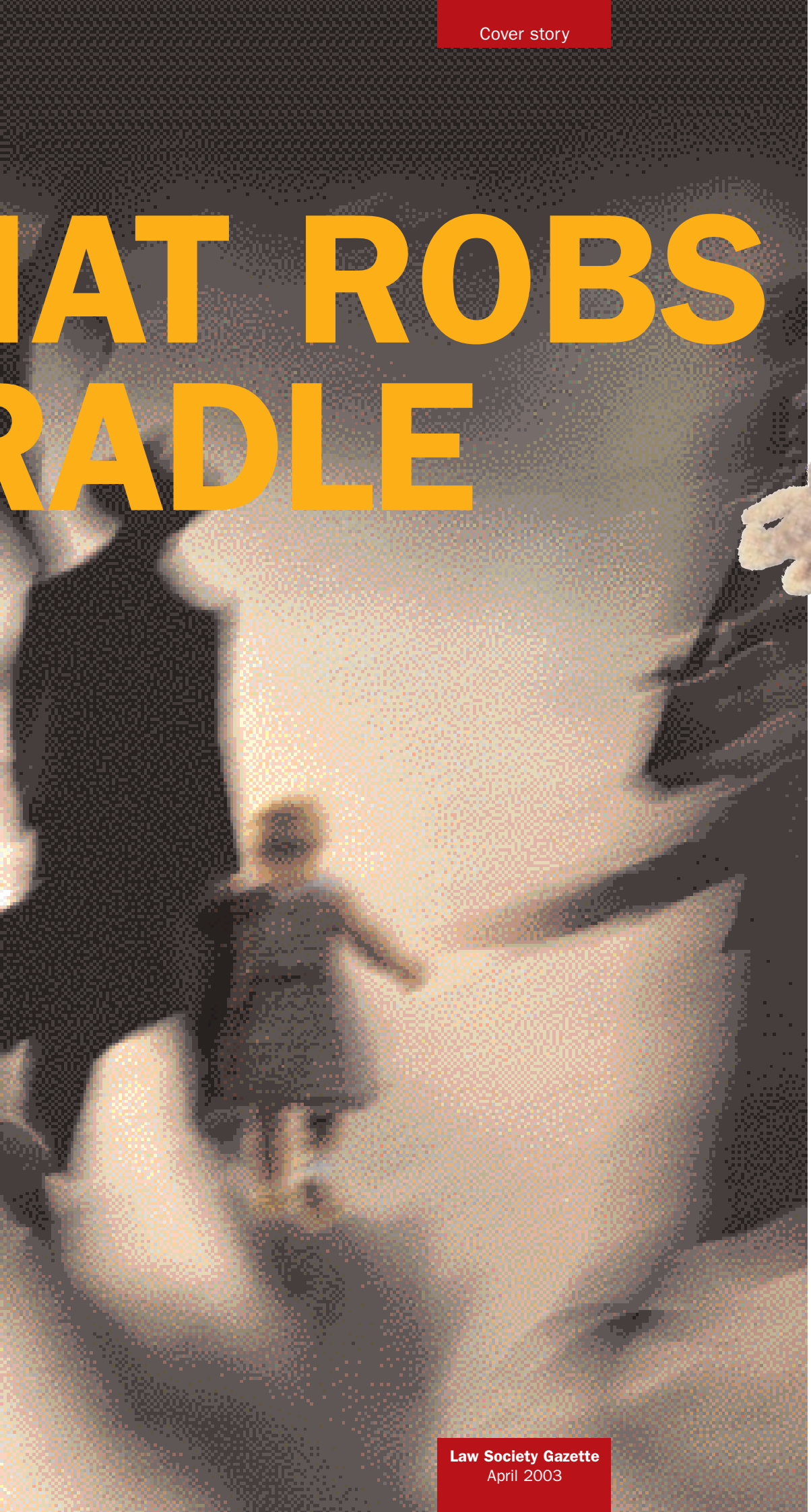


PIC: REX FEATURES

The principle of comity of courts applies to the abduction of children from a non-contracting state. Irish courts recognise and enforce decisions and orders made by courts in jurisdictions with comparable legal systems. However, it is likely that the courts will be mindful of the convention principles in dealing with such cases (see *AS v EH and RMH*, unreported, High Court, Budd J, May 1996).

Hague convention

The *Hague convention* of 1980 has set down the summary return mechanism in 73 countries for wrongfully removed or retained children. It provides a robust solution to the problem of child abduction by requiring the courts of the state to which the child has been abducted to return the child to the state from which he was taken. The convention states its objectives in article 1:

- To secure the prompt return of children wrongfully removed to, or retained in, any contracting state, and
- To ensure that rights of custody and access under the law of one contracting state are effectively respected in the other contracting states.

The central principle of the convention, therefore, is that in cases of wrongful removal or wrongful retention contracting states are required to recognise the state of a child's habitual residence as being the jurisdiction best equipped to adjudicate on any disputes relating to the child. The convention is unambiguous in its objective of seeking to secure the return of the child to the jurisdiction of his habitual residence.

The 1980 convention applies to any child who was 'habitually resident' in a contracting state immediately before he was abducted. In the recent case of *EM v JM* (unreported, High Court, 18 July 2002), O'Donovan J held that 'habitual residence' and 'ordinary residence' amount to one and the same thing and means the place where someone lives. To trigger the mechanisms of the convention, there must have been a wrongful removal of the child from the place where he was habitually resident.

Rights of custody

The removal or retention of a child is wrongful, within the meaning of the convention, where it is in breach of a right of custody as defined in article 3. This article gives 'rights of custody' a very wide interpretation and specifies three possible legal origins of a right of custody:

- By operation of law, or
- By reason of a judicial or administrative decision, or
- By reason of an agreement having legal effect under the law of that state.

Article 3 requires that rights of custody were actually exercised at the time of the removal. It should be noted that in *P v B* ([1994] 3 IR 507), the Supreme Court unequivocally determined that within *Hague convention* proceedings, the Irish courts should not decide the merits of a custody dispute until it has been determined that a child is not to be returned under the convention (see also *W v W* [1993] 2 FLJ 47).

The scope of the term 'rights of custody' was considered in *HI v MG* ([1999] 2 ILRM 22). The applicant, an Egyptian citizen, married the respondent, a British citizen, according to the rites of the Muslim faith. The Islamic marriage ceremony was not recognised by New York law. Following the removal by the respondent of her son H to this jurisdiction, the applicant, a non-marital father, sought the return of H under the *Child Abduction and Enforcement of Custody Orders Act, 1991*.

It was submitted on behalf of the applicant that he was entitled to apply to the New York courts for rights to custody of or access to H, once the issue of paternity was formally confirmed. The defendant had acknowledged that the plaintiff was H's father; therefore, he had inchoate rights in respect of the child, which would almost inevitably have crystallised into established rights. It was submitted that he should then be entitled to invoke the 1980 *Hague convention*.

The Supreme Court, however, reversing the finding of the High Court, rejected the assertion that the requested state should have regard to an undefined body of inchoate rights not recognised by that state. Keane J, delivering judgment for the majority, stated that the term 'rights of custody' did not embrace 'an undefined hinterland of inchoate rights of custody, not attributed in any sense by the

law of the requesting state to any party asserting them or to the court itself'.

Defences under the convention

A defendant in *Hague convention* proceedings may find recourse in the 'defences' provided by articles 13 and 20. That said, it is only a very small proportion of cases where return orders are not made on the basis of one of the defences being established. Return orders always specify a country, rather than a specific place or person.

The court is not bound to order the return of the child if the person, institution or other body opposing the return establishes that:

- There was consent to the removal/retention
- There was acquiescence in the removal/retention
- Proceedings are instituted after one year has elapsed since the wrongful removal and it is demonstrated that the child has settled in his new environment
- There is a grave risk that to return the child would expose him to physical or psychological harm or otherwise place him in an intolerable situation
- The child objects to being returned and has attained an age and maturity at which it is appropriate to take account of his views, or
- The person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of the removal or retention, or had consented to or subsequently acquiesced in the removal or retention.

Once an applicant proves that there has been a wrongful removal or retention, the onus shifts to the respondent to establish a defence.

The *Child Abduction and Enforcement of Custody Orders Act, 1991* confers exclusive jurisdiction in convention cases on the High Court, subject to an appeal to the Supreme Court. It is important to note that articles 3 and 4 of the *Hague convention* are conditions precedent to any application under that convention: the child must have been under 16, the child must have been wrongfully removed or retained, and the child must have been habitually resident in the contracting state immediately before the breach.

High risk of abduction

Where parents feels that their child may be abducted from Ireland, they can apply to the Circuit Court or the High Court for an injunction restraining the removal of the child, together with an order permitting a port alert and notification of the airports and the gardaí.

They can also apply to the courts for orders under section 11 of the *Guardianship of Infants Act, 1964* and section 37 of the *Child Abduction and Enforcement of Custody Orders Act, 1991*. The latter section confers extensive powers on a member of An Garda Síochána to detain a child who he reasonably suspects is about to be, or is being, removed from the state in breach of the *Hague convention*. Practitioners should consider invoking the wardship jurisdiction where a child may be removed to a non-convention country.

Article 8 of the *Hague convention* states: 'Any person, institution or other body claiming that a child has been removed or retained in breach of

RECOMMENDATIONS FOR REFORM

Child abduction within the state

Section 16 of the *Non-Fatal Offences Against the Person Act, 1997* established a new offence of abduction of a child under the age of 16 out of the state by his or her parent or guardian. While this section makes abduction out of the state an offence, it does not appear to cover taking a child within the state. The latter situation can only be dealt with through normal custody proceedings. Section 16 of the *Non-Fatal Offences Against the Person Act, 1997* should therefore be amended without delay but in a manner that will not prejudice domestic violence victims who leave the family home to escape violence. Similarly, section 36 of the *Child Abduction and Enforcement of Custody Orders Act, 1991* should be amended. This section, which gives the court the power to order the disclosure of a child's whereabouts, is confined to child abductions out of the state, but does not appear to cover a situation where a child is not taken out of the country.

Domestic violence

The 1980 *Hague convention* can operate unjustly when applied to domestic violence victims who abduct to escape that violence. The courts of the member states are only now waking up to the injustices that can result from applying the 1980 *Hague convention* to domestic violence victims (see *Re F (Child abduction: risk if returned)* [1995] 2 Fam L Rep 31). Greater efforts must be made to be sensitive to the 1980 *Hague convention*'s remedy of return in circumstances where the abductor is a victim of domestic violence.

Rights of non-marital father

The rights of non-marital fathers under the 1980 *Hague convention* present particular difficulties and need to be addressed, given the fact that in a number of countries, including Ireland, they do not have an automatic right to custody equivalent to those of the married parents.

Delay

Time is of the essence in child abduction cases. Article 11 of the 1980 *Hague convention* states that applications should be resolved within a six-week period. In *S v S* ([1998] 2 IR 244), the Supreme Court expressed its concern at the considerable delay (of 18 months) between the date of the commencement of the High Court proceedings seeking the return of the children in question and the date on which the matter concluded in the Supreme Court.

Noting that delay has the potential to defeat the purpose of the convention, Denham J said that parties and professionals should display special diligence in expediting child abduction proceedings. The current delay in the procurement and completion of social reports in Ireland and the difficulties encountered in retaining guardians *ad litem* must surely fall to be considered in this context.

Continuity of judges

There is a lack of continuity in the judges hearing convention cases. This is a matter that can be addressed with relative ease.

Mediation as a solution

It is obviously desirable for all parties that, if at all possible, a solution be reached by means other than court proceedings. To this end, mediation should be actively promoted to help secure the return of the child to the parent who has the legal custody.

custody rights may apply either to the central authority of the child's habitual residence, or to the central authority of any other contracting state, for assistance in securing the return of the child'.

In summary, the 1980 *Hague convention* establishes a procedure where a left-behind parent applies to the central authority in his or her own state for the return of his child. The central authority then passes the application to the central authority in the state to which the child has been removed. Proceedings are brought in that jurisdiction to have the child returned summarily under the convention. Section 9 of the *Child Abduction and Enforcement of Custody Orders Act, 1991* requires the central authority to take the appropriate action to secure the return of the child.

Since the implementation of the *Non-Fatal Offences Against the Person Act, 1997*, parental child abduction has been a criminal offence. Under section 16 of that act, where a child is under the age of 16 years, it is an offence for any person (a parent, a guardian, or a person to whom custody of the child has been granted by a court) to take, keep or send the child out of the state in contravention of a court order without the consent of any other guardian. This offence attracts a maximum sentence of seven years' imprisonment and entitles the gardaí to arrest on suspicion of an attempted abduction. Section 17 of the *Non-Fatal Offences Against the Person Act, 1997* can be invoked where a non-guardian abducts a child.

'It would appear that parental child abduction is a growing problem in the Irish Muslim community'

Sharia law

It would appear that parental child abduction is a growing problem in the Irish Muslim community. At the centre of this problem are tensions between Irish and Sharia law. Sharia law – Islamic religious law – is an all-encompassing religious law that governs all family relationships in the Islamic world, independent of any state interference. Under Sharia law, a Muslim parent is required, without exception, to bring his or her children up as a Muslim. The Muslim parent may therefore argue that he is justified, once conflict arises, in using this as an excuse to abduct his children for the purpose of taking them back to an Islamic state. That said, there is no moral or legal justification for the use of culture for the purpose of the abduction of a child.

On 22 August 2002, Morocco became the first Muslim state to ratify the *Hague child protection convention 1996*. This is a significant development and one that, it is hoped, will facilitate close co-operation between Morocco and the other state parties to the convention in solving the complex problem of child abduction.

Forthcoming changes

'Complete automatic enforcement' is the basis of an EC proposal for a new council regulation modifying or repealing *Brussels II* (known as *Brussels IIA*). A fully automatic enforcement regime takes no account of the fact that circumstances change rapidly in child matters. Indeed, the interlocutory nature of a parental responsibility order makes it unsuitable for automatic recognition and enforcement. While the remedy of automatic return works well if the abductor is a non-custodial parent, it is inappropriate when the abductor is a primary carer who is seeking protection from the other parent's violence.

At their council meeting of 29 November 2002, the EU justice ministers addressed the relationship between *Brussels IIA* and the 1980 *Hague convention*. It was agreed that the court in the child's home country is to have jurisdiction to make rulings on custody and access rights. The exception to this is where the child has been living with the non-custodial parent for over a year, and the custodial parent has made no request for his or her return.

New provisions

Under the new proposed regulation, the courts of the requested member state can continue to refuse to return a child by invoking the defences provided by the 1980 *Hague convention*.

- Article 11 requires that the court to which such an application has been made issues a judgment on custody without delay, and, in doing so, the child must be heard unless it is inappropriate because of his age and maturity
- Article 11(3) of the proposed regulation provides that the court shall, unless exceptional circumstances make this impossible, issue its order no later than six weeks after it is seised of the application. Significantly, as regards the return of the child, a court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to be heard
- Under article 11(6), if a court issues an order for non-return under article 13 of the 1980 *Hague convention*, the court must send a copy of the court order on non-return and the relevant documents to the competent court in the member state where the child was habitually resident immediately before the wrongful removal or retention. The latter court must receive all the mentioned documents within one month from the date of the non-return order.

The court in the member state where the child was habitually resident immediately before the wrongful removal or retention is expected to invite the parties, including the health board, to make submissions within three months of the date of the notification. Should the judgment on custody involve the return of the child, it will take precedence over a non-return order made under article 13 of the 1980 *Hague convention*.

The provisions on the rights of the child in the proposed regulation are very much to be welcomed and will require important procedural changes in Irish domestic law. Any such changes will need to be backed up with adequate public funding of legal representation for children.

In summary, the effect of the proposed regulation will, in my opinion, be to change the application of the 1980 *Hague convention* within the EU. It will

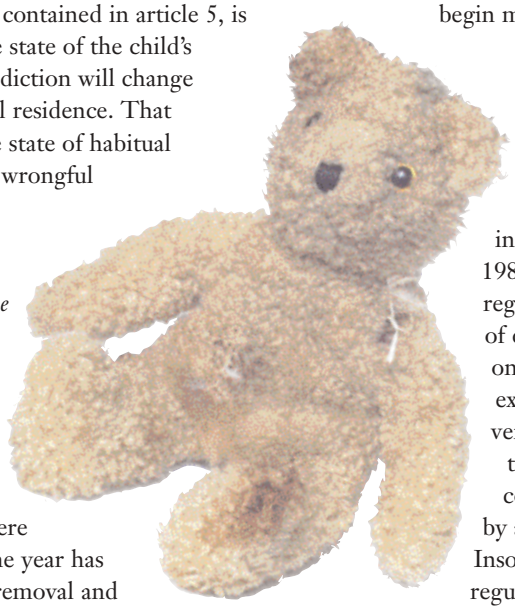
allow courts in the member states to which the child has been abducted to make non-return orders under the convention, but leave the courts of the child's habitual residence to make final orders on custody according to the merits until the child has acquired a habitual residence in another member state.

A different regime will apply to abduction within member states and outside such states. This is regrettable, given the fact that the majority of applications to member states come from outside the European Union. While *Brussels IIA* will take precedence where the child is within the EU, the 1980 *Hague convention* applies where the child is outside the European Union. This should make for some interesting forum shopping by personal litigants.

Hague child protection convention 1996

The *Hague child protection convention 1996* came into force on 1 January 2001. The 1996 convention has a potentially much wider scope than any of the other Hague conventions affecting children. Its ambit is wider than that proposed under *Brussels IIA*. Ireland has already passed the implementing legislation in the form of the *Protection of Children* (Hague Convention) *Act, 2000*. At their meeting on 29 November last, the EU council approved a draft decision authorising the member states to sign the 1996 convention. A declaration attached to the decision states that this convention is to enter into force at the same time as the *Brussels IIA* regulation.

As regards jurisdiction, there are a number of rules dealing with different aspects of the 1996 convention. The main rule, contained in article 5, is to ascribe jurisdiction to the state of the child's habitual residence, and jurisdiction will change with any changes in habitual residence. That application of the law of the state of habitual residence is unaffected by a wrongful removal or retention unless circumstances similar to the exceptions to parental child abduction in the 1980 *Hague convention* are applicable.



Article 7 provides that, in cases of wrongful removal or retention, jurisdiction remains in the state of the child's former habitual residence unless there has been acquiescence or one year has elapsed since the wrongful removal and the child is settled in its new environment. Authorities can decline jurisdiction on the basis of *forum non conveniens* (the doctrine that gives courts a discretionary power to refuse to take jurisdiction if there is some other available forum which is clearly more suitable for the trial of the case).

As with other modern child conventions, it will be incumbent on each member state to establish a central authority to assist co-operation between states to fulfil the purposes of the 1996 convention. Article 32 could be useful in the context of child abduction in that it provides that the authorities of another state may, for specified reasons, request the central authority of a child's habitual residence to begin measures to protect a child's person. In summary, the 1996 *Hague convention* provides an important additional control on international child abduction.

Compared to other international instruments, the 1980 *Hague convention* is generally regarded as a success. The number of cases where returns are refused on the basis of one of the exceptions having been proven is very low. It would seem, however, that the progress achieved by the convention could be imperilled by a competing EU instrument. Insofar as the proposed *Brussels IIA* regulation will impact on the client, any material conflict in substance or practice between it and the 1980 *Hague convention* is likely to cause difficulty, uncertainty and increased costs. The advantages brought about by an added tier of legislation in the form of the draft regulation are not obvious, though the pitfalls and tripwires are many. G

Geoffrey Shannon is the Law Society's deputy director of education.

CHILD ABDUCTION RULES

Statutory instrument 94 of 2001 sets down the rules regarding child abduction and inserts order 133 into the *Rules of the Superior Courts*. Rule 2 principally governs applications for the return of a child removed to or from the state. It provides that all applications shall be brought by way of special summons.

Rule 2 requires an affidavit verifying proceedings and having regard to the matters detailed in article 8 of the 1980 *Hague convention* (rule 3(1)). The affidavit should, where possible, be accompanied by the following:

- Information on the identity of the applicant, the child and the person alleged to have removed or retained the child
- The child's birth certificate, where available
- The grounds on which the application for the return of the child is based
- All available information as to the child's whereabouts and the identity of the person with whom the child is presumed to be.

Rule 4 provides that a respondent may deliver a replying affidavit, which must be served on the applicant within seven days of the grounding affidavit being served. The replying affidavit must detail the grounds of the defence that will oppose the application (rule 4(2)). Rule 4(3) enables the applicant to file a further affidavit within seven days of the replying affidavit being served, to respond to any issue or matter alluded to by the respondent.

Rule 5 requires the court to facilitate an early hearing, which is to be conducted on the basis of affidavit evidence only, save in exceptional circumstances where the court may 'direct or permit oral evidence to be adduced'.

The changing of DISCOV

The Master of the High Court, Edmond Honohan, recently issued a series of judgments clarifying the practice and procedure for seeking discovery of documents. Here, Andrew Fitzpatrick analyses the master's decisions and provides draft documentation that should ensure your discovery application meets with success

MAIN POINTS

- Recent judgments in the Master's Court
- *Rules of the Superior Courts*
- Draft documentation for practitioners

While order 31, rule 12(1) of the *Rules of the Superior Courts* has always provided for two conditions to be met by an applicant seeking an order for discovery (that the documents sought relate *'to any matter in question therein'* and that discovery be *'necessary for disposing fairly of the cause or matter or for saving of costs'*), the Irish courts frequently applied the first condition (the 'relevance' test) but did not examine the effect of the second (the 'necessity' test) in any great detail.

The authority dealing with the relevance test effectively began and ended with the 1967 judgment of Kenny J in *Sterling-Winthrop Group Limited v Farbenfabriken Bayer Aktiengesellschaft* ([1967] IR 97). He held that 'every document relates to the matters in question in the action … which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the [applicant] to advance his own case or to damage the case of his adversary'.

For the following 30 years, this was the sole test applied by the courts when considering applications for discovery and was consistently followed without variation and without any analysis of the necessity test.[1] Consequently, as the categories of document that satisfied this definition were quite broad, it used to be the case that one could obtain discovery of almost any document so long as it was possible to make some tenuous connection between it and the matters in issue in the case.

The face of discovery began to change in 1999 with the Supreme Court judgment in *Brooks Thomas Limited v Impac Limited* ([1999] 1 ILRM 171). In that case, the plaintiff had brought an action claiming that the defendant had been negligent and in breach of a contract to provide management consultancy services and sought discovery of all documents 'indicating the Impac approach to management consultancy'. Having observed that that it would be no answer to the plaintiff's claim for the defendant to 'point to any of these books and say that they followed what is laid down here' (at p176), the court held that discovery

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'hardly seems necessary when it is remembered that the respondents must first and foremost show a breach by the [defendant] of some obligation or other … arising out of the contract/relationship … which in itself would entitle the respondents to succeed'.

The court concluded by observing that because of the growth in the number of discovery applications coming before the courts, the Superior Court Rules Committee might consider changing the rules so as to require a party seeking discovery to file an affidavit stating why it needed discovery of the particular documents.

Material reasons

The committee considered this recommendation and, in 1999, order 31, rule 12 RSC was amended by the entry into force of the *Rules of the Superior Courts (No 2) (Discovery), 1999* (SI 233 of 1999). Intending discovery applicants were now required to first serve the respondent with a letter specifying 'the precise categories of documents required and … the reasons why each category of document is required'. One of the effects of this amendment is that practitioners now need to ask themselves: 'what documents do I want and why do I need them?'

The master of the High Court has delivered a series of written decisions that aim to provide guidance to practitioners on how to answer these questions. The most recent are *Kelly v Van Den Burgh Foods Limited and Another* (unreported, 16 January 2003) and *Clarke v Drogheda Corporation* (unreported, 16 January 2003). These cases effectively summarise the master's approach when considering applications for discovery and are discussed in detail below.

In *Kelly v Van Den Burgh Foods Limited and Another*, the master outlines several factors that should be considered in discovery applications, of which the most pertinent are:

'b) Only material facts ought to have been alleged: if non-material (or 'surplus') facts have been alleged, discovery will not be granted …

d) Only documents which may yield evidence probative of a material fact will be discoverable …

e) Has the party seeking discovery other proof or proofs of

DRAFT LETTER OF DISCOVERY

Re: Mark Smith v Peter Jones

Dear Sirs,

We refer to the above matter and hereby request that your client make voluntary discovery of the following categories of documents:

a) All medical records relating to the plaintiff for a period of five years prior to the date of the accident the subject matter of these proceedings
Reason: The plaintiff has claimed in the statement of claim delivered herein that he has suffered extensive injuries to his spine. The defendant disputes this claim and notes that the particulars of personal injury disclose that, prior to the accident, the plaintiff suffered from a painful condition of the lumbar spine. The documents are relevant to the state of the plaintiff's health at the time of the accident and to the relationship between the lumbar spine condition and the injuries of which he now complains

b) All documents or memoranda concerning or relating to any earnings, business interest, work or gainful employment carried on by the plaintiff in the five-year period prior to the alleged accident the subject matter of these proceedings
Reason: The plaintiff has claimed that as a result of the alleged accident, he suffered serious injuries which he claims have caused him to lose earnings both immediately after the accident and into the future. The above documents will allow the defendant to ascertain the earnings received by the defendant in the five-year period prior to the alleged accident and the relationship between that figure and the amount of earnings claimed to have been lost

c) All documents or memoranda concerning or relating to instructions and/or training as received by the plaintiff from the defendant or any other source
Reason: In the particulars of contributory negligence pleaded herein, the defendant has alleged that the plaintiff failed to undertake the task as he had been trained. The above documents will provide evidence of the nature of the training provided to the plaintiff

d) All documents or memoranda recording the contents of any communication between the parties during the two-month period prior to the date of the conclusion of the contract the subject matter of these proceedings
Reason: The pre-contract representations made by the parties to the proceedings are in issue and the above documents will provide evidence of what representations were made by the parties prior to the conclusion of the contract.

Accordingly, please confirm that you will give voluntary discovery of the said documentation within 21 days hereof or alternatively an application will be brought to this honourable court seeking said discovery pursuant to order 31, rule 12(1) RSC.

Please note that any agreement on your part to make discovery would require same to be made in like manner and form, and would have such effect as if directed by order. Please also note that any failure on your part to honour any such agreement would result in an application being brought to this honourable court pursuant to order 31, rule 21 RSC.

[Author's commentary: Where a party agrees to a request to make voluntary discovery but subsequently fails to honour that agreement, order 31, rule 12(3) allows for an application to be made to have the plaintiff's claim dismissed or the defendant's defence struck out, depending on the identity of the defaulting party.

However, such an application may only be brought where the original letter seeking voluntary discovery contains the statements contained in the foregoing paragraph. If no such paragraph appears, an order for discovery will have to be sought before proceeding with any subsequent application.]

DRAFT NOTICE OF MOTION

THE HIGH COURT
RECORD No 123P/2000

Between: Mark Smith (plaintiff) and Peter Jones (defendant)

NOTICE OF MOTION

Take notice that on the ... day of ... 2003 at 10.30 in the forenoon or the first available opportunity thereafter, counsel on behalf of the defendant herein will apply to the master of this honourable court sitting at the Master's Court, The Four Courts, Dublin 7 for:

1) An order for discovery of all documents in the power, procurement or possession of the plaintiff in the following categories:
   a) all medical records relating to the plaintiff for a period of five years prior to the date of the accident the subject matter of these proceedings
   b) all documents or memoranda concerning or relating to any earnings, business interest, work or gainful employment carried on by the plaintiff in the five-year period prior to the alleged accident the subject matter of these proceedings
   c) All documents or memoranda concerning or relating to instructions and/or training as received by the plaintiff from the defendant or any other source
   d) All documents or memoranda recording the contents of any communication between the parties during the two-month period prior to the date of the conclusion of the contract the subject matter of these proceedings.

   [Author's commentary: It should be noted that SI 233 of 1999 does not require that the reasons for which discovery of the documents is sought be re-stated in the notice of motion.]
2) Such further and other orders
3) An order providing for the costs of this application.

Which said application will be grounded upon the proceedings already had herein, this notice of motion and grounding affidavit of Roy Keane, the affidavit of service thereof, the nature of the case and the reasons to be offered.

Date:
Signed:

the fact to which the documents are stated to relate? If so, discovery is not necessary'.

From this it can be seen that that the master divides allegations of fact into two categories, material facts and surplus facts, and in order to satisfy the necessity test an applicant must show that the facts to which the requested documents relate are 'material facts'.

What then is a 'material fact'? The master makes the following comments:

'Difficulty often arises as to what is or is not a material fact. Materiality is a question of law. The essential ingredients of the (usual) cause of action in negligence are:

a) The circumstances giving rise to the existence of a duty of care
b) The behaviour of the defendant alleged
   (a) to fall short of the reasonable care to which the plaintiff is entitled either under common law or pursuant to statute, and
   (b) to have caused or contributed to the accident.
   Both these criteria (a) and (b) have to be met ... [and]
c) The injury or loss sustained by the plaintiff'.

The master has listed here all the facts that must be proved in order to succeed in the particular cause of action. Thus, in order to obtain discovery, practitioners must show that the requested documents relate to issues of fact upon which the applicant must succeed if he is to win his case.

The master's description of facts that fail the test of materiality appears to be shorthand for facts which are 'non-causal'. The concept of a non-causal fact was dealt with by Murphy J in the case of *Cosgrove v Ryan and the ESB* (unreported, 18 December 2002), who cited paragraph 2.18 of the most recent edition of *Law of torts* by McMahon and Binchy, and continued: *'McMahon and Binchy classify causation (in the sense of searching for factual causes to an event) as a preliminary matter, intended to act as a filter for unstateable claims and to eliminate factually inaccurate or far-fetched explanations for an event rather than an element the proof of which is necessary to place legal responsibility upon a defendant. They state that "when the field is narrowed by the elimination of the factually irrelevant causes, the inquiry must continue along those causes considered to be factually relevant, to establish whether they are legally relevant to the court's inquiry".'*

Other evidence

Although the sorting of allegations of fact into 'material' and 'surplus' piles may look like prejudgment of the factual issues in a case, such a criticism would only stand if the master embarked on an analysis of the likely strength or weakness of the evidence that might be adduced by each of the parties at the trial of the action. However, the master does not take this approach and merely employs the methodology of the Supreme Court in *Brooks Thomas Limited v Impac Limited* and examines the elements that each party needs to prove in order to succeed in the case and whether the documents sought are relevant to these elements.

In *Clarke v Drogheda Corporation*, the master suggests the following list of questions that must be asked by applicants for discovery:

'Practitioners need to ask themselves simple questions: what are the facts in dispute? which of these are material, and which surplus? what documents might lead to probative (and admissible) evidence concerning the disputed material facts? can I prove the disputed fact without discovery?'

It is this final question that practitioners should especially note. Formerly, it may have been the case that a party could obtain discovery of documents which related to a certain issue even though one of his own witnesses would be able to give evidence on that same issue at the trial of the action. Now, however, if at the trial of the action a party will be able to call a witness who will give evidence on a particular issue, that party does not need discovery

of documents which relate to that issue.

Consequently, as can be seen from *Kelly v Van Den Burgh Foods Limited and Another*, discovery of safety statements will not be granted as such a document 'is never the yardstick by which the court determines the measure of what constitutes "reasonable care": that adjudication is by reference to the standard of the reasonable man'. This would appear to have been the rationale followed by the Supreme Court in *Brooks Thomas Limited v Impac Limited*. Therefore, where safety is in issue, the master has held that a plaintiff does not need access to the safety statement to prove want of care; he can do that by simply calling expert engineering evidence.

Furthermore, the master has held on previous occasions that plaintiffs in personal injury actions do not need discovery of any accident report form that may have been prepared in respect of their accident; rather, they can simply give their own evidence of what happened.

Order for costs

In summary, in order to obtain discovery of a particular category of document, an applicant will have to demonstrate the following:

a) That the documents in question relate to issues of fact upon which the applicant must succeed if he is to win his case against the respondent, and
b) That he will not be able to prove his case on this issue unless discovery of the documents is ordered.

Apart from forcing practitioners to consider the necessity of their applications for discovery, the effect of the *Rules of the Superior Courts (No 2) (Discovery), 1999* was broadened by the judgment of Morris P in *Swords v Western Protein Limited* ([2001] 1 IR 324), where he held that where the letter used to seek voluntary discovery failed 'to pinpoint the documents … required and … give the reasons why they were required', the master had no power to make a determination on the application.

Since it was handed down, this decision has led to numerous applications for discovery being struck out in the Master's Court, with an order for costs against the relevant applicant, on the grounds that the letter used by the applicant to seek voluntary discovery failed to sufficiently identify both the documents sought and the reasons for which their discovery was required.

One of the reasons behind the large number of dismissals is that many parties seeking discovery have failed to appreciate the exacting nature of the burden placed upon them by *Swords v Western Protein Limited*. On the basis of the master's previous decisions, the draft letter, notice of motion and grounding affidavit (**see panels**) are offered as sample documents that in previous applications have been upheld as complying with Morris P's *dicta*. Commentaries on certain aspects of these documents appear in square brackets.

DRAFT AFFIDAVIT

THE HIGH COURT
RECORD No 123P/2000

Between: Mark Smith (plaintiff) and Peter Jones (defendant)

AFFIDAVIT OF ROY KEANE

I, Roy Keane, solicitor, of Station Road, Dublin 2, aged 18 years and upwards, make oath and say as follows:

1) I am a solicitor in the firm of Murphy Solicitors, solicitors on record for the defendant herein, and I make this affidavit for and on his behalf and from facts within my own knowledge save where otherwise appears and whereso otherwise appearing I believe the same to be true and accurate in every respect
2) I beg to refer to the proceedings herein. As appears from the statement of claim herein, the plaintiff claims that on the … day of …
[Author's commentary: A brief statement of the circumstances of the case may be inserted here but is not strictly required.]
3) I wrote to Messrs McGinty Solicitors, solicitors on record for the plaintiff in the proceedings herein, on the … day of … 2003 seeking voluntary discovery of the following documents:
   a) all medical records relating to the plaintiff for a period of five years prior to the date of the accident the subject matter of these proceedings
   b) all documents or memoranda concerning or relating to any earnings, business interest, work or gainful employment carried on by the plaintiff in the five-year period prior to the alleged accident the subject matter of these proceedings
   c) all documents or memoranda concerning or relating to instructions and/or training as received by the plaintiff from the ESB or any other source
   d) All documents or memoranda recording the contents of any communication between the parties during the two-month period prior to the date of the conclusion of the contract the subject matter of these proceedings.

   I beg to refer to the said letter, upon which marked with the letters **RK1** I have signed my name prior to the swearing hereof
4) I say that the reasons for which the defendants seek discovery of the said documents are set out in the said letter
[Author's commentary: While SI 233 of 1999 states that the reasons for which discovery of the documents is sought be re-stated in the grounding affidavit, the master has held that an averment is sufficient.]
5) I say that to date the plaintiff has failed to make discovery of the documents set out at paragraph 3 above
6) I say that discovery of the documents set out at paragraph 3 above is necessary for disposing fairly of the cause herein and/or for saving costs in the following circumstances: the plaintiff has no evidence of …/ the locus of the accident has been substantially altered since the date of the accident …
7) Accordingly, I beg this honourable court for an order in the terms of this notice of motion together with an order for costs.

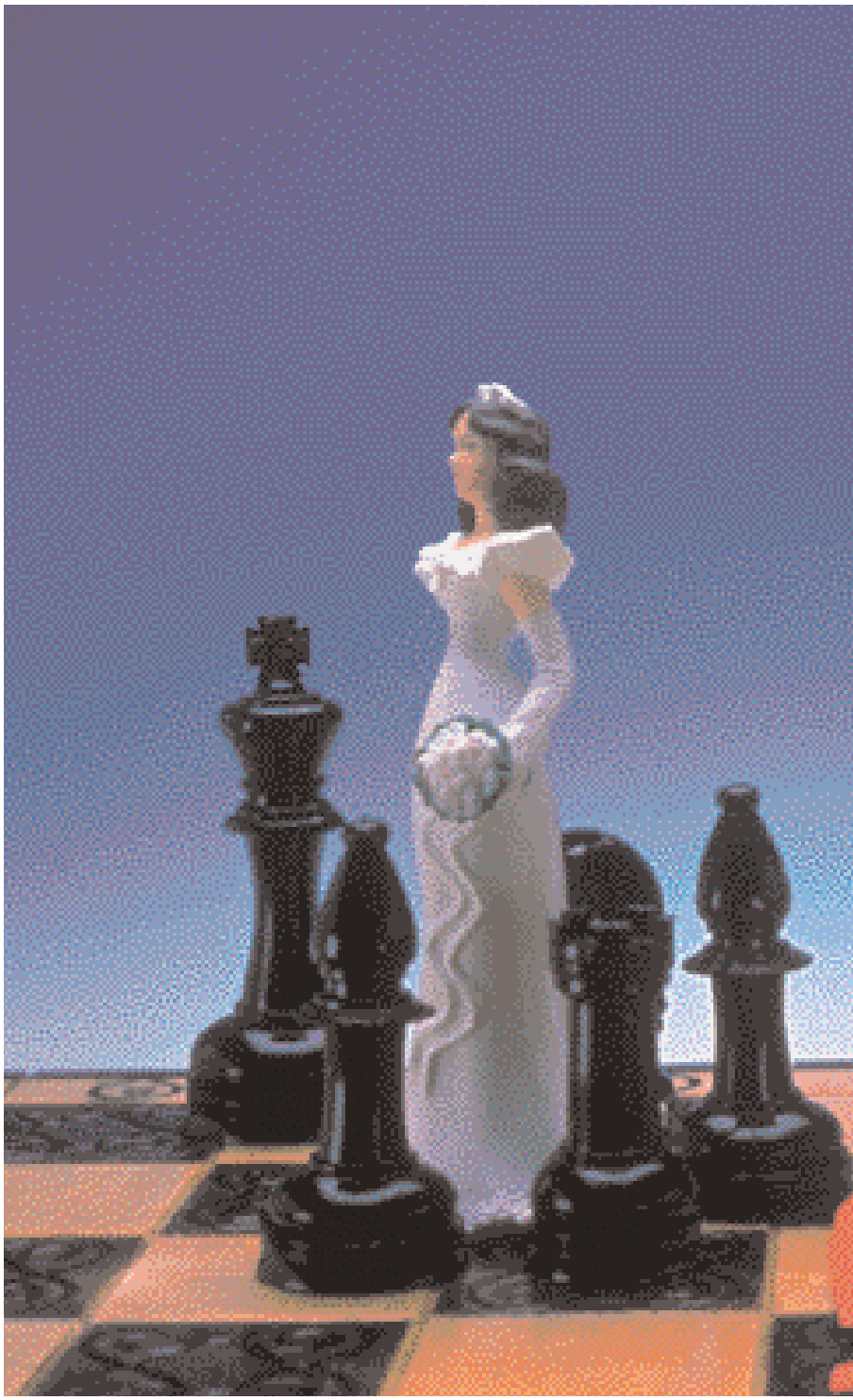
Footnote

1 See *Irish Shell Limited v Dan Ryan Limited* (unreported, Costello J, 22 April 1986), *Woodfab Limited v An Coillte Teoranta and Medite of Europe* (unreported, Flood J, 11 August 1995), and *Aquatechnologie Limited v National Standards Authority of Ireland* (unreported, Supreme Court, 10 July 2000). G

Andrew Fitzpatrick BL is a Dublin-based barrister.

SPLITDE

Two recent cases have set a benchmark for the distribution of assets in 'clean-break' divorce settlements. Ann FitzGerald discusses the judgments and the new questions they raise for family lawyers



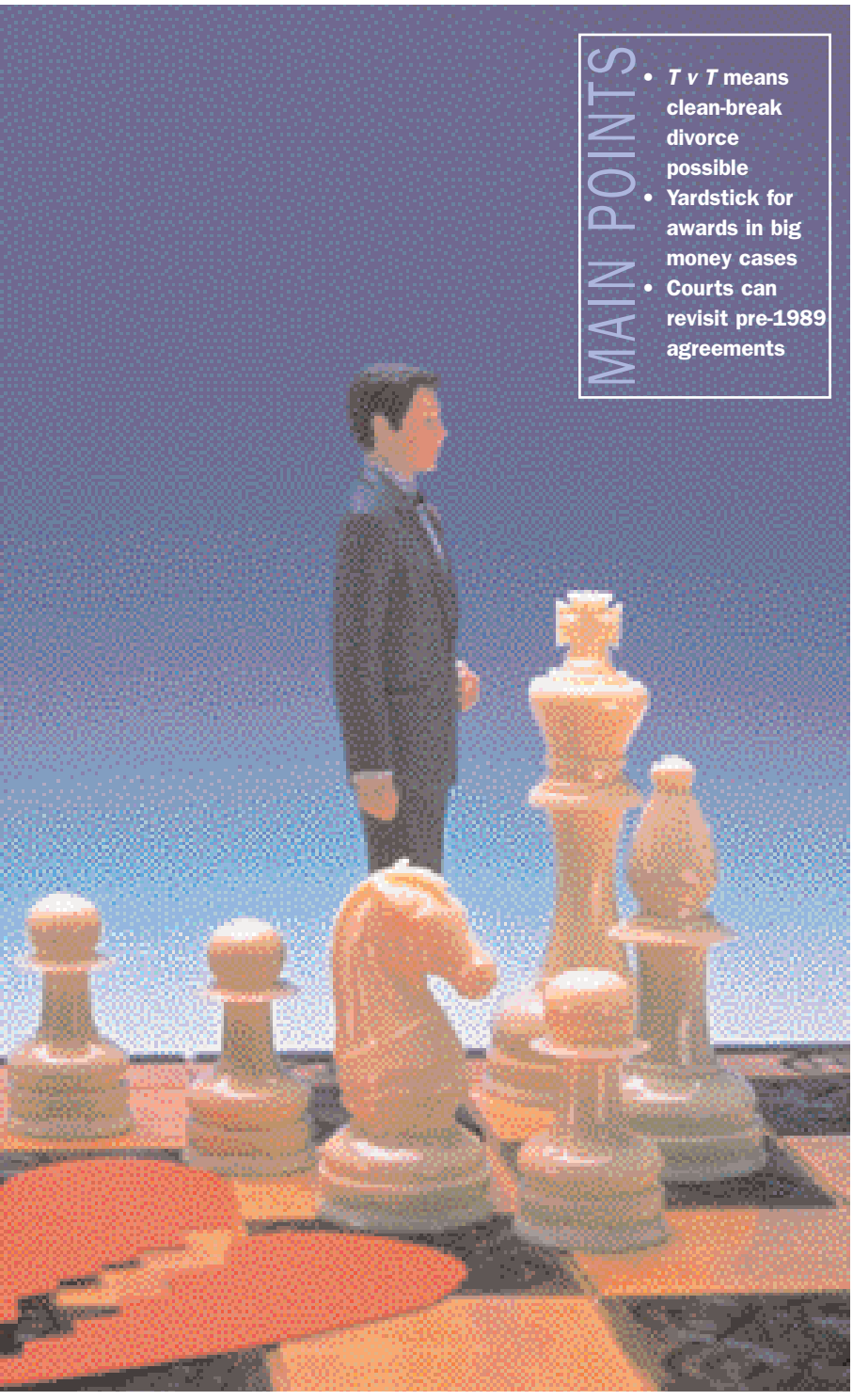
Perhaps one in five Irish marriages now run into trouble, yet the development of our jurisprudence in the area of what constitutes in financial terms a fair outcome of divorce or judicial separation proceedings is only in its infancy. Is it possible to predict the likely distribution of family assets in these proceedings?

Judicial separation was first introduced here in 1989 and divorce in 1997. The number of cases coming before the courts is increasing sharply. They are more complicated and frequently there are highly valuable estates involved. However, there have been few written judgments from the courts and so any new ones are greeted with great interest.

Even if only the well-off can afford to contemplate proceedings in the High Court, nonetheless the judgments emanating from there and from the Supreme Court provide an insight into how the judiciary views the role of either spouse in a marriage. Up to recently, the leading case in this area was the High Court judgment of Mrs Justice Catherine McGuinness in *D v D* in 1997, which addressed the issue of finality, finding that a clean break was not permitted under Irish divorce or separation legislation.

The seminal case of *T v T* (which produced five written judgments from the Supreme Court in October 2002) demonstrated how a wealthy couple fared when that court was called upon to ensure so-called proper provision was made for the wife, when her husband sought a decree of divorce. These judgments will form the basis of guidelines for property settlement on divorce and separation into the future.

CISIONS



MAIN POINTS

- *T v T* means clean-break divorce possible
- Yardstick for awards in big money cases
- Courts can revisit pre-1989 agreements

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In *T v T*, the husband appealed an earlier High Court order granting him a divorce, subject to payment of a lump sum of £5 million (€6.35 million) and a pension adjustment order whereby the wife was to receive 55% of the accrued benefits on certain policies. The wife was also to renounce her inheritance rights against his estate. The couple married in 1980 and had three children. Both were professionals but the wife assumed the role of homemaker and curtailed her career plans, while allowing her husband to pursue his career unhindered. They separated in 1994 and at that time the husband transferred about 30% of his wealth to the wife. By the time of the divorce, he had accumulated a further £14 million (€17.78 million) approximately. Thus, the case fell into the category known as 'ample resources' (formerly referred to as a 'big money' case).

The Supreme Court dismissed the husband's appeal and made a number of cardinal findings in its judgments.

Fairness versus finality

The Chief Justice, Mr Justice Keane, disapproving of the judgment in *D v D*, declared that, where possible, and to avoid future litigation between the parties, the courts should facilitate a so-called clean break on divorce to achieve certainty. According to Mr Justice Fennelly, 'the desire of litigants for finality should not be frustrated'. This is a welcome change in approach and now allows spouses the possibility of a clean break when proper provision has been made.

The court found in *T v T* that the wife had contributed greatly to the husband's ability to accumulate wealth, even though the cream of this wealth had been accumulated *after* the separation. Mrs Justice Denham was of the view that there was a direct link between these increased assets and the wife's input into her husband's professional practice. Thus, if there was no such link and if one party after separation 'commenced and achieved success in a wholly new area', then Mrs Justice Denham suggested that these newly-acquired assets might not form part of the asset base on a divorce.

All assets in principle come into the reckoning, and to facilitate a clean break the court considered

that the 'reasonable requirement' of the dependent spouse in an 'ample resources' case called for a yardstick of 33% to 50% of the capital assets.

Frequent reference is made to the recent House of Lords judgment in *White v White* and the Court of Appeal judgment in *Cowan v Cowan*. However, direct comparison is not possible. First, the stated objective of the Irish *Divorce Act* is the need to make 'proper provision', which is not replicated in the UK legislation. Second, the clean break has been a given in the UK for many years whereas it has only become a possible option in limited cases in this jurisdiction by virtue of *T v T*. Third, the Irish *Succession Act* grants automatic inheritance entitlements to spouses. This is not mirrored in the UK.

Yardstick of equality

The UK judgments and the Supreme Court in *T v T* examined the so-called 'yardstick of equality of division' of assets. While rejecting such equality, they suggest that 'a calculation of what would be the result of equal division is a necessary cross-check against discrimination against the stay-at-home spouse' (see Thorpe LJ in *Cowan v Cowan*).

'A calculation of what would be the result of equal division is a necessary cross-check against discrimination against the stay-at-home spouse'

In plain English, our legislation does not mandate equal division because 'proper provision' is the test. Nonetheless, the trial judge should calculate what amounts to equal division so that in making 'proper provision' he or she ensures that there is no discrimination against the non-earning spouse.

In *T v T*, Mr Justice Keane declared that: *'The use of the one-third share of the estate to which the respondent would otherwise have been entitled under the* Succession Act *as a yardstick is more questionable. Such an inheritance depends on the contingency of the applicant predeceasing the respondent and, in the normal course, would, in any event, be deferred for many years. The Irish courts, however, dating from times when family law cases were far less frequent and complex, traditionally approached the assessment of maintenance on the basis that, all things being equal, the amount of maintenance should be one third of the disposable income of the earning partner, then almost invariably the husband. To that limited extent, the court might be justified in treating, in "ample resources" cases, one third of the net assets as a yardstick at the lower end of the scale'.*

So we finally arrive at a 'one third yardstick at the lower end of the scale', which indicates a distribution on divorce of not less than one third, rising up to possibly an 'equal division', depending on the factors in each case. Yet this begs the question as to why a one-third and not one-half distribution? This is not further elaborated on in the judgment of the chief justice save that reference is made to a rule of thumb calculation when assessing maintenance payments, which does not appear to have an automatic application to the distribution of capital assets. It is to be hoped that a further opportunity will arise in the future to examine this thorny issue.

Lack of money

Mrs Justice Denham's judgment provides perhaps more clarity: *'The Irish law on divorce does not provide for property division. Indeed, it is irrelevant in very many cases where there is not enough money for two homes where one had existed and where lack of money is a severe concern and limiting factor for both spouses and children. In cases of ample provision, such as this, the sums involve more than essentials. Each case must be decided on its own circumstances. However, there are relevant fundamental legal principles – such as to recognition of spouses' work in the home – as to spouses' rights under the* Succession Act *– as to the place of the family in our society.*

'Consequently, I agree with the chief justice that a figure of one third of the assets may be a useful benchmark to fairness. Against that bench may be aligned, both positively and negatively, the specific circumstances of a case, and in particular the factors set out in section 20(2)(a) to (i) of the act of 1996.

'The concept of one third as a check on fairness may well be useful in some cases; however, it may have no application in many cases. It may not be applicable to a family with inadequate assets. It may not be relevant to a family of adequate means if, for example, such a sum could only be achieved by a sale of assets which would destroy a business, or the future income of a party or parties, or if it related to property brought solely by one party to the marriage, or any other relevant circumstance. It may not be applicable to a situation where a party has wealth from his or her own endeavours to which the other party has no claim except under the factors set out in section 20(2)(a) to (i) of the act of 1996'.

The time for determination of what is so-called 'proper provision' is the date of the hearing of the divorce application, not the date of separation, nor the date when the divorce proceedings were initiated.

The concept of 'proper provision' comes directly from the wording of the divorce referendum put to the people in 1996 as the 15th amendment to the constitution, inserted in article 41, and passed by the narrowest of margins. Thus, one can only be granted a divorce by a judge if the judge is satisfied that proper provision exists or will be made for the (first) spouse and any dependent children. The criteria to be taken into account in determining this issue are elaborated on in the divorce legislation, the *Family Law (Divorce) Act, 1996*, and includes explicit recognition of the role of a spouse in 'looking after the home or caring for the family' (section 20(2)(f)) and the 'effect on the earning capacity of each spouse of the marital responsibilities assumed by each' and

'the degree to which the future earning capacity of a spouse is impaired by reason of having relinquished or forgone the opportunity of remunerative activity in order to look after the home or care for the family' (section 20(2)(g)) (**see panel**). These factors first entered the Irish legislative framework in the *Judicial Separation and Family Law Reform Act, 1989* and were repeated, with slight changes, in the later divorce legislation.

Given the magnitude of the lump sum awarded, the court made it clear that it would be 'unlikely in the extreme that a court would see fit to order payment of an increased lump sum or payment by way of maintenance', in the future, thereby effecting a 'clean break' between the parties in financial terms. In particular, the chief justice approved of this approach 'given the desirability of avoiding future litigation between spouses whose marriages have irretrievably broken down'. Mr Justice Keane went on to declare that 'it seems to me that, unless the courts are precluded from so holding by the express terms of the constitution and the relevant statutes, Irish law should be capable of accommodating those aspects of the "clean break" approach which are clearly beneficial'.

Judicial discretion

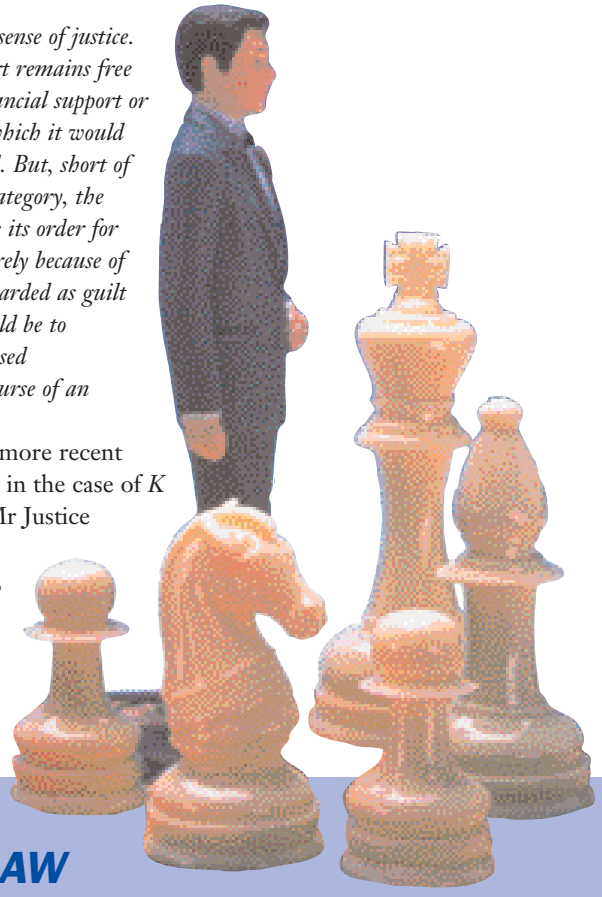
As Denham J observed in *F v F (Judicial Separation)* ([1995] 2IR 354), certainty and finality can be as important in this as in other areas of the law. Undoubtedly, in some cases finality is not possible and thus the legislation expressly provides for the variation of custody and access orders and of the level of maintenance payments. I do not believe that the Oireachtas, in declining to adopt the 'clean break' approach to the extent favoured in England, intended that the courts should be obliged to abandon any possibility of achieving certainty and finality and of encouraging the avoidance of further litigation between the parties.

It was emphasised by the court that ultimately each case must be judged on its merits and the judge should specifically examine each of the factors set out in section 20 of the *Divorce Act* so as to produce a fair result. This reliance on judicial discretion renders it difficult for lawyers to advise clients on the potential outcome of their case where no two cases can ever be the same. Further, given the *in camera* rule and its strict interpretation in this jurisdiction, much of the information emanating from the courts is anecdotal only, and this arguably does not serve the public interest.

The issue of what weight a spouse's (bad) conduct should be given as a factor under section 20(2)(i) is dealt with by Mrs Justice Denham, and she adopts with approval the approach of the former British Master of the Rolls, Lord Denning, in 1973 as follows:

'There will no doubt be a residue of cases where the conduct of one of the parties is in the judge's words "both obvious and gross", so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice. In such a case, the court remains free to decline to afford financial support or to reduce the support which it would otherwise have ordered. But, short of cases falling into this category, the court should not reduce its order for financial provision merely because of what was formerly regarded as guilt or blame. To do so would be to impose a fine for supposed misbehaviour in the course of an unhappy married life'.

We now have the more recent High Court decision in the case of *K v K*, a judgment of Mr Justice Iarfhlaith O'Neill of January 2003, which, coming hot on the heels of the Supreme Court judgment in *T v T*,



FAMILY LAW (DIVORCE) ACT, 1996, SECTION 20(2)

The court shall, in particular, have regard to the following matters:

a) The income, earning capacity, property and other financial recourses which each of the spouses concerned has or is likely to have in the foreseeable future
b) The financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future (whether in a case of the remarriage of the spouse or otherwise)
c) The standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses commenced to live apart from one another, as the case may be
d) The age of each of the spouses, the duration of their marriage and the length of time during which the spouses lived with one another
e) Any physical or mental disability of either of the spouses
f) The contributions which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse, and any contribution made by either of them in looking after the home or caring for the family
g) The effect on the earning capacity of each of the spouses of the marital responsibilities assumed by each during the period when they lived with one another and, in particular, the degree to which the future earning capacity of a spouse is impaired by reason of that spouse having relinquished or forgone the opportunity of remunerative activity in order to look after the home or care for the family
h) The conduct of each of the spouses if that conduct is such that in the opinion of the court it would in all the circumstances the case be unjust to disregard it
i) The accommodation needs of either of the spouses
j) The value to each of the spouses of any benefit (for example, a benefit under a pension scheme) which, by reason of the decree of divorce concerned, that spouse will forfeit the opportunity or possibility of acquiring
k) The rights of any person other than the spouses but including a person to whom either spouse is remarried.

makes interesting reading. (The case has not been appealed as of the date of writing.) In a lengthy and well-reasoned judgment, Mr Justice O'Neill has an early opportunity to implement the guidelines set out in the Supreme Court judgments in *T v T*.

The couple married in 1963 and there were six children of the marriage. They separated in 1980 and concluded a deed of separation as of January 1982. The husband sought a divorce in the Republic of Haiti in 1984 without notifying the wife and went on to 're-marry' in the United States in 1985. This second marriage is clearly not recognised in this jurisdiction. At the same time, he progressed from his early days on the shop floor in a factory in Britain to end up as president of a multinational company in the USA.

Meanwhile, the wife remained in Ireland caring for the six children and did not work outside the home. The husband continued to pay the original sum agreed in maintenance, which was only increased in line with the consumer price index. The judge was of the view that the husband was fortunate not to have faced an earlier variation application. The husband did make other payments in addition to the maintenance and responded to a variety of requests to defray the cost of the children's education and to contribute towards maintaining and repairing the family home, in which the wife continued to reside, although it remained jointly owned. In 1994, the wife rented out the family home and moved to live in a Dublin bedsit so that she could attend a third-level college. She completed a primary degree, an MA and contemplated further post-graduate studies. At the date of the High Court judgment, the couple were in the 40th year of their marriage.

'Should marriage provide the non-earning spouse caring for home and the children with a so-called meal ticket? Is divorce a feminist issue?'

The best years

Mr Justice O'Neill made explicit reference to the judgments in the *T v T* case and found that 'the role of the dependent homemaker and child carer, usually the wife, should not be disadvantaged in the distribution of assets by reason of having a non-economic role'. In *K v K*, the wife had spent 30 years nurturing and rearing the children of the marriage while the basis for the husband's ultimate success was in place from the breakdown of the marriage in 1980 and, as Judge O'Neill put it at page 41: 'No doubt when the separation did take place, it was probable that his freedom thereafter from day-to-day family responsibilities would have further enhanced his capacity to devote himself to the development of his career'. The wife's standard of living declined in the years subsequent to the separation, whereas by the end of the 1980s the husband's income and standard

of living had improved greatly. From the time he had moved to the US, 'he moved, as it were, in a different league and from then on enjoyed a very wealthy standard of living, commensurate with the very large income he had from then on'.

The judge went on to examine individually and at length each of the other factors set out in section 20 of the 1996 act, and, while conscious of the so-called one third yardstick at the bottom end of the scale as a bench mark, believed he would avoid any discrimination against the wife because of her status as homemaker and child carer. He ordered payment of a lump sum to the applicant of €450,000 plus the respondent's half-share in the family home, amounting to approximately 33% of the respondent's assets. In addition, he awarded maintenance to the wife of €40,000 a year, secured in part by an order over 100% of the respondent's Irish pension.

Mr Justice O'Neill concluded by declaring: *'I am quite satisfied that at the time when this application was initiated, the terms of the separation agreement fell far short of providing "proper provision" for the applicant and indeed I would be of the view that for many years prior to the initiation of these proceedings the separation*

agreement failed to make adequate provision for the applicant. The gap or shortfall that has occurred is the result of the passage of time, the limited range of legal reliefs available in 1981 and the enormous gulf that developed between the fortunes of the applicant and the respondent over the intervening years'.

The case of *K v K* dealt with a very old separation agreement entered into prior to the *Judicial Separation Act, 1989*. This act provided for legislative recognition of the stay-at-home spouse, moving away from the position up to then which gave such a spouse a shared interest in the family home or other assets only where that spouse could prove a direct or indirect contribution to the acquisition of those assets, which, more often than not, a non-earning spouse was unable to do. It was therefore quite predictable that a judge, reviewing an agreement more than 20 years later on a divorce application, would consider it just and prudent to re-open matters in the light of changed circumstances, including the more progressive legislation.

All assets considered

Insofar as it is possible to extrapolate from the particular to the general in this area of the law, let us examine suggested parameters for future cases:

1) All assets in principle, from whatever source and regardless of when acquired, come into consideration when examining what might be 'proper provision' for divorce. Inherited assets are more likely to be disregarded where the overall size of the estate for distribution is large
2) 'Old' separation agreements dating back to before the 1990s are likely to be reviewed for proper provision if a divorce is sought
3) The stay-at-home spouse (of either sex) who has given their 'best years' will be entitled to share in the good fortune of the spouse freed to develop their own career. The long shadow thrown over the accumulated wealth of the career spouse can go back more than 20 years as in the *K v K* case and is not 'disconnected' or too remote, particularly where there are numbers of dependent children
4) By contrast, a recent separation agreement or consent judicial separation entered into with appropriate advice, where all assets and the various factors have been addressed, could form the basis of 'proper provision' for divorce unless there has been a material change in circumstances
5) Where assets are limited and not in the 'ample resources' bracket, arguably a benchmark of an equal distribution of the net assets will apply, once consideration of the factors in section 20 has been made
6) Where the 'proper provision' hurdle is overcome, the question of whether this can be a final or a clean-break settlement will depend on the factors in section 20 (of the *Family Law (Divorce) Act, 1996*). Where there are ample resources, a benchmark of 33% to 50% of the net assets is suggested, possibly including capitalised maintenance into the future
7) A spouse anxious to move on and progress after a separation would be well advised – all other things being equal – to seek a divorce as soon as possible after the four years' minimum living apart period has passed so as to minimise exposure of assets acquired post-separation
8) Future variation of capital and/or maintenance is not likely where a large capital sum is awarded, thereby allowing severance in financial terms. Finality on maintenance to a spouse will be difficult to achieve, but not impossible – all the more so if dependent children remain, even with a separate award of maintenance for the children
9) The jury remains out on whether a recent separation agreement or consent order for judicial separation incorporating a clause 'in full and final settlement' is likely to hold good on a divorce. The decision in *T v T* gives grounds for optimism that it will eventually receive judicial approval, particularly where full disclosure has been made with an exchange of affidavits of means.

Debate will centre on the age-old issue of reward or compensation to the spouse with the non-economic role. This model of a marital relationship may be outdated, as Mr Justice Keane declared in *T v T* below:

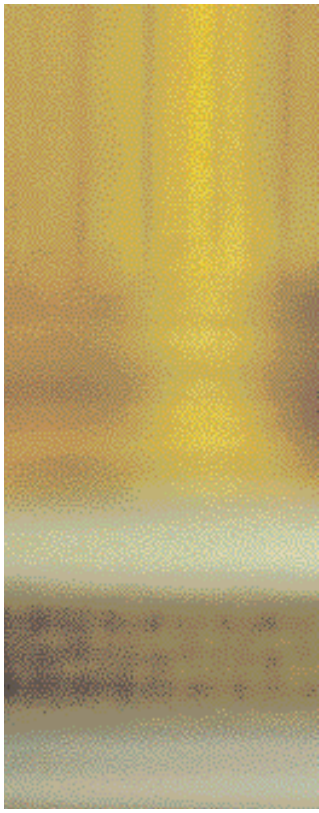
'In Irish society today, it can no longer be assumed that the husband and wife will occupy their traditional roles in which the husband has been the breadwinner and the wife the homebuilder and carer. The roles may on occasions even be reversed and, in many instances, both husband and wife will be in receipt of income from work. In those cases where one spouse alone is working and, in the result, a significantly greater responsibility for looking after the home has devolved on the other, it is clear that under section 20(f), the court must have regard to that as a relevant factor. Moreover – and this is of particular significance in the present case – the court is obliged by virtue of sub-paragraph (g) to have regard to the financial consequences for either spouse of his or her having relinquished the opportunity of remunerative activity in order to look after the home or care for the family'.

Clearly, in the Ireland of the 21st century, in many cases both spouses will engage in economic activity outside the home and thus the 'yardsticks' may have less relevance. Responsibility for the care of the children remains a live issue, and couples will make appropriate adjustment to their careers as required. However, in so-called 'ample resources' cases, one spouse may have the opportunity to accumulate far greater assets than the other, and a number of questions must be addressed: Is marriage a partnership? Should marriage provide the non-earning spouse caring for home and the children with a so-called meal ticket? Is divorce a feminist issue? And what does the Irish public want? G

Ann FitzGerald is a partner in the Cork law firm FitzGerald and O'Leary.

Accounting for

Auditors who suspect clients of serious company law offences now have to report this to the director of corporate enforcement. Solicitors can expect plenty of requests for advice from them and their clients as a result, writes Emmet Scully



The fallout from last year's Enron scandal put senior Andersen partner David Duncan and his colleagues in a US senate committee dock, because they ignored the public interest element of the auditor's job and collided with the company. At the same time, auditors in this country found themselves under a new public interest duty to report serious corporate crime to the authorities.

Section 74 of the *Company Law Enforcement Act, 2001* expands auditors' duties to report certain breaches of the *Companies Acts*. It inserts a new sub-section (5) into section 194 of the *Companies Act, 1990*, stating that:

'Where, in the course of, and by virtue of, their carrying out an audit of the accounts of the company, information comes into the possession of auditors of a company that leads them to form the opinion that there are reasonable grounds for believing that the company or an officer or agent of it has committed an indictable offence under the Companies Acts, *the auditors shall, forthwith after having formed it, notify that opinion to the director* [that is, the director of corporate enforcement] *and provide the director with details of the grounds on which they have formed that opinion'.*

By the end of 2002, the Office of the Director of Corporate Enforcement (ODCE) had received 395 reports from auditors. In a statement issued on 3 January, Director of Corporate Enforcement, Paul Appleby, said his office was getting 80 such notifications a month from auditors and predicted that the number of notifications for 2003 could be double that received in 2002.

He has issued a decision notice (*D/2002/2*, see *www.odce.ie*) giving guidance on the application of section 194(5). The ODCE prepared this in conjunction with the Auditing Practices Board (APB) and the Consultative Committee of Accountancy Bodies – Ireland (CCAB-I). In light of the fact that the APB and CCAB-I have approved the decision notice, it is likely that many auditors will rely heavily on its contents for guidance until a new statement of accounting standards is published on this topic.

While the decision notice contains a useful discussion of some of the implications of the new reporting obligation, it cannot be relied on as a legal interpretation of the legislation. In fact, the director has specifically reserved the right to take action that may or may not be in accordance with the provisions of the decision notice.

Section 194(5) is concerned with suspected indictable offences committed by a company or its officers or agents. The term 'company' means a company established under the *Companies Act, 1963* and certain preceding legislation. The obligation does not extend to companies formed outside the state or to building societies or friendly societies and so on. Appleby states in paragraph 8.7 of the decision notice that 'where the audit is of the consolidated financial statements of a group of companies, the obligation to report applies to each group company individually'.

Reasonable grounds

The officers of a company include its directors (including shadow directors, as defined in the *Companies Act, 1990*, s27), the secretary and/or the company's auditor in certain specified circumstances. The term 'agent' can conceivably include a company's solicitor where the solicitor is authorised to bind the company and is acting in that capacity.

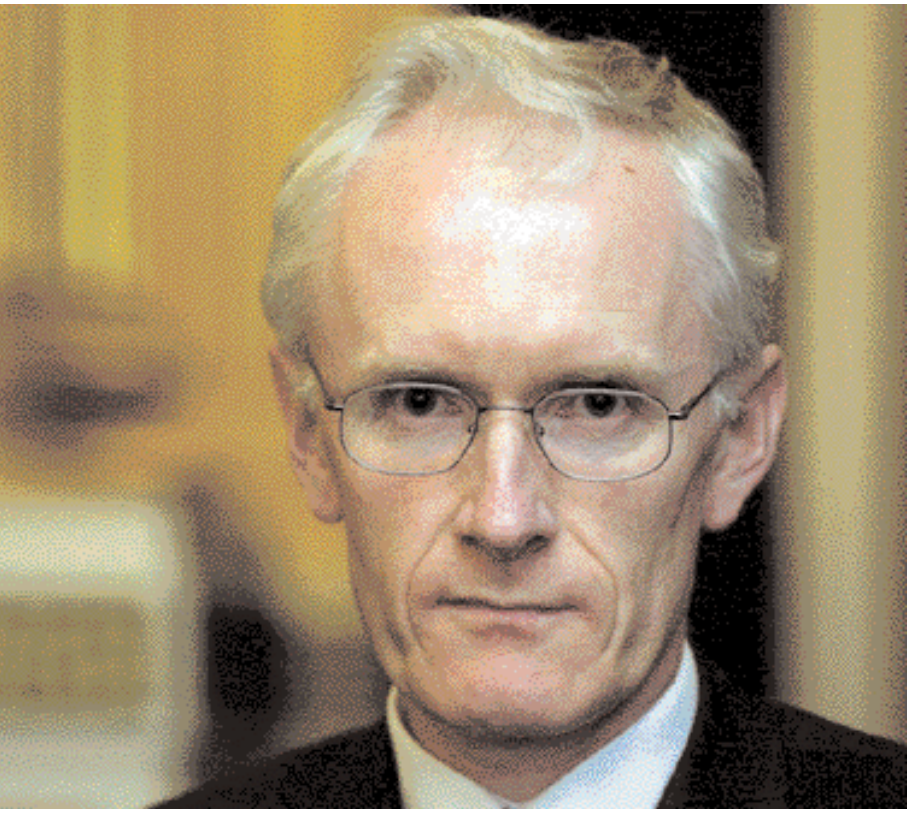
Section 194(5) of the *Companies Act, 1990* requires an auditor to report to the director where the auditor has formed the opinion that there are reasonable grounds for believing that an indictable offence under the *Companies Acts* has been committed. The acts provide for both summary and indictable offences. It is up to the director to decide if any particular reported matter should be prosecuted summarily or referred to the director of public prosecutions (DPP) for prosecution on indictment. Appendix two of the decision notice lists the indictable offences under the *Companies Acts, 1963* to *2001*.

In considering whether or not to report a matter under section 194(5), it would be irrelevant for an auditor to enquire whether the offence will be prosecuted summarily or on indictment. Equally, an auditor should not take into consideration the fact that another party may have already brought the matter to the director's attention, when deciding whether or not he will report it to the director.

MAIN POINTS

- **Auditors' new duty to report offences**
- **Offences must come to light during audit**
- **Reporting not a breach of confidentiality**

CRIME



Director of Corporate Enforcement Paul Appleby

The new law does not impose legal obligations on accountants or firms that are only providing non-audit services to clients. But the position is not as straightforward where a firm performs, or has performed, non-audit services for a client and is then appointed auditor to that company.

The duty to report applies to information that comes to the attention of the auditor 'in the course of, and by virtue of, their carrying out an audit of the accounts of the company'. In his notice, Appleby argues, with reference to *Statement of accounting standards 620* (SAS 620), that an auditor should take proper account of information obtained in the course of non-audit work carried out by the firm's staff, where it could affect the audit.

Section 194(5) does not require an auditor to form a definitive view that an indictable offence under the *Companies Acts* has been committed. Rather, it provides that the reporting obligation arises when he has formed the 'opinion that there are reasonable grounds for believing that' such an indictable offence has been committed.

The director of corporate enforcement states that auditors will be expected to react to information coming into their possession which suggests that an indictable offence has been committed, and to make

'Auditors will have to react if they suspect an offence has been committed'

AUDITORS AND THE LAW

While recognising that an auditor cannot be expected to detect all possible non-compliance of laws and regulations, *Statement of accounting standards 120* (SAS 120) specifically identifies two main categories of laws and regulations which are relevant to an audit.

The first is those which relate directly to the preparation of, or the inclusion or disclosure of, specific items in the client's financial statements. The second category is those which provide the legal framework within which the client conducts its business, and which are essential to the client's ability to conduct its business.

SAS 120 specifies that laws and regulations are essential to a client's ability to carry out its business where compliance is necessary to obtain a licence to operate it, or where non-compliance may reasonably be expected to result in the client ceasing operations, or otherwise call into question the client's continuation as a going concern. For example, SAS 120 instances a situation where the non-compliance accounts for a substantial portion of the client's profits, or where the level of fines or damages that the client could suffer could jeopardise the company's future as a going concern.

SAS 120 provides a number of practical examples of where auditors are expected to have some knowledge of the laws and regulations affecting a client's business. Where a client's major activity is the development of a single property, the auditor would be expected to obtain a general understanding of the planning regulations or consents to which the company is subject or may need. Another example is where the client is a waste disposal company. In this case, the auditor may need to get a general understanding of the licences for disposing of hazardous waste that the client holds.

SAS 120 directs that auditors should ask management to outline the laws or regulations that are essential to the company's ability to conduct its business. It also requires them to ask management to outline the policies and procedures for complying with those laws and regulations. In addition, it directs auditors to discuss with management the policies and procedures for identifying, evaluating and dealing with litigation risk.

Auditors are also directed to help identify possible or actual incidences of non-compliance by:

- Obtaining a general understanding of the legal and regulatory framework that applies to the client and the industry, and the relevant compliance procedures
- Inspecting correspondence with the relevant licensing or regulatory authorities
- Asking the directors if they are aware of any possible incidents of non-compliance with laws and regulations, and
- Obtaining written confirmation from the directors that they have disclosed to the auditors all those events of which they are aware that involved possible non-compliance.

PIC: REX FEATURES

On oath: David Duncan, former Anderson partner-in-charge of Enron testifies before a senate committee

the necessary enquiries to enable them to form a considered opinion on the matter. He draws attention to auditors' powers under section 193(3) of the *Companies Act, 1990* which entitles them to require the company's officers to give them any information that they think necessary for the performance of their duties.

If the auditor has sufficient information to form an opinion that there are reasonable grounds for believing that an indictable offence under the *Companies Acts* has occurred, then that triggers the obligation to notify the director of corporate enforcement.

If the information does not of itself ground such an opinion, existing professional standards require the auditor to investigate further. If a company officer refuses to give any information or explanations requested of him, then that, together with the other information known to the auditor, may form the basis for coming to the required opinion.

In his decision notice, Appleby recognises that auditors may wish to seek independent legal or professional advice as part of the process of forming their opinion, but says they are not obliged to do this.

He warns that obtaining such advice does not excuse an auditor from exercising his professional judgement on whether the information he holds should be reported. The decision notice specifically states that an auditor will not be entitled to rely on legal or other professional advice if he felt that it was mistaken, incomplete or otherwise inadequate.

Section 194(5) states that auditors are required to notify the director immediately after forming the opinion that there are reasonable grounds to believe that an indictable offence under the *Companies Acts* has been committed. (Appendix three to notice *D/2002/2* is the report form.)

Appleby acknowledges that auditors may not be able to form an opinion immediately, as they may need to get further more information from company officers and/or employees. But he states that auditors must also carefully consider the nature of the circumstances that have come to light in assessing how urgent it is for them to form an opinion.

Paragraph 11.3 of the notice lists specific examples of where an auditor's delay in notifying the director of a suspected offence could compromise the effectiveness of enforcement or other remedial action which the director could take. These include fraudulent trading, insider dealing and failure to keep proper books of accounts.

Where auditors intend reporting a company, Appleby's notice encourages them to give its officers and agents the opportunity to submit their views with the report, except where the auditors doubt the integrity of anyone involved. The submission should include details of any corrective or remedial action they have taken or propose taking. The notice recommends that the company be given two days for this. It appears to be open for officers and agents to make separate submissions to the ODCE.

When a report is made, the ODCE will investigate the matter further. The director has extensive powers to demand additional information from the company. Its policy on bringing prosecutions is not clear, but it has indicated that it is less likely to prosecute if the suspected offence has been rectified.

Section 74 of the *Company Law Enforcement Act, 2001* introduces a new sub-section (6) into section 194 of the *Companies Act, 1990*:

'No professional or legal duty to which an auditor is subject by virtue of his appointment as an auditor of the company shall be regarded as contravened by, and no liability to the company, its shareholders, creditors or other interested parties shall attach to, an auditor, by reason of his compliance with an obligation imposed on him by or under this section.'

Consequences for lawyers

If an auditor is to benefit from the statutory protection afforded by section 194(6) of the *Companies Act, 1990*, the suspected offence and the circumstances giving rise to the formation of the auditor's opinion must come within the scope of section 194(5). If an auditor consults a client's solicitor in the course of forming his opinion on matters covered by section 194(5), the solicitor should be mindful of his duties of confidentiality to his client as section 194(6) does not afford solicitors any protection.

Section 194(5) is so broadly drafted it is inevitable that auditors will report to the ODCE with increasing frequency. These are likely to range from fairly technical breaches of the *Companies Acts* to far more serious infringements. In many cases, auditors will seek advice from either client companies' solicitors or from independent solicitors on the application of the reporting obligation. Solicitors will also be asked for advice on whether an auditor is justified in making a report, and on the likely consequences of making a report. Finally, they will have to deal with follow-on investigations by the ODCE and to defend clients where such reports result in prosecutions. G

Emmet Scully is a partner in the Dublin law firm LK Shields Solicitors.

'Auditors may wish to seek independent legal or professional advice as part of the process of forming their opinion, but says they are not obliged to do this'

US and them

The Competition Authority is getting tougher on cartels, armed with new powers to pursue price-fixers. The US busted its cartel problems years ago and Ireland might take some pointers from that experience, writes Terry Calvani

MAIN POINTS

- Meaningful sanctions
- Sentencing guidelines
- Immunity programme

The success of American cartel enforcement can be attibuted to criminalisation of the offence. The American experience cannot necessarily be 'transplanted' to here. Ireland is a different country with different traditions, somewhat different laws, and a different judicial system. We must understand and respect those differences.

Nonetheless, there may be lessons from the American experience that have value to Ireland. This article seeks to explore some of these experiences and to share a few thoughts on their applicability to this country.

The Irish cartel programme has evolved and its current contours are not fixed in stone. The insights of the business and legal communities and the public at large are most welcome.

Price-fixing in America occurs much less often than it did in the past. This is a good thing for consumers. Like their Irish counterparts, they have a right to expect that prices paid for goods and services are determined by operation of the free market. Competition increases consumers' well-being and better ensures a vibrant economy. While there are some price-fixing cases in the US, for example, the art auction cases (see *United States v Taubman*, no 02-1253, 2d Cir: filed April 20, 2002), there is much less domestic cartel activity today than before.

Call in the feds

When I was called to the Californian bar in 1972, price-fixing was illegal in the US. It was also common. Many in the business community thought it 'technically' illegal; certainly not illegal in the same sense as stealing. While the antitrust division of the US Department of Justice prosecuted price-fixers, the sanctions imposed by the courts were often trivial. For example, a well-respected judge (who later served as deputy attorney general under President Carter) sentenced convicted price-fixers to give speeches to Rotary club lunches on the evils of price fixing.

The situation today in the US is dramatically different from what it was not so many years ago. There are at least five reasons for the change.

First, Congress amended the law to make price fixing a felony (see 15 USC s1 (2000)). As a result of that amendment and more recent changes in the law, one can serve three years' imprisonment and pay substantial fines.

Examples of changes include the *Comprehensive Crime Control Act* and the *Criminal Fine Improvement Act*, which provides that a fine may be increased to twice the gain from the illegal conduct, or twice the loss to the victims. Levied fines have been as high as $500 million. It is a serious offence.

Second, the antitrust division began using special agents of the Federal Bureau of Investigation (FBI) for assistance in cartel investigations. FBI agents now routinely staff these investigations. Indeed, agents are actually seconded to the field offices of the antitrust division, where they work together with division attorneys in jointly investigating cartels.

Third, these FBI agents have brought with them the techniques used to combat serious crime. Antitrust investigators now routinely employ computer forensics, 'wire' witnesses, conduct 'ambush' interviews and other such tactics in the

course of antitrust investigations. Investigation has been professionalised.

Fourth, the antitrust division implemented an immunity programme which has enjoyed dramatic success. The corporate leniency policy was promulgated by the Department of Justice in 1978 and revised in 1993. An immunity programme for individuals was established the following year.

Under this programme, a cartel participant can get complete immunity from criminal prosecution by providing new evidence to the division that enables it to prosecute. This classic 'divide and conquer' tactic has been spectacularly successful, demonstrating once again that 'there is no honour among thieves'. Recent prosecutions in the vitamins and art auction cases are good examples of the value of such an immunity programme.

Finally, Congress enacted changes in the law that removed a great deal of sentencing discretion from judges and helped to ensure that price-fixers see the inside of a prison. The *Sentencing Reform Act 1984* requires that courts apply the sentencing guidelines to antitrust offences. Convicted felons in the US also lose many of their rights of citizenship, such as the right to vote. But most importantly, they go to prison.

These changes have significantly reduced the incidence of cartel behaviour in the US. What lessons do these changes in US law and practice hold for Ireland? Mindful that such lessons may not be transplantable in different soil, some merit discussion.

As a result of recent legislative changes and the reorganisation of the Competition Authority, Ireland is now poised for serious cartel enforcement. Significantly, sanctions have been increased under the *Competition Act, 2002*. Like the US, Ireland today treats price-fixing as an indictable offence, with meaningful sanctions. Conviction carries a maximum five-year term of imprisonment under section 8 of the act.

Second, the cartel division now has career detectives seconded to the unit to assist in the development of cases. These professionals, seconded or hired from An Garda Síochána, now work together with case officers at the Competition Authority. The mere presence of a garda detective in an interview or on a search has a demonstrable effect: suspects appreciate that cartel activity really is a crime.

Wires and phone taps

Third, the cartel division is also employing criminal investigative techniques in its investigations. For example, the unit now has the ability to employ computer forensics to better capture electronic communications on searched computers. It now has the power to arrest suspected offenders and detain them for questioning.

Unlike the US, the unit has not, to date, 'wired' individuals nor tapped phone lines. While the laws of this country limit the use of these investigative methods, we should not reject applications for authorisation to use such devices in cases where it is appropriate. The cartel division is now beginning to investigate cartel behaviour as the crime that it is.

Fourth, Ireland now has a cartel immunity programme (published on 20 December 2001, available from the Competition Authority). In time, we believe it will prove to be a most valuable arrow in the authority's quiver. The success of the programme is contingent on the wrongdoers' perception that the choice is between providing evidence and going to prison. Having said that, one ought not conclude that the immunity programme is not working. Suffice it to say that it is now active.

Finally, Ireland has nothing quite like the US sentencing guidelines, and one may question what Irish judges will do when confronted with convicted offenders. The competition law defendant sitting in the dock may look much more like the judge than the usual thief or robber. He or she may be prominent in the community, active in their parish, belong to the right clubs, have a reasonable golf handicap, and support meritorious charities. Does this person really belong in prison? Only if you want to curtail price fixing.

To that end, it is important that judges and the community at large recognise that price fixing is theft. Its victims are often those who can afford it least – particularly when the objects of the conspiracy are

REQUIREMENTS FOR FULL IMMUNITY

1) The applicant must take effective steps, to be agreed with the authority, to terminate its participation in the illegal activity
2) The applicant must do nothing to alert its former associates that it has applied for immunity under this programme
3) The applicant, including all its relevant past and present employees, must satisfy the authority that it has not coerced another party to participate in the illegal activity and has not acted as the instigator or played the lead role in the illegal activity
4) Throughout the course of the authority's investigation and any subsequent prosecution, the applicant must provide complete and timely co-operation. In particular, the applicant must:
   a) reveal any and all offences under the *Competition Acts* in which it may have been involved
   b) provide full, frank and truthful disclosure of all the evidence and information known or available to it or under its control, including all documentary and other records, wherever located, relating to the offences under investigation with no misrepresentation of any material facts, and
   c) co-operate fully, on a continuing basis, expeditiously and at its own expense throughout the investigation and with any ensuing prosecutions
5) In the case of corporate undertakings, the application for immunity must be a corporate act. While applications from individual directors or employees will be considered, they will not be regarded as made on behalf of the undertaking in the absence of a corporate act. Corporate undertakings must take all lawful measures to promote the continuing co-operation of their directors, officers and employees for the duration of the investigation and any ensuing prosecutions.

necessities. Violation of competition law is often much more remunerative than bank robbery. Whether Irish judges will impose custodial sentences remains to be seen, but the Competition Authority's cartel division is committed to finding out.

A few more words on the immunity programme are probably in order. Applicants are entitled to a qualified grant of immunity from criminal prosecution by the director of public prosecutions (DPP).

An applicant (or his legal advisors) seeking to avail of the programme must contact the authority's designated immunity officer. Contact can be made in person or by telephone. The current designated officer is Ciaran Quigley. He can be reached between 10am and 4pm, Monday to Friday, on (087) 763 1378.

The applicant must present an outline of the facts, but may do so through legal advisors in hypothetical terms. The immunity officer will place a 'marker' in the queue, which will hold the place for the applicant for a period determined by the immunity officer.

The applicant must then complete the application with a sufficient description of the illegal activity. If satisfied, the authority will then present the application to the DPP, seeking a written grant of qualified immunity. If the DPP concurs, the applicant must then satisfy both the DPP and the authority that he has satisfied the requirements for immunity.

If the first applicant to request immunity fails to meet these requirements, a subsequent applicant that does meet the requirements can be considered for immunity. If a corporate undertaking qualifies for a recommendation for full immunity, all past and present directors, officers and employees who admit their involvement in a cartel as part of the corporate admission, and who also comply with the requirements discussed above, will also qualify. Applications for immunity for an individual employed by an undertaking involved in a cartel will be considered, even where the employer undertaking does not apply or otherwise co-operate under the programme.

Another important reason for the decrease in American cartel activity is the significant role of the bar in educating the business community.

Recognising the importance of antitrust compliance to the well-being of their clients, lawyers have been able to interest their clients in undertaking antitrust compliance programmes. The significance of this effort cannot be underestimated. This convergence of virtue and self-interest is important to effective antitrust compliance. There should be increased opportunities for Irish legal advisors to counsel their business clients and their trade associations.

Dawn raids

Where appropriate, Irish legal advisors ought to ensure that their clients have *effective* competition law compliance programmes in place. A section in an unread employee manual is not effective. If written guidelines are disseminated, steps should be taken to make them both interesting and comprehensible. Legal advisors may prefer to consider presentations to employee gatherings.

A competition audit is generally an authorised, but unannounced, review of personnel and files (including electronic files) to assess actual compliance. In that sense, it is essentially an internal 'dawn raid'. Competition audits may be valuable to clients who are particularly at risk.

The competition lawyers' role in a trade association context is important. Trade associations have been a particularly fruitful area for finding anti-competitive conduct, recalling Adam Smith's famous maxim (from *The wealth of nations*) that 'people of the same trade seldom meet together, even for merriment or diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices'. Prudent counselling would seem to demand that special attention be devoted to antitrust compliance in this context.

In summary, criminal cartel enforcement is a central mission for the Competition Authority today, and is the exclusive focus of the cartel division. The new sanctions, the increase in enforcement resources, the immunity programme and the employment of the gardaí and criminal investigative methods will enhance the authority's success. That, together with compliance counselling provided by legal advisors, should reduce the anti-competitive injury imposed by cartels on Irish consumers. G

Terry Calvani is a member of the Competition Authority, director of its cartel division, and acting manager of its mergers division. The views in this article are his own.

Special AGENTS

Employers can't turn a blind eye to the behaviour of their independent contractors, especially if uniforms or rules associate them with the company. Murray Smith looks at Irish law on vicarious liability and a recent case that made waves in Australia

PIC: RAY TANG/REX FEATURES

Employers, vicariously liable for the conduct of employees in the course of their employment, have traditionally argued in court that this liability does not extend to independent contractors, submitting that these work on their own behalf and do not represent the company.

A plaintiff seeking compensation for injury might argue that such a contractor nonetheless works under a contract *of service*, and that the 'employer' is responsible for torts committed while providing this service. The defence would hinge on the argument that the independent contractor is working under a contract *for services*.

However, a recent Australian judgment suggests an alternative strategy for such a plaintiff. He could submit that the independent contractor, if not an employee of an employer, is an 'agent of a principal' and that the defendant is therefore still responsible for his conduct.

Irish law: *Denny* and *Tierney*

The employee versus independent contractor argument has come before the Supreme Court on a

MAIN POINTS

- **Independent contractor agreements**
- **Recent Australian judgment**
- **Case law on vicarious liability**

AGENTS AND STATUTE

EU directive 86/653/EEC (18 December 1986) was incorporated into Irish law by two statutory instruments, the *European Communities (Commercial Agents) Regulations 1994* (SI no 33 of 1994) and the *European Communities (Commercial Agents) Regulations 1997* (SI no 31 of 1997).

Under this directive, certain categories of self-employed commercial agents with authority to negotiate the sale or purchase of goods are entitled to certain protections. These include:

- The principal needing to act 'dutifully and in good faith' in relations with the agent
- The agent's entitlement to certain commissions, as well as when they become due, and the components used to calculate them
- The entitlement to a signed written document setting out the terms of the agency contract
- The notice periods regarding the termination of the contract
- The indemnification or compensation for damages for the agent as a result of this termination, and
- Restrictions on the types of restraint-of-trade clauses a principal can impose.

In terms of prohibiting discrimination in employment, the provisions of the *Employment Equality Act, 1998* include discrimination by a provider of agency work against an agency worker. 'Agency workers' (sections 2(1) and 8) are those who agree with a person carrying on the business of an employment agency 'to do or to perform personally any work or service for another person'.

few occasions, most notably in *Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare* ([1998] ELR36). The court upheld a decision that a demonstrator of food products in a supermarket was an employee.

Keane J gave the main judgment. In terms of the criteria that he said should be used in such cases, he first held that the relevant appeals officer was 'entirely correct' in holding that he 'should not confine his consideration to what was contained in the written contract [it stated that the demonstrator was an independent contractor], but should have regard to all the circumstances of her employment' (p47).

He continued: 'It is, accordingly, clear that, while each case must be determined on particular facts and circumstances, in general a person will be regarded as providing his or her services under a contract of service and not as an independent contractor where he or she is performing those services for another person and not for himself or herself. The degree of control exercised over how the work is to be performed, although a factor to be taken into account, is not decisive. The inference that the person is engaged in business on his or her own account can be more readily drawn where he provides the necessary premises or equipment or some other form of investment, where he employs others to assist in the business and where the profit which he derives from the business is dependent on the efficiency with which it is conducted by him' (p48).

The same court later considered *Denny* in the case of *Sean Tierney v An Post* ([2000] 1 IR536), where it held that the postmaster of a sub-post office was appointed under a contract for services. Keane J gave the judgment, using (and quoting) the criteria he set out in *Denny*. He had regard to the fact that 'the post office business is carried on in the same premises as the plaintiff's own business'. The monies spent by him in improving the premises and employing assistants, which had the effect of increasing the volume of post office business and profit, would also increase the profit from his own business (p545).

Australian law: *Hollis v Vabu Pty Ltd*

The same question was dealt with in a recent decision of the High Court of Australia in *Hollis v Vabu Pty Limited* ([2001] 207 CLR21). The respondent company engaged a number of individual couriers. When one of them knocked over and injured the appellant, he sued the company, claiming that it was vicariously liable for that courier's negligence.

The case ended up before the High Court of Australia, that country's Supreme Court, which held by a 6-1 majority that the company was vicariously liable. Of the six judges, five so held on the ground that the courier was an employee of the company (pp25-47).

The criteria they followed was broadly similar to those given by Keane J in *Denny*:

- The whole relationship between the parties must be examined
- The facts vary from case to case
- An independent contractor is someone in business on his own, not for another, and
- The control test, while important, is not an exclusive factor.

The five were influenced by the significant level of control the company had over the couriers, who were presented to the public as 'emanations' of Vabu. Instructions were given to them regarding the performance of their work, as well as on behaviour towards clients, appearance, including dress, and the need to wear a uniform with the company logo. The courier who knocked the appellant down could not be personally identified, but his wearing of this uniform established his connection with Vabu.

One of the six majority judges, McHugh J, though he reached the same conclusion as the other five, did so on a different ground – that the courier was an 'agent' of Vabu.

While he agreed with his five colleagues that the couriers were not independent contractors, he said that 'features of the relationship' between the two parties were 'not typical' of the traditional employment one.

He looked at the fact that the couriers provided their own equipment and some provided their own motor vehicles. He was not in favour of 'attempting to force new types of work arrangements into the so-called employee/independent contractor

"dichotomy", based on medieval concepts of servitude' (pp48-50).

In his judgment, he referred (pp51, 58-60) to a previous High Court case, *Colonial Mutual Life Assurance Society Ltd v The Producers and Citizens Co-operative Assurance Company of Australia Ltd* ([1931] 46 CLR, 41). It held that a principal was vicariously liable for the torts of his agent.

In this case, a person employed by a life insurance company as a canvasser and agent, while trying to obtain business for the company, made defamatory remarks regarding another life insurance company. The second company took an action for slander against the first, alleging vicarious liability for the agent's remarks. The court held in favour of this argument, holding that the agent made the remarks within the authority given to him by the company, despite the fact that such remarks were expressly forbidden by it.

The first company's defence, that the person was an independent contractor, was rejected by the court. One of the judges, Dixon J, made clear the difference between an independent contractor and an agent: 'The independent contractor carries out his work, not as a representative but as a principal. A difficulty arises when the function is to represent the person (who requested its performance) in a transaction with others, so that the very service to be performed consists of standing in his place and assuming to act in his right, and not in an independent capacity' (pp48-9).

'While Irish case law on the vicarious liability of principals for the torts of their agents is small, it is conclusive'

Following this precedent, McHugh J held in *Hollis* that Vabu was vicariously liable for the courier's negligence because:

- The courier was performing for Vabu its duty to make deliveries to or on behalf of its clients
- The courier performed the duty for the economic benefit of Vabu
- The courier was representative of Vabu. This was apparent to the public and clear between Vabu and the couriers ([2001] 207 CLR, 21 at 60).

He, in common with the other five judges, spoke about the significant degree of control exercised over the couriers, including the wearing of the uniform with the company logo.

Irish and EU agents

While Irish case law on the vicarious liability of principals for the torts of their agents is small, it is conclusive, and runs along the same lines as those mentioned in *Colonial Mutual Life*. In *Higgins v O'Reilly and Monaghan* ([1940] Ir Jur Rep 15), Johnson J in the High Court held that an election candidate was liable for the torts of his personation agent, who had wrongly charged a voter with the offence of personation.

The voter took a successful action against the agent and the candidate for libel, slander, unlawful arrest, malicious prosecution, false imprisonment and trespass to the person. The judge held that both the agent and candidate were 'equally liable' for damages. While the candidate was not personally responsible, 'he was legally responsible' (p16).

A more recent High Court case also established that a *perceived* relationship of principal and agent can lead to the perceived principal being liable in tort. In *Irish Permanent Building Society v Cornelius O'Sullivan and Dymphna Collins* ([1990] ILRM 598), the agent of a building society (the appellants) also carried on an auctioneering business from the same office. A couple (the respondents) told him that they needed a loan to buy a house, and were told by the agent to open an account with the building society. He later told them that they qualified for a loan.

This agent, in his capacity as an auctioneer, something known to the appellants, sold the couple a house, saying that it was in good condition, needing only wallpapering and painting. In fact, the house had many defects and the couple were unable to fully repair it. They fell behind in their mortgage repayments to the building society, which tried to recover possession of the house. The couple counterclaimed for damages for negligence and breach of duty.

Blayney J held in their favour. The building society was under a duty to ensure that it was made clear to members of the public that, in selling houses, Mr Coyne (its agent) was not acting as its agent but was acting as a principal. The plaintiff building society failed to discharge this duty and the defendant suffered damage as a result. It was because of their belief that Mr Coyne was the agent of the plaintiff building society that they relied on his representations about the house (p600).

It should also be mentioned that, in terms of statute law, domestic and EU law has intervened to give some agents rights *vis-à-vis* their principals, narrowing the distinction between agent and employee (see **panel** opposite).

Where the defendant uses an 'independent contractor' defence to an allegation of vicarious liability for the torts of an alleged employee, the plaintiff can argue from the judgment of McHugh J in *Hollis* that a relationship of principal and agent exists, making the defendant still vicariously liable.

This, I hasten to add, is not available in a case wholly based on statute, where the words 'employer' and 'employee' or 'contract of service' are used. Also, the *Hollis* case was decided on its particular facts, that the company exercised a significant degree of control over the couriers, particularly regarding their behaviour and dress, including an obligation to wear uniforms with the company logo. G

Murray Smith is a Dublin-based barrister.

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Book review

EC state aid: law and policy

Conor Quigley and Anthony Collins. Hart Publishing (2003), Salters Boatyard, Folly Bridge, Abingdon Road, Oxford OX1 4LB, England. ISBN: 1-84113-162-8. Price: stg£50 (hardback).

Many countries give formal support to particular industries within their territory. This is so for many reasons. However, article 87(1) of the *EC treaty* declares state aid incompatible with the common market, where aid is granted by a member state or through state resources in any form which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods in so far it affects trade between member states.

There is more to state aid that the issue of a subsidy. The authors consider the other interventions that may have similar effect. For example, up to 25% of all state aid takes the form of exemptions from taxes or social security. Other interventions include the provision of market research and advertising activities or logistical and commercial assistance at reduced rates.

The authors in their foreword submit that state aid (law and policy) has been considered by many as being the poor cousin of EC competition law. They correctly draw attention to the fact that high levels of state aid are just as capable of distorting competition to the ultimate detriment of consumers. The authors consider the statutory framework for exempting certain aid from the notification requirements and consider the EC regulation which codified the complex rules governing notification and assessment of aid, suspension and repayment of unlawful aid, and reporting mechanisms.

In a short note such as this, it is only possible to give a broad overview of the work of the authors. Eight chapters are included in the book, with detailed sub-headings enabling the reader to get to the heart of the matter. The chapters consider state aid under article 87(1) EC, the compatibility of state aid with the common market, state aid for investment purposes, state aid with horizontal objectives, particular industries in the context of state aid, supervision by the European Commission, judicial review of EC decisions and judicial enforcement of EC state aid law.

There is a comprehensive table of cases, divided into cases of the European Court of Justice and the Court of First Instance (in alphabetical and numerical order), and national courts. There is also a table of EC legislation and a very useful index.

Written by leading lawyers, Conor Quigley, barrister of Brick Court Chambers, London and Brussels, and Anthony Collins, barrister, Dublin, this book not only gives a detailed analysis of this important area of Community law, but advances our understanding with critical insights. Lawyers, academics and students will find a wealth of information in this stimulating and concisely written book. It represents a valuable contribution to our law. G

Dr Eamonn Hall is company solicitor of Eircom Limited.

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Know when to hold 'em

Beware of derivatives, advises Warren Buffet in his annual letter to shareholders, they could be 'weapons of mass destruction'. Cedric Heather reports

Warren Buffet published his annual chairman's letter to the shareholders of Berkshire Hathaway on 8 March. The letters have been published annually since 1965 and have become a much-anticipated event in the investment world. Regarded by many as one of the world's greatest investors, Buffet's annual letters give a unique insight into the investment style and philosophy behind his extraordinary success.

In this month's article we have highlighted some of the letter's key points, his view of equity markets in general and, more specifically, his views on derivatives, which both he and Charlie Munger (Buffett's partner in Berkshire Hathaway) believe to be potential time bombs. The following are extracts from the letter. (The full publication can be found at *www.berkshirehathaway.com*)

Bubble trouble

'We continue to do little in equities. Charlie and I are increasingly comfortable with our holdings in Berkshire's major investees because most of them have increased their earnings while their valuations have decreased. But we are not inclined to add to them. Though these enterprises have good prospects, we don't yet believe their shares are undervalued.

'In our view, the same conclusion fits stocks generally. Despite three years of falling prices, which have significantly improved the attractiveness of common stocks, we still find very few that even mildly interest us. This dismal fact is testimony to the insanity of valuations reached during the great bubble. Unfortunately, this hangover may prove to be proportional to the binge.

'The aversion to equities that Charlie and I exhibit today is far from congenital. We love owning common stocks – if they can be purchased at attractive prices. In my 61 years of investing, 50 or so years have offered that kind of opportunity. There will be years like that again. Unless, however, we see a very high probability of at least 10% pre-tax returns (which translate to 6% to 7% after corporate tax), we will sit on the sidelines. With short-term money returning less than 1% after tax, sitting it out is no fun. But occassionally, successful investing requires inactivity.

'Charlie and I are of one mind in how we feel about derivatives and the trading activities that go with them. We view them as time bombs, both for the parties that deal in them and the economic system.

'Even experienced investors and analysts encounter major problems in analysing the financial condition of firms that are heavily involved with derivatives contracts. When Charlie and I finish the footnotes detailing the derivative activities of major banks, the only thing we understand is that we *don't* understand how much risk the institution is running'.

Toxic genie

'The derivatives genie is now well out of the bottle, and these instruments will almost certainly multiply in variety and number until some event makes their toxicity clear. Knowlege of how dangerous they are has already permeated the electricity and gas business, in which the eruption of major troubles caused the use of derivatives to diminish dramatically. Elsewhere, however, the derivatives business continues to expand unchecked. Central banks and governments have so far found no effective way to control or even monitor the risks posed by these contracts.

'Charlie and I believe Berkshire should be a fortress of financial strength – for the sake of our owners, creditors, policy holders and employees. We try to be alert to any sort of mega-catastrophe risk, and this posture may make us unduly apprehensive about the burgeoning quantities of long-term derivatives contracts and the massive amount of uncollateralised receivables that are growing alongside. In our view, however, derivatives are financial weapons of mass destruction, carrying dangers that, while now latent, are potentially lethal'.

While Buffet's message may not necessarily be music to investors' ears, it does sit well with our view of equity markets in general. With the exception of the Irish market, and the UK markets to a lesser extent, we believe that world equity valuations are still way too high. Our message to investors is to continue to hold higher than average weightings in cash and to focus on the domestic blue chip names. As Buffet points out, despite being no fun, successful investing sometimes requires level of inactivity. G

Cedric Heather is a portfolio manager with Davy Stockbrokers' private clients unit.

Davy STOCKBROKERS

Cedric Heather: world market valuations are still too high

DERIVATIVES EXPLAINED

Put simply, derivatives call for money to change hands at a future date, with the amount to be determined by, for example, interest rates, stock prices or currency values. If, for example, you are either 'long' or 'short' (you have bought or sold an Standard and Poors (S&P) 500 futures contract), you are a party to a very simple derivatives transaction with your gain or loss derived from movements in the index.

Derivatives contracts are of varying duration (running sometimes to 20 or more years), and their value is often tied to several variables.

Unless derivatives contracts are collateralised or guaranteed, their ultimate value also depends on the creditworthiness of the counter-parties to them. In the meantime, though, before a contract is settled, the counter-parties record profits and losses – often huge amounts – in their current earnings statements without so much as a penny changing hands.

Report of Law Society Council meeting held on 21 February

Personal Injuries Assessment Board and Motor Insurance Advisory Board

The Council noted the contents of a press release issued by the society on 14 February in relation to the prosecution of fraudulent claims.

The president noted that, even though the society's position had been announced in advance of the launch by the Irish Insurance Federation of its campaign against fraudulent claims, the society had obtained no media coverage for its press release, other than a passing reference in the coverage of the IIF campaign.

The director general reported that a special RTE *Prime Time* programme devoted to the topic of 'compensation culture' would be broadcast towards the end of March. It was likely to be predictably hostile to the legal profession.

Money-laundering directive

James MacGuill reported that draft regulations designating solicitors for the purposes of the money-laundering legislation were expected from the Department of Justice, Equality and Law Reform within a matter of weeks. They would be carefully considered by the task force and a report would be brought to the Council in due course.

Solicitors' undertakings to the VHI

Michael Boylan reported that the Litigation Committee was deeply concerned about the form of undertaking currently being sought by the VHI from solicitors where a claim for damages for personal injuries was being pursued by an injured party. The VHI was insisting on undertakings that the full cost of hospital and medical expenses would be discharged from the damages, regardless of the percentage of value of the claim recovered. It was not prepared to accept a *pro rata* payment or any apportionment of liability. It appeared that, where a solicitor was not prepared to provide such an undertaking, treatment of the injured party was being withheld.

Mr Boylan said that a draft practice note to the profession would be brought before the Council for consideration at its next meeting. He confirmed that the society had made several attempts to seek a resolution to the matter but that the VHI was not prepared to alter its position in any respect.

Committee on Court Practice and Procedure

The president reported on a meeting with the Committee on Court Practice and Procedure, attended by the president, the director general and the vice-chairman of the Litigation Committee, Pat Crowley, to discuss the structure and operation of the court rules committees. The society's representatives had been warmly received by the committee and there appeared to be broad agreement with the society's views.

Proposed Commercial Court

The president reported on a meeting with Mr Justice Peter Kelly and Noel Rubotham to discuss the outline details for the proposed Commercial Court. The society had been invited to put its views in writing and these were being prepared by Roddy Bourke, Isabel Foley and Richard Martin.

Report of independent adjudicator

John O'Connor referred to the fifth annual report to the society from the independent adjudicator, which had been presented to the minister for justice, equality and law reform and would be published shortly. The adjudicator was glowing in his praise for the society's Complaints Section, which he described as 'a well-organised and responsive unit'. He had, however, expressed some dissatisfaction in relation to those solicitors who failed to attend before meetings of the Registrar's Committee.

The president noted that the downward trend in the number of complaints over the past two years was encouraging. John O'Connor noted that the adjudicator had been very emphatic in his comments to the minister that self-regulation was the only proper means of regulating the profession and also that, when compared with the neighbouring jurisdictions, the society's complaints-handling was second to none.

Family law issues

Moya Quinlan said that the Family Law Committee was receiving disturbing reports about the conditions in family law courts outside the Dublin area. There were also considerable difficulties with delays in having cases heard. Patrick Dorgan confirmed that, after sustained pressure, an amount of €26 million had been allocated for refurbishment of the courthouse in Cork. Gerard Griffin said that the minister for justice, equality and law reform had been the primary force behind the allocation of these funds. The director general noted that the extent of courthouse refurbishment had improved significantly over the past five years, although funds were now coming to an end.

Mrs Quinlan said that the difficulties did not relate purely to buildings, but also to the listing system, with unacceptable delays of up to two years in matrimonial cases. Andrew Dillon said that the situation in the District Court in Cork was simply unthinkable. It was located in an old schoolhouse, with only one meeting room for all the parties to an action. The conditions, both before and during court sittings, were absolutely appalling and, if the situation was not improved, family lawyers could be forced to cease providing a service.

Patrick O'Connor said that, because of a philosophical opposition to public/private partnerships within the Department of Finance, the seven-year building plan within the Courts Service was proving difficult to progress. The Council agreed that the society should highlight the unacceptable delays and poor conditions, particularly in relation to family law matters, within the courts system. G

Committee report

BUSINESS LAW

Renominalisation of share capital: beat the 30 June 2003 deadline

On 1 January 2002, the share capital of any company that had not already done so of its own initiative was automatically converted (redenominated) into euro.

For many companies, this will have resulted in awkward par values. For example, a company that had an authorised share capital of IR£100,000, divided into 400,000 shares of IR£0.25 each, now has a share capital of €126,973.81, divided into 400,000 shares of €0.317434525 each; and a company which formerly had an authorised share capital of IR£1 million, divided into 1 million shares of IR£1 each, now has a share capital of €1,269,738.08 divided into shares of €1.269738 each. Under the rules relating to the redenomination of share capital (contained in section 24 of the *Economic and Monetary Union Act, 1998*), it is not permitted to round the figure representing the individual par value of each share.

It would make sense, therefore, to adjust the figures to produce even amounts (this procedure is known as *renominalisation*). Thus, the company with a share capital of €126,973.81 might decide to increase it to €128,000, with each share having a par value of 0.32 cents, or to reduce it to €120,000, giving an individual par value of €0.30 cents. The company with a share capital of €1,269,738.08 might decide to increase it to €1.3 million, resulting in individual shares of €1.30 or to reduce it to €1,250,000 divided into 1 million shares of €1.25 each.

These adjustments will involve either an increase or a reduction in the *issued* share capital of the company which, in normal circumstances, would require an injection of fresh capital (in the event of an increase) or the approval of the court (in the case of a reduction).

However, section 26 of the 1998 *Economic and Monetary Union Act* allows these adjustments to be made by means of a simple (and therefore inexpensive) process without the injection of capital or court approval – provided it is done before 30 June 2003. The section sets out the steps to be taken to make adjustments. G

LEGISLATION UPDATE: 21 JANUARY – 14 MARCH 2003

ACTS PASSED

Capital Acquisitions Tax Consolidation Act, 2003
Number: 1/2003
Contents note: Consolidates enactments relating to capital acquisitions tax
Date enacted: 21/2/2003
Commencement date: 21/2/2003

Unclaimed Life Assurance Policies Act, 2003
Number: 2/2003
Contents note: Provides a legislative framework whereby all life assurance undertakings doing business in the state are obliged to notify holders of unclaimed policies, the proceeds of which are payable in the state, of the existence of those policies. If the policy-holder cannot be traced, provides for the transfer of monies payable under unclaimed life assurance policies to the dormant accounts fund established under the *Dormant Accounts Act, 2001*; provides for the payment of monies from the fund, for the appointment of inspectors and for these and other purposes amends and extends the *Dormant Accounts Act, 2001*
Date enacted: 22/2/2003
Commencement date: 10/3/2003 (per SI 92/2003)

SELECTED STATUTORY INSTRUMENTS

Capital Gains Tax (Multipliers) (2003) Regulations 2003
Number: SI 12/2003
Contents note: Specify the multipliers by reference to which sums (such as the base cost of an asset and enhancement expenditure incurred on it) which are allowable as a deduction from the consideration for the disposal of an asset in the year of assessment 2003 are to be increased, under s556(2) of the *Taxes Consolidation Act 1997*, for the purpose of computing the chargeable gain accruing to a person on such a disposal

European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003
Number: SI 11/2003
Contents note: Implement directive 1999/44/EC on certain aspects of consumer goods and associated guarantees. The directive provides a common set of minimum rules that can be relied upon when a consumer is purchasing goods in any member state of the European Union
Commencement date: 22/1/2003

European Communities (Community Designs) Regulations 2003
Number: SI 27/2003
Contents note: Give effect to council regulation (EC) 6/2002 on Community designs. Regulation 6/2002 establishes a system for registration of industrial designs providing protection throughout the European Union
Commencement date: 29/2/2003

European Communities (Directive 2000/31/EC) Regulations 2003
Number: SI 68/2003
Contents note: Implement directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market (*Electronic commerce directive*)
Commencement date: 24/2/2003

European Communities (Requirements to Indicate Product Prices) Regulations 2002
Number: SI 639/2002
Contents note: Revoke and replace the *European Communities (Product Prices) Regulations 2001* (SI 422/2001) giving effect to directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers
Commencement date: 1/3/2002

European Communities (Undertakings for Collective Investment in Transferable Securities) (Amendment) Regulations 2003
Number: SI 51/2003
Contents note: Amend the *European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 1989* (SI 78/1989) by the substitution of a new regulation 5 *Prohibition on conversion of UCITS into undertaking not subject to directive*
Leg-implemented: dir 85/611 as amended by dir 88/220 and dir 95/26
Commencement date: 17/2/2003

Pensions (Amendment) Act, 2002 *(Section 3 (insofar as it relates to the insertion of sections 91 to 120 into the* Pensions Act, 1990*) and Sections 4, 7, 13, 14, 38, 56 and 57) (Commencement) Order 2002*
Number: SI 502/2002
Contents note: Appoints 7/11/2002 as the commencement date for s3 of the *Pensions (Amendment) Act, 2002* insofar as it relates to the insertion of ss91 to 120 into the *Pensions Act, 1990*; also appoints 7/11/2002 as the commencement date for ss4, 7, 13, 14, 38, 56 and 57 of the *Pensions (Amendment) Act, 2002*. Section 3 of the *Pensions (Amendment) Act, 2002* provides for the insertion in the *Pensions Act, 1990* of a new part X (ss91 to 124) which sets out the framework for the personal retirement savings accounts (PRSAs). Section 4 of the *Pensions (Amendment) Act, 2002* amends the *Taxes Consolidation Act, 1997* to provide for the introduction of the new PRSAs. Sections 7, 13, 14, 38, 56 and 57 provide for amendments to other sections of the *Pensions Act, 1990* to reflect the arrangements for the new PRSAs

Pensions (Amendment) Act, 2002 *(Sections 121(3), (4), (5) and (6)) (Commencement) Order 2003*
Number: SI 78/2003
Contents note: Appoints 14/2/2003 as the commencement date for ss121(3), 121(4), 121(5) and 121(6) of the *Pensions Act, 1990* as inserted by s3 of the *Pensions (Amendment) Act, 2002*. These sections require employers to remit contributions in respect of PRSAs to the relevant custodian account of the PRSA provider within a specified time limit and to provide statements to employees at least once a month showing the amount remitted on the employee's behalf

Personal Retirement Savings Accounts (Disclosure) Regulations 2002
Number: SI 501/2002
Contents note: Make provision in relation to the disclosure of information to be made by or on behalf of a PRSA provider both prior to the conclusion of a PRSA contract and at specified times after a PRSA contract has been concluded
Commencement date: 7/11/2002

Personal Retirement Savings Accounts (Operational Requirements) Regulations 2002
Number: SI 503/2002
Contents note: Prescribe the information which must be furnished to the Pensions Board by a PRSA provider, detailing the information to be contained in: the three-month report and the three-month return required under s99 of the *Pensions Act, 1990* relating to the database of statistics to be maintained by the board, and the annual report to be delivered by a PRSA provider to the Pensions Board
Commencement date: 7/11/2002

Planning and Development Regulations 2003
Number: SI 90/2003
Contents note: Make certain changes to part 5 of the *Planning and Development Regulations 2001* (SI 600/2001) and provide the format of a receipt for the payment under section 96b of the *Planning and Development Act,*

2000 (as inserted by section 4 of the *Planning and Development (Amendment) Act, 2002*)
Commencement date: 6/3/2003

Residential Institutions Redress Act, 2002 *(Miscellaneous Provisions) Regulations 2002*
Number: SI 645/2002
Contents note: Make provision in relation to the written evidence of an applicant; the notice to and provision of evidence by a named relevant person and a specified relevant person; and the giving of evidence generally
Commencement date: 19/12/2002

Residential Institutions Redress Act, 2002 *(Section 17) Regulations 2002*
Number: SI 646/2002
Contents note: Specify the amounts of awards to be made in accordance with a weighting scale. The weighting scale and the amounts payable for weightings are set out in schedules 1 and 2 to the regulations. Make provision for the making of an award above the maximum amount in exceptional cases. Make provision for the making of an additional award calculated by reference to the principles of aggravated damages and for an additional award in respect of the reasonable expenses of medical treatment which an applicant has received for the effects of the injury suffered. When making an award and implementing these regulations, the Residential Institutions Redress Board shall have regard to the report of 15/1/2002, made in accordance with s16 of the act, entitled *Towards redress and recovery*
Commencement date: 19/12/2002

Residential Institutions Redress Act, 2002 *(Section 33) Regulations 2002*
Number: SI 644/2002
Contents note: Make provision for the payment of the expenses of an application under the act to the Residential Institutions Redress Board and/or to the Residential Institutions Review Committee. Expenses to be paid in respect of an award under the act shall include the expenses incurred in an application that has been settled
Commencement date: 19/12/2002

Safety, Health and Welfare at Work (General Application) (Amendment No 2) Regulations 2003
Number: SI 53/2003
Contents note: Amend the *Safety, Health and Welfare at Work (General Application) Regulations 1993* (SI 44/1993) as amended by the *Safety, Health and Welfare at Work (General Application) (Amendment) Regulations 2001* (SI 188/2001) to give further effect to council directive 89/39/EEC. Substitute a new regulation 5 (general duties of employer), a new regulation 8 (protective and preventive services) and introduce requirements relating to fire fighting and first aid
Commencement date: 30/1/2003

Solicitors (Continuing Professional Development) Regulations 2003
Number: SI 37/2003
Contents note: Make provision for a required number of hours of continuing professional development (CPD) being undertaken by a solicitor as a prerequisite to being granted a practising certificate. Provide for the certifying of the hours of CPD undertaken to the Law Society and provide that a breach of the regulations may be found by the Disciplinary Tribunal to be misconduct
Commencement date: 1/7/2003

District Court (Fees) Order 2003
Number: SI 87/2003
Contents note: Provides for the fees to be charged in District Court offices with effect from 10/3/2003. Provides for the exemption from fees of certain proceedings, including family law proceedings. Revokes the *District Court (Fees) (No 2) Order 2001* (SI 487/2001)

Circuit Court (Fees) Order 2003
Number: SI 88/2003
Contents note: Provides for the fees to be charged in Circuit Court offices with effect from 10/3/2003. Provides for the exemption from fees of certain proceedings, including family law proceedings. Revokes the *Circuit Court (Fees) (No 2) Order 2001* (SI 486/2001)

Supreme Court and High Court (Fees) Order 2003
Number: SI 89/2003
Contents note: Provides for the fees to be charged with effect from 10/3/2003 in the Office of the Registrar of the Supreme Court, the Central Office, the Examiner's Office, the Office of the Official Assignee in Bankruptcy, the Taxing Master's Office, the Accountant's Office, the Office of Wards of Court, the Probate Office and District Probate Registries. Provides for the exemption from fees of certain proceedings, including family law proceedings. Revokes the *Supreme Court and High Court (Fees) (No 2) Order 2001* (SI 488/2001)

Correction to *Legislation update* published in the last issue of the *Gazette*
The following act was omitted from the list of acts passed in 2002:
Statute Law (Restatement) Act, 2002
Number: 33/2002
Date enacted: 24/12/2002
Commencement date: 24/12/2002

Prepared by the Law Society Library

Solicitors' Benevolent Association

139th report and accounts

Year 1 December 2001 to 30 November 2002

The Solicitors' Benevolent Association, founded in 1863, is the profession's voluntary charitable body. It consists of members of the profession throughout Ireland who contribute to our funds, and its aim is to assist members or former members of the solicitors' profession in Ireland and their spouses, dependants and families who are in need. The association also provides advice and financial assistance on a confidential basis and functions independently of both law societies.

The amount paid out during the year in grants was €359,302. Currently, there are 52 beneficiaries in receipt of regular grants and approximately one third of these are themselves supporting spouses and children.

The directors anticipate that, particularly in view of the increasing number of families with young children being helped, there will be a need for increased assistance in the coming years. Again, in a number of cases, the directors are conscious of the fact that grants have not been increased for some time, despite rising costs, and in several instances increased needs are apparent in cases where beneficiaries are of advanced age. For these reasons, the directors particularly welcome higher level of subscriptions, donations and legacies and the general support of the profession.

There are currently 15 directors, three of whom reside in Northern Ireland, and they meet monthly in the Law Society's offices, Blackhall Place. They meet at Law Society House, Belfast, every other year. The work of the directors, who provide their services entirely on a voluntary basis, consists in the main of reviewing applications for grants and approving of new applications. The directors also make themselves available to those who may need personal or professional advice.

The directors are grateful to both law societies for their support and, in particular, wish to express thanks to Elma Lynch, immediate past-president of the Law Society of Ireland, Alan Hewitt, past president of the Law Society of Northern Ireland, Ken Murphy, director general, John Bailie, chief executive and all the personnel of both societies.

I wish to express particular appreciation to all those who contributed to the association when applying for their practising certificates, to those who made individual contributions and to the following:

- The Law Society of Ireland
- Northern Ireland Law Society
- Dublin Solicitors' Bar Association
- Belfast Solicitors' Association
- Faculty of Notaries Public In Ireland
- Limavady Solicitors' Association
- Tipperary Bar Association
- Northern Ireland Young Solicitors' Association
- West Cork Bar Association
- Sheriffs' Association
- Waterford Law Society
- Contributors to Irish conveyancing precedents
- Oisín Publications, publishers of the *Gazette yearbook and diary*.

To cover the ever-greater demands on the association, additional subscriptions are more than welcome, as, of course, are legacies. Subscriptions and donations will be received by any of the directors or by the secretary, from whom all information may be obtained at 73 Park Avenue, Dublin 4, and I would urge all members of the association, when making their own wills, to leave a legacy to the association. You will find the appropriate wording of a bequest at page 26 of the *Law directory 2003*.

I would like to thank all the directors and the association's secretary, Geraldine Pearse, for their valued hard work, dedication and assistance during the year.

Thomas A Menton,
chairman

RECEIPTS AND PAYMENTS ACCOUNT
YEAR ENDED 30 NOVEMBER 2002

	2002	2001
RECEIPTS	€	€
Subscriptions	256,029	240,736
Donations	39,416	38,060
Investment income	31,416	44,588
Bank interest	4,301	3,784
Repayment of grants	16,380	–
	347,542	**327,168**
PAYMENTS		
Grants	(359,302)	(312,122)
Bank charges	(1,048)	(1,952)
Administration expenses	(17,582)	(21,593)
	(377,932)	**(335,667)**
DEFICIT FOR THE YEAR BEFORE SPECIAL EVENTS	(30,390)	(8,499)
Lawyers diaries and Christmas cards	22,554	(469)
Irish conveyancing precedents publication	983	5,940
DEFICIT FOR THE YEAR BEFORE LEGACIES	**(6,853)**	**(3,028)**
Legacies	27,324	209,528
SURPLUS FOR THE YEAR	**20,471**	**206,500**

DIRECTORS AND OTHER INFORMATION

Directors
Thomas A Menton (chairman)
John Sexton (deputy chairman)
Sheena Beale, Dublin
Desmond Doris, Belfast
Felicity M Foley, Cork
John Gordon, Belfast
Colin Haddick, Newtownards
Niall D Kennedy, Tipperary
Mary H Morris, Swinford
John M O'Connor, Dublin
Sylvia O'Connor, Wexford
Brian K Overend, Dublin
Colm Price, Dublin
David Punch, Limerick
Andrew F Smyth, Dublin

Trustees (*ex officio* directors)
Brian K Overend
John M O'Connor
Andrew F Smyth

Secretary
Geraldine Pearse

Auditors
Deloitte & Touche
Chartered Accountants
Deloitte & Touche House
Earlsfort Terrace
Dublin 2

Stockbrokers
Bloxham Stockbrokers
2-3 Exchange Place
IFSC
Dublin 1

Bankers
AIB plc
37/38 Upper O'Connell Street
Dublin 1

First Trust
31/35 High Street
Belfast BT1

Offices of the association
Law Society of Ireland
Blackhall Place
Dublin 7

Law Society of Northern Ireland
Law Society House
90/106 Victoria Street
Belfast BT1 3JZ

Personal injury judgment

Employer liability – employee exposed to asbestos dust – actual knowledge of employer that asbestos dust was in workplace – failure to inform employees on becoming aware of the problem – negligence of employer – no contributory negligence on the part of the employee – High Court award – employer appealed to Supreme Court – criteria for recovery of damages for nervous shock – 'fear of disease' where no physical injury – policy considerations involving limitations on potential claims – no damages for irrational fear of contracting a disease because of the negligent exposure to health risk by employers when the risk was characterised by medical advisers as being very remote

CASE

***Stephen Fletcher v Commissioners of Public Works in Ireland*, High Court, judgment of O'Neill J of 15 June 2001; Supreme Court, Keane CJ, Denham, Murray, Hardiman and Geoghegan JJ, judgments of Keane CJ and Geoghegan J of 21 February 2003.**

THE FACTS

Stephen Fletcher was born on 28 December 1947 and was first employed by the Commissioners of Public Works (the OPW) in 1977. He is married with one child. From 1985 onwards, he was engaged in Leinster House as a general operative, helping plumbers, electricians and fitters in what was described as 'an enormous and labyrinthine central heating system'. The piping in the central heating system in Leinster House was covered with a lagging containing asbestos of various types, and much of it was in extremely poor condition – for example, it was friable, dusty and falling off in many places.

As part of Mr Fletcher's work, he was regularly obliged to hack off the lagging in order to enable the tradesmen he was assisting to get access to the pipework. The work had to be done in difficult conditions in confined areas.

In July 1984, an inspection was carried out of the working conditions on behalf of the minister for labour. The inspector concluded that the asbestos lagging had deteriorated to such an extent that it should be removed section by section until complete removal had been achieved. In a letter to the OPW, the Department of Labour pointed out that the inspector strongly recommended that immediate steps be taken to have all the asbestos removed under the conditions pursuant to the relevant statutes as if the building were a factory for the purposes of the statutes.

Mr Fletcher finished his work in Leinster House in 1991; thereafter, his exposure to asbestos dust ceased.

Mr Fletcher was angered and annoyed on being informed that he had been unnecessarily and without his knowledge exposed to risks associated with asbestos. Initially, he consulted a solicitor, who in turn referred him to Professor Luke Clancy, consultant respiratory physician at St James' Hospital, Dublin, described as an acknowledged authority on respiratory diseases generally and diseases resulting from exposure to asbestos in particular. Ultimately, Mr Fletcher went to a consultant psychiatrist, Dr John Griffin.

In his evidence in the High Court, Mr Fletcher described his feelings of anxiety and annoyance as a result of his learning of his exposure to asbestos. His general medical practitioner gave him medication for anxiety. In answer to the question as to whether the medical experts should have been able to give him any help, he replied as follows:

'They tell me not to be worried and all that, but then people, I know they are professional people, but when I go out the door, I am back to square one, so it doesn't matter what they tell me. I was being exposed to asbestos in 1985/1986 and that's in my mind'.

Mr Fletcher was asked what his principal fear was and he said 'death'. Mr Fletcher said he tried to forget about his anxiety when he went to work but that at times his sleep was affected.

Stephen Fletcher issued proceedings against the OPW based on negligence, breach of duty, including breach of statutory duty, on the part of his employers.

JUDGMENT OF THE HIGH COURT

The case came before O'Neill J, who delivered judgment on 15 June 2001. Evidence was given in the High Court as to the quantities of asbestos in the area in which Mr Fletcher worked. O'Neill J found as a fact, which was not contested, that significant quantities of asbestos polluted the air which Mr Fletcher breathed and that, of necessity, he inhaled very large quantities of asbestos dust over a number of years.

Evidence was also given that in February 1985 an engineer acting on behalf of the OPW had written to submit a tender for the work involved in removing insulation from a certain area in Leinster House. That letter stated that workers must be supplied with appropriate protective clothing and protective masks. The letter also stated that all removal of contaminated clothes and washing facilities must be within the confined area and that workers, when washed, should then move directly to their clean-change area. Based on that evidence, O'Neill J concluded that it was absolutely clear that a dangerous situation pertained and that the state of the lagging in the basement area of Leinster House and other pipe work was in 'a dreadful condition' and was a danger to anyone who was obliged to work with it, as Mr Fletcher was.

O'Neill J held as a fact that it was clear that the OPW knew

all of this and knew it from, at the very latest, mid-1984. The judge stated it was also clear from correspondence that the OPW was well aware of the dangers of asbestos because in a tender document, it made the most stringent requirements of a contractor coming in to bid for the work. Nevertheless, at the same time, Mr Fletcher was obliged as part of his contract of employment to carry out work in this area without being informed at all of the existence of asbestos or the risks attached to asbestos dust or without being provided with protective clothing or without any steps whatsoever having been taken to protect him from the effects of asbestos dust.

O'Neill J found that from 1985, and probably well into 1989, Mr Fletcher was regularly exposed in the course of his employment to asbestos dust and during that time inhaled very significant quantities of the dust. In those circumstances, he was satisfied that the OPW was guilty of 'gross negligence' and that no question of contributory negligence arose.

In the High Court, Professor Clancy (the respiratory consultant) gave evidence that Mr Fletcher had been exposed to the risk of developing asbestosis and was also at an increased risk of lung cancer, but that Mr Fletcher had not contracted either disease and that it was very unlikely that he ever would. Professor Clancy's evidence was to the effect that as a result of his exposure to asbestos Mr Fletcher was at risk of contracting in later life the disease called mesothelioma. This would not happen until at least 20 years after the first exposure to asbestos and might not occur until 40 years thereafter. If it occurred, the prognosis would be very poor, since the disease would be painful and likely to prove terminal within two or three years of it developing. Professor Clancy emphasised, however, that the risk of contracting the disease was very remote.

Professor Clancy also testified that while the likelihood was that Mr Fletcher had inhaled asbestos fibres, and that some of them would have remained in his body and caused microscopic scarring, there were in fact no physical manifestations of the scarring visible on x-ray.

A consultant psychiatrist, Dr John Griffin, concluded in the High Court that Mr Fletcher was suffering from 'a reactive anxiety neurosis' and O'Neill J found that this could not be assuaged by counselling or the best advice which was available.

In the context of Mr Fletcher's anger and anxiety reaction, it had been argued by the OPW that that was not caused by the exposure to asbestos dust itself; it was, so to speak, caused by Mr Fletcher's exposure to the knowledge of it, which he gained through the media in late 1996. O'Neill J stated that Mr Fletcher's psychiatric condition was the result of exposure to the asbestos dust and not his exposure to the knowledge of it. However, the judge accepted that Mr Fletcher's exposure to the knowledge of asbestos dust was a trigger factor which started the psychiatric complaint, but that did not mean that any psychiatric illness did not arise from exposure to the asbestos dust.

The OPW appealed to the Supreme Court on the basis that no award for damages ought to have been made at all.

THE AWARD IN THE HIGH COURT

O'Neill J assessed general damages at IR£45,000 and special damages at IR£3,760.
Total: IR£48,760

JUDGMENT OF THE HIGH COURT

The case came before the Supreme Court of five judges – Keane CJ, Denham, Murray, Hardiman and Geoghegan JJ – with judgments delivered by Keane CJ and Geoghegan J on 21 February 2003, with all judges concurring with those judgments. Both judgments dealt with the facts and the law and considered the submissions made to the Supreme Court by the various parties.

Keane CJ stated that the issue which the Supreme Court had to resolve was whether Mr Fletcher was entitled to recover damages for the impairment of his 'mental condition', which, according to the evidence of the psychiatrist in the High Court, had resulted from his exposure to the risk of contracting mesothelioma, a risk which beyond doubt was created by the failure of the OPW to take the precautions which a reasonable employer would have taken to ensure that Mr Fletcher was not exposed to any such risk.

Recovery of damages for psychiatric illness

The chief justice noted that the fact that it was reasonably foreseeable that particular acts or omissions would cause loss or injury to another person does not, of itself, give rise to liability in negligence. There must also be what judges have called a relationship of 'proximity' between the plaintiff and the defendant which gave rise to the legal duty to take care that the foreseeable consequence was avoided. Keane CJ stated that that of itself did not present any difficulty for Mr Fletcher. If this were a case in which the injuries sustained by him were purely physical, in that situation, given that the injuries were the foreseeable consequence of the actions or omissions of the OPW as his employer, there would not be the 'slightest difficulty' in concluding that the OPW was liable in negligence.

Keane CJ stated that it had been the law in Ireland that a plaintiff who suffers what usually has been described as 'nervous shock', even where unaccompanied by physical injury, can recover damages where the other ingredients of negligence are established. It was undoubtedly the law that damages were not recoverable for grief or sorrow alone; no degree of mental anguish arising from the wrongful acts or omissions of another was compensatable at common law. However, he stated that nervous shock, even where there was no physical injury or even fear of such injury, was compensatable when caused by the negligence of a defendant.

The Supreme Court referred to the circumstances in which damages for nervous shock were recoverable. These were set out by Hamilton CJ in the case of *Kelly v Hennessy* ([1995] 3 IR 253). In that case, the Kelly family had been involved in a serious car crash caused by the negligence of the defendant. Mr Kelly and one of his daughters suffered permanent brain damage. Mrs Kelly had not been present at the accident but had learnt of it by telephone. It was accepted that Mrs Kelly suffered as a consequence from post-traumatic stress disorder. It was held by the Supreme Court that where a plaintiff came on the immediate aftermath of an accident, either at the scene or in hospital, involving a person with whom a plaintiff had a close relationship, a duty of care arose.

The circumstances in which damages for nervous shock were set out by Hamilton CJ in the *Kelly* case and are as follows:

1) The plaintiff must establish that he actually suffered 'nervous shock'. This term has been used to describe 'any recognisable psychiatric

illness' and a plaintiff must prove that he suffered a recognisable psychiatric illness if he is to recover damages for nervous shock
2) A plaintiff must establish that his reasonable psychiatric illness was shock induced
3) A plaintiff must prove that the nervous shock was caused by a defendant's act or omission
4) The nervous shock sustained by a plaintiff must be by reason of actual or apprehended physical injury to the plaintiff or a person other than the plaintiff
5) If a plaintiff wishes to recover damages for negligently-inflicted nervous shock, he must show that the defendant owed him a duty of care not to cause him a reasonably foreseeable injury in the form of nervous shock.

The chief justice stated that the 'nervous shock' suffered by an employee (who does not have to be characterised as a 'primary' or 'secondary' victim of negligence) in the workplace is properly compensatable where it is as a result of the negligence of an employer. This was 'admirably demonstrated' by the Circuit Court decision of Judge Bryan McMahon in *Curran v Cadbury (Ireland) Limited* ([2000] 2 IRLM 343), where the chief justice stated the legal issues were 'analysed with [Judge McMahon's] customary erudition'.

Several other cases were considered by the Supreme Court including *Byrne v Great Southern and Western Railway Company of Ireland* (unreported), *Bell and Another v The Great Northern Railway Company of Ireland* ([1890] 26 LR (Ir) 428), *McLoughlin v O'Brian* ([1983] AC 410), *Alcock and Others v Chief Constable of South Yorkshire Police* ([1992] 1 AC 310), *White v Chief Constable of South Yorkshire Police* ([1999] 2 AC 455), and *Page v Smyth* ([1996] AC 155).

If, for example, the advice of Professor Clancy had been that as a matter of probability Mr Fletcher would contract the disease of mesothelioma and Mr Fletcher had, as a result, suffered the psychiatric disorder of which he now complained, it would seem, according to the chief justice, unjust and anomalous that the OPW should escape liability. The fact that the advice that Mr Fletcher received was that he was at no more than a very remote risk of contracting the disease would not be a reason, in principle, for relieving the OPW of liability *in limine*. The general principle that the wrongdoer must take his victim as he finds him should, in the absence of other considerations, apply. The chief justice considered that it might be, on one view, questionable whether the law should apply the so-called 'eggshell skull' test in cases of psychiatric illness. The fact remains that the test is applied routinely in personal injury cases in Irish courts. The judge stated that he was very familiar with minor soft-tissue injuries which have, according to medical evidence, caused a plaintiff acute psychiatric injury which, he was assured, is of real significance to the plaintiff, however surprising his or her reaction is to the objective finder of fact.

'Nervous shock' would probably be regarded by medical experts today as an inexact expression, to put it no more strongly, according to the chief justice. The authorities, however, use it to define a set of circumstances which, when they give rise to a specific psychiatric disorder unaccompanied by physical injury that was the reasonably foreseeable consequence for breach of duty on the part of the defendant, may lead to a finding of liability provided the conditions laid down by Hamilton CJ in *Kelly v Hennessy* are met.

Policy considerations

The chief justice referred to the issue of possible policy considerations which, in the case of what could be conveniently cate-

gorised as 'fear of disease' cases such as the present, argue even more powerfully against the imposition of liability. One issue was the undesirability of awarding damages to plaintiffs who have suffered no physical injury and whose psychiatric condition is solely due to an unfounded fear of contracting a particular disease. The chief justice noted that a person who prefers to rely on the ill-informed comments of friends or acquaintances or inaccurate and sensational media reports rather than the considered view of an experienced physician should not be awarded damages by the law of tort.

The second policy argument, which was closely related, concerned the implications for the healthcare field of a more relaxed rule as to recovery for psychiatric illness. The chief justice referred to the judgment of Baxter J, giving the opinion of the majority of the California Supreme Court in *Potter and Others v Firestone Tyre and Rubber Company* (682 NE 2d 253). In that case, Baxter J stated that access to prescription drugs was likely to be impeded by allowing recovery of 'fear of cancer' damages in negligence cases without the imposition of a heightened threshold. Thousands of drugs with no harmful effects are currently being prescribed and used. If and when negative data is discovered and made public, Baxter J stated that unless meaningful restrictions were placed on this potential plaintiff class, the threat of numerous large monetary awards coupled with the added cost of insurance could diminish the availability of new, beneficial drugs or increase their price beyond the reach of those who need them most.

The chief justice considered that in cases where there was no more than a very remote risk that a person would contract the disease of mesothelioma, recovery should not be allowed for such a psychiatric illness. This was because the policy considerations which he had summarised point clearly to the necessity of imposing some limitations on a number of potential claims which might otherwise come into being.

The Supreme Court then considered cases relating to claims for emotional distress arising out of exposure to asbestos that had come before the United States Supreme Court.

In conclusion, Keane CJ stated that he was satisfied that the law in Ireland should not be extended by the courts so as to allow recovery by plaintiffs of damages for psychiatric injury resulting from an irrational fear of contracting a disease because of their negligent exposure to health risks by their employers, where the risk was characterised by their medical advisers as being very remote. He added a final observation. The court was not in this case concerned with the question as to whether an employer should be held liable, where it was reasonably foreseeable that an employee might suffer a nervous breakdown because of the stress and pressures of his workload, an issue resolved in favour of the plaintiff by the English High Court in *Walker v Northumberland County Council* ([1995] 1 All ER 737).

Geoghegan J in his judgment stated that the case of *Kelly v Hennessy* ([1995] 3 IR 253) did not govern the present case because he said it should only be taken to relate to 'accident damage'. He therefore considered that the Supreme Court was in 'virgin territory' and that it must consider 'unguided by any Irish precedent' whether damages were properly recoverable in the particular case before the court.

He reviewed the case law of both Ireland and courts in many other jurisdictions. It was against that background that the Supreme Court must decide as a matter of policy and of reasonableness whether claims for damages for psychiatric injury only and resulting from fear of asbestos-related diseases of a degree which was objectively irrational were recoverable. He was quite satisfied that for the reasons set out in the American cases, and also by reason of reasonably objective irrationality of the fears of persons that they would contract asbestos-related diseases, the appeal should be allowed. He stated it would be unreasonable to impose a duty of care on employers, whether they be state or non-state (there being no known justification for making any distinction), insured or uninsured, to take precautions not merely that their employees would not contract disease but that they would not contract so serious a fear of contracting a disease – however irrational – that they develop a psychiatric overlay. The court should not permit compensation for irrationality in that way.

Having considered at some length the case law in various jurisdictions, Geoghegan J set out certain principles. Reasonable foreseeability was not the only determining factor in establishing a duty of care. Proximity (given an elastic definition in case law), the reasonableness of the imposition of a duty of care and questions of public policy can be additional determining factors.

Geoghegan J took the view that it would be unreasonable to impose a duty of care on employers to guard against mere fear of a disease, even if such a fear might lead to psychiatric condition. He deliberately refrained from expressing any view as to whether the implantation of fibres into the lung (which did occur in the *Fletcher* case) or the development of pleural plaques (which did not occur), and in neither case involving any immediate symptoms, could be described as a physical injury, especially having regard to the definition of injury in the *Civil Liability Acts*.

The Supreme Court allowed the appeal of the OPW and set aside the judgment of O'Neill J in the High Court. G

This judgment was summarised by solicitor Dr Eamonn Hall.

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ADMINISTRATIVE

Planning and development

Judicial review – certiorari – *planning and environmental law – administrative law – protected structures – whether grounds adduced by applicant substantial – whether respondent failed to have regard to county development plan* – Local Government (Planning and Development) Act, 1963 – Local Government (Planning and Development) Act, 1999

The applicants brought judicial review proceedings in respect of a decision issued by An Bord Pleanála refusing planning permission for the development of a number of apartments. The applicants first sought leave to bring judicial proceedings and were obliged to show that the grounds adduced were substantial in accordance with section 82(3B) of the *Local Government (Planning and Development) Act, 1963*, as amended. The applicants contended that the respondent had wrongfully decided that the lands in question were within the curtilage of a protected structure (which was situated on the lands) and were themselves part of the protected structure. In addition, the applicants contended that the respondent had wrongfully interpreted the development plan with regard to protected structures.

Ó Caoimh J refused leave to seek judicial review, holding that the applicants had failed to advance substantial grounds that the respondent had erred in law. The protection afforded to a 'protected structure' as set out in the *Local Government (Planning and Development) Act, 1999* included land lying within the curtilage of the structure. This did not mean that no work could be permitted on the structure, but any application for planning permission must take into account the status of the structure.

***Begley v An Bord Pleanála*, High Court, Mr Justice Ó Caoimh, 14/1/2003** [FL6829]

Housing, traveller issues

Judicial review – local authority – housing issues – obligation of housing authority to provide suitable traveller accommodation – Housing Act, 1988, *section 13* – Housing (Traveller Accommodation) Act, 1998, *sections 13, 16, 23*

The applicants, who were travellers, sought various reliefs after they had been told by the respondent housing authority that no halting site accommodation was available within its administrative area other than that at the Cooperage, Limerick, but that standard local housing would be available. The applicants claimed that the site at the Cooperage was unsuitable and did not fulfil the duty imposed on the respondents by section 13 of the act of 1988 to provide proper caravan sites for travellers and that they were entitled to be provided with suitable halting site accommodation notwithstanding the fact that a travellers' accommodation programme had not yet been implemented by the respondents.

Herbert J declared that the respondent failed to discharge its statutory obligations to provide a site for the applicants' caravan, holding that the functions of a housing authority under section 13 of the 1988 act must be performed in a reasonable manner and must involve the application of a coherent and fair system of allocating accommodation to people who had been included in the assessment of needs under section 9 of the act by the housing authority. As such, the applicants were entitled to priority to the provision of a caravan site within the respondent's administrative area. Section 13 of the 1998 act provides that the respondent's obligations to provide for housing needs extends to the provision not of dwelling houses but of caravan sites in respect of travellers and section 23 of the act intended to make clear that the respondent was not inhibited from providing traveller accommodation by the fact that it had not yet adopted an accommodation programme.

***O'Donoghue v City of Limerick*, High Court, Mr Justice Herbert, 6/2/2003** [FL6943]

CONSTITUTIONAL

Delay, fair procedures

Judicial review – criminal law – constitutional law – right to fair trial – delay – sexual offences – prohibition – fair procedures – prejudice – whether order of prohibition restraining trial should issue – whether real risk of unfair trial – whether offences known to law at time of arrest – Non-Fatal Offences Against the Person Act, 1997 – Interpretation Act, 1937 – Interpretation (Amendment) Act, 1997

The applicant sought an order of prohibition to restrain his trial on the grounds of delay. He claimed that the delay in bringing the criminal prosecution was inordinate and his defence had been hampered and prejudiced. It was claimed that there was a real and serious risk of an unfair trial. Furthermore it was contended that the offences with which he had been charged had been abolished by section 28 of the *Non-Fatal Offences Against the Person Act, 1997*, and the relevant provisions of the *Interpretation Act, 1937* and the *Interpretation (Amendment) Act, 1997* did not act as a saver.

Murphy J refused the order sought. There was no doubt that there had been extensive delay. On the balance of probabilities, the delay by the complainant in reporting the incidents was accepted by the court. The question of the motives and the credibility of the complainant were a matter for the trial. A previous Supreme Court judgment in *Corbett v DPP* had upheld the saver provisions with regard to the prosecution of certain offences

***G(M) v DPP*, High Court, Mr Justice Murphy, 17/12/2003** [FL6961]

CONTRACT

Land law

Rescission – time expressed to be of essence – forfeiture of deposit – whether vendor entitled to forfeit deposit – reason for rescission – whether sale subject to vacant possession – conduct of purchaser – whether purchaser permitted to take advantage of error made by vendor's solicitor in replies to requisitions – whether purchaser prejudiced by erroneous reply thereto

The plaintiff issued a vendor and purchaser summons for the return of a deposit paid to the defendants on a property subject to a tenancy after the contract for sale had been rescinded. The plaintiffs claimed that the rescission was due to the

fact that the defendants did not provide the property with vacant possession as they had allegedly agreed to. The defendants claimed that vacant possession had never been a term of the contract and that the rescission arose from the delay caused by the plaintiffs. The defendants further alleged that the only reason the plaintiffs made vacant possession an issue was that there had been a genuine error in the written replies to requisitions to the effect that vacant possession of the property would be furnished, which had never been an issue between the parties up to that point.

Smyth J ordered the defendants to return the plaintiffs' deposit, holding that the defendants were intent on rescinding the contract if the sale did not close by the due date and the plaintiffs were entitled to treat the announcement from which the defendants never resiled as a repudiation of the contract. However, as the defendants had been inhibited from disposing of the property for over a year due to the plaintiffs' conduct in raising no serious objection if vacant possession were not available on the conclusion of the sale until it became clear that they could not proceed with the purchase due to their own financing difficulties and as they had not been prejudiced by the erroneous replies to requisitions, no interest would be awarded on the said sum and the defendant was entitled to two thirds of the costs of the action as against the plaintiff.

***Hade and Others v Meehan*, High Court, Mr Justice Smyth, 21/1/2002** [FL6862]

CRIMINAL

Appeal, *certiorari*

Sexual offences – appeal – judicial review – certiorari – *fair procedures – charge – charge not known to criminal law – whether charge a nullity – whether applicant properly returned for trial* – Sexual Offences (Jurisdiction) Act, 1996, *section 2(1)*

The respondent was charged with an offence stated as being contrary to section 2 of the *Sexual Offences (Jurisdiction) Act, 1996* as set out in the statement of charges. The respondent asserted that the statement of charges disclosed no offence known to the law, in that section 2 of the act did not itself create an offence. The High Court granted an order of *certiorari*, quashing an order made by the district judge returning the respondent for trial in the Circuit Court in respect of that charge. The appellant appealed that decision.

Geoghegan J dismissed the appeal, holding that section 2(1) of the 1996 act was unambiguous and did not create a new offence but rather extended the jurisdiction to try certain existing offences. Accordingly, the return for trial was invalid as the statement of charges did not specify which scheduled offence was being referred to. As the statement of charges had been carried over into the return for trial, it followed that the return was invalid and the respondent was not properly before the Circuit Court.

***BH v DPP*, Supreme Court, 6/2/2003** [FL6873]

Bail, case stated

Estreatment of bail – accused remanded on bail – recognisances entered into by respondents – charges struck out and re-entered on return date – grounds for striking-out of charges – accused remanded on continuing bail upon re-entry of charges – bailspersons not on notice of re-entry of charges – bail subsequently estreated – whether bailspersons bound by recognisances in respect of re-entered charges – Courts of Justice Act, 1947, *section 16*

The first respondent was charged with various offences set out in charge sheet 334/98 and was released on bail, the three respondents having entered recognisances. On the remand date, the District Court struck out the charge sheet as the prosecution had not served the book of evidence by then. Later that day, the district judge re-entered the charge sheet at the request of the first respondent but without the knowledge of the second and third respondents and remanded the first respondent on continuing bail. Subsequently, the District Court made an order estreating the recognisances and forfeiting the monies lodged in court for non-performance by the first respondent of his conditions of bail. That order was appealed to the Circuit Court. The Circuit Court posed the following questions for the opinion of the Supreme Court: 'Did the recognisance entered into by the respondents expire on 18 November 1998 when the original charge sheet was struck out by the District Court? Did the said recognisance revive as against the first respondent upon the granting of the application made on his behalf to have the said charge sheet re-entered? Was the said recognisance revived as against the second and third respondents when the said charge sheet was re-entered, notwithstanding the fact that they had no notice of the application to re-enter the said charge sheet and were not present in the District Court at the time?'

McGuinness J answered the first two questions posed in the affirmative and the third question in the negative, holding that there was a clear gap between the strike-out order and the re-entry order. As a consequence, the first respondent's recognisance and those of his bailspersons were discharged. An alteration by the judge, even on the same day, could not retrospectively undo those facts. The re-entry of the charge was a fresh step by the court which brought about a new situation which affected the position of all three respondents. It was not open to the District Court to re-impose recognisances on the second and third respondents without their agreement and without notice to them as it was contrary to the principles of natural justice. The situation of the first respondent differed, as it would be contrary to justice that he not be bound by the recognisance he had given in connection with the original charges as he had sought to bring about the events in question.

In answering the first two questions posed in the affirmative and the third question in the negative, Geoghegan J held that it was implicit in the joint request of the first respondent to the state solicitor to re-enter the original charges that he would be treating himself as continuing to be bound by the recognisance. As the District Court struck out the original charges on substantial grounds, the second and third respondents were entitled to believe that their obligations were at an end.

Fennelly J held that the first two questions should be answered in the affirmative and in regard to the third question agreed with McGuinness J.

***Superintendent Kennelly v Cronin*, Supreme Court, 18/12/2002** [FL6919]

Delay, fair procedures

Impending prosecution for indecent assault – right to expeditious trial – fair procedures – whether applicant must prove prejudice caused by delay – whether delay excessive – whether applicant's constitutional rights infringed – cause of delay – whether applicant prejudiced in defence by reason of delay – prohibition – whether psychological evidence adduced reliable – whether evidence of dominion established

The applicant was charged in 2000 with alleged indecent assaults on the complainant in 1989, but the complaint had not been made to the gardaí until 1998. He sought the prohibition of the continuance of the prosecution on the grounds that the delay in the institution and prosecution of the proceedings had been excessive and violated his right to trial with rea-

sonable expedition and that the delay prejudiced his chances of obtaining a fair trial in that it hindered the preparation of his defence.

McKechnie J granted the relief sought, holding that an accused has a right to have a trial with reasonable expedition which, constitutionally based, is independent of any other right which might attach to a trial of such a person on a criminal charge so that delay itself, even where no prejudice exists, can be sufficient to prohibit the prosecution of a trial. As the accused did not exercise dominion over the complainant after the incidents complained of, no excuse could be made for the complainant's delay in making her complaint. Accordingly, the accused was entitled to the relief sought on the ground of delay alone. He was not entitled to relief on the ground of any alleged prejudice as a result of delay.

***BJ v DPP*, High Court, Mr Justice McKechnie, 12/2/2002** [FL6812]

Detention, road traffic

Lawful detention – case stated – road traffic offence – whether defendant in lawful detention at time request for sample made – Road Traffic Acts, 1961–1994

The defendant was arrested under the *Road Traffic Acts* and taken to a garda station. He was detained in the station for roughly 20 minutes and then asked to provide a breath specimen. The garda indicated in court that the garda 'guidelines' stated that a garda should observe an arrested person for 20 minutes prior to the taking of a sample or requiring that a sample be given. The defendant refused to comply with the garda's direction to give a breath specimen. The Circuit Court stated a case to the Supreme Court, seeking an opinion on whether the defendant was in lawful detention at the time the request for a sample was made.

The Supreme Court answered the first question in the negative, holding that the defendant's detention at the time the request was made was not lawful. Where authorities were entitled to perform a particular procedure on arrest, they were entitled to a reasonable period of time in which to do it. However, in this case, no reason whatever was given for the interval. In another case there might be evidence that would clearly demonstrate the reasonableness of the 20-minute interval between arrival at the garda station and the administration of the test.

***DPP v Finn*, Supreme Court, 19/2/2003** [FL6904]

Evidence, privacy, telecommunications

Constitutional law – evidence – telecommunications – privacy – contract law – statutory interpretation – interception of mobile telephone call – whether interception of phonecall amounted to invasion of rights – whether evidence of phonecall inadmissible – Postal and Telecommunications Services Act, 1983

The applicant had been convicted on foot of evidence obtained by An Garda Síochána from a telephone conversation on a mobile phone. The gardaí had obtained a mobile phone from a suspect and had received information from a telephone call made to the mobile phone. The applicant appealed the conviction on the basis that the evidence in question had been improperly obtained as the interception was in breach of the *Postal and Telecommunications Services Act, 1983*. It was submitted that the interception was in violation of the applicant's constitutional rights.

The Court of Criminal Appeal (Hardiman J delivering judgment, Ó Caoimh J and Finnegan J agreeing) allowed the appeal and quashed the conviction. There had been no agreement by the applicant to the listening by the gardaí of the telephone conversation and this had amounted to an 'interception'. An interception which was unlawful could not become lawful on the basis of what was heard during it. The evidence of the phonecall was therefore admitted in error and the conviction must be quashed.

***DPP v Dillon*, Court of Criminal Appeal, 20/12/2002** [FL6920]

Guilty plea, sexual offences

Appeal – rape offence – guilty plea – whether custodial sentence mandatory – Criminal Law (Rape) Act, 1991 – Sex Offenders Act, 2001

The applicant sought leave to appeal against the severity of a sentence. The applicant had pleaded guilty to two offences of rape and had received a term of three years' imprisonment. On behalf of the applicant, it was contended that a sentence of imprisonment was not mandatory in all such cases. It was submitted that the applicant was a person of excellent prior character and that a custodial sentence had not been warranted.

The Court of Criminal Appeal (Fennelly J delivering judgment, Lavan J and Abbott J agreeing) allowed the application in part. The trial judge had erred in not leaving open the possibility of a non-custodial sentence. The provisions of the *Sex Offenders Act, 2001* that applied to the applicant constituted a real and substantive punitive element. It was an exceptional case and the court would suspend the balance of the remaining sentence.

***DPP v Y(N)*, Court of Criminal Appeal, 19/12/2002** [FL6838]

ENVIRONMENTAL

Judicial review, planning and development law

Permission – aviation law – refusal of planning permission – fair procedures – whether designation of applicant's land as aviation 'safety area' ultra vires *respondents' powers – compensation – whether designation of applicant's land as 'safety area' without compensation deprivation of constitutional property rights – whether applicant entitled to compensation – whether respondents should be compelled to compulsorily acquire applicant's lands* – Air Navigation and Transport Act, 1950, *section 14* – Local Government (Planning and Development) Regulations 1994, *regulation 32(1)(h)*, *third schedule*, *paragraph 8* – *Bunreacht na hÉireann*, *articles*, *40.1*, *40.3 and 43.2*

The applicant sought various reliefs following a refusal by An Bord Pleanála to grant planning permission for houses within an aviation 'safety area' next to Shannon airport. The respondents had lodged objections to the original grant of permission by Clare County Council on the grounds that development within that area would pose a threat to the proper functioning of aviation around the airport. Schedule 8 of the 1994 regulations provides that no compensation is payable where permission is refused on the grounds that the development would interfere with air traffic. Section 14 of the *Air Navigation and Transport Act, 1950* also allows the respondents to prevent development within an area surrounding an aerodrome and provides for compensation to landowners so affected. The applicant claimed that the designation of such safety areas was *ultra vires* the powers of the respondents and that it denied him the right to compensation which would be available under section 14 of the 1950 act, which was an unjust attack on his constitutional property rights.

Finnegan P refused the reliefs sought, holding that the respondents had a legitimate interest in proper planning and development of the area surrounding Shannon airport and if the respondents' objectives could be achieved within the planning process, there was no basis in law upon which they

could be compelled to adopt statutory procedures available to them. As the planning code is of universal application, there was no unjust discrimination contrary to article 40.1 of the constitution. Preventing development which might interfere with air traffic around an aerodrome is a valid objective based on the common good and is therefore an appropriate matter to be balanced pursuant to article 43.2 of the constitution against the constitutional rights in relation to private property found in article 40.3.

***Liddy v Minister for Public Enterprise, Irish Aviation Authority, Aer Rianta and Ireland*, High Court, Mr Justice Finnegan, 4/2/2003** [FL6927]

FAMILY

Divorce

Ancillary financial orders – Family Law (Divorce) Act, 1996 – Bunreacht na hÉireann, *article 41.3.2*

The parties were granted a decree of divorce. The respondent appealed against the ancillary financial orders and eventually the matter was returned to the High Court so that the question of proper provision for the parties could be considered in light of the mandatory provisions of the *Family Law (Divorce) Act, 1996*.

In making provision for the applicant, O'Neill J held that in complying with section 20(3) of the *Family Law (Divorce) Act, 1996*, the court, being required to 'have regard' to the terms of a separation agreement, must examine the agreement to ensure that, at the time of the application, the agreement, in light of the circumstances of the party, either at that time made a 'proper provision' or that it contained obligations which would ensure that such provision would be made.

***K(M) v K(JP)*, Supreme Court, 24/1/2003** [FL6866]

LAND LAW

Adverse possession, trespass

Encroachment – adverse possession – trespass – whether title of disputed land had vested in plaintiffs

The plaintiffs had purchased a property and over time had incorporated an area at the back of the house into their garden. The defendant subsequently acquired an interest in the lands in question and sought to enforce its title and entered onto the disputed area of land. The plaintiffs issued proceedings seeking a declaration that title of the disputed area was vested in them.

The president of the High Court held that title was vested in the plaintiffs. The plaintiffs had not entered onto the disputed area by permission but had done so by encroachment. The plot in question had been enclosed by the plaintiffs and had clearly been incorporated into their garden. The amount of damages to be awarded for trespass would be decided at a later date.

***Battelle v Pinemeadow Ltd*, High Court, Mr Justice Finnegan, 9/5/2002** [FL6825]

LITIGATION

Abuse of process, personal injuries

Tort – litigation – loss of earnings – damages – contributory negligence – video evidence – abuse of process – whether plaintiff unfit for work – whether evidence tendered by plaintiff credible

The plaintiff had been involved in an accident while on a bus and, as a result, had sustained injuries. As part of her proceedings subsequently brought, the plaintiff submitted a claim for loss of earnings. At the trial in the High Court, it emerged by way of video evidence that the plaintiff's injuries were not as serious as originally thought and had in fact been exaggerated. O'Higgins J in the High Court awarded £172,500 in damages, with a reduction made for contributory negligence. The defendants appealed to the Supreme Court, arguing that the finding of only 25% contributory negligence against the plaintiff and the amount of damages awarded were in error. The Supreme Court (Denham J and Hardiman J delivering judgment, McGuinness J agreeing) allowed the appeal and reduced the damages. Denham J held it was clear that the plaintiff had suffered a significant injury. However, the plaintiff had deliberately exaggerated her symptoms and had lost credibility as a consequence. The damages awarded would be reduced to £90,000 and contributory negligence assessed at 50%, resulting in an award of £45,000. Hardiman J held that the plaintiff's manifest falsehoods and the overall impression of the video evidence had given rise to a considerable difficulty. The original award of the High Court would be set aside and a decree in the sum of £45,000 awarded.

***Shelly-Morris v Bus Átha Cliath*, Supreme Court, 22/1/2003** [FL6849]

Damages, negligence, personal injuries

Tort – personal injuries – litigation – negligence – damages – quantum – whether damages should be awarded for loss of earnings

The plaintiff had been involved in an accident while driving. The plaintiff initiated proceedings seeking compensation for the injuries suffered. Although liability was conceded by the defendants, there was a dispute

as to the extent of the injuries suffered by the plaintiff. There was also uncertainty as to the extent of the plaintiff's loss of earnings which were attributable to the accident.

O'Donovan J awarded over €97,000 in damages. He held that the plaintiff had a tendency to 'gild the lily' in relation to aspects of her claim. In the short term, after the accident the plaintiff was unable to work. The plaintiff was now fit for work and damages for loss of earnings would only be awarded up to a certain date and approximately €16,700 would be awarded for loss of earnings in total. A sum of €50,000 would be awarded for general damages.
***Wall v Raleigh*, High Court, Mr Justice O'Donovan, 16/1/2003** [FL6826]

MEDICAL NEGLIGENCE

Evidence, liability

Professional negligence – appeal – liability – causation – evidence – findings of fact – inferences to be drawn from primary facts – whether credible evidence of primary facts to support trial judge's secondary findings of fact
The plaintiff, who suffers from cerebral palsy, sued for damages for his condition, which, he alleged, was caused by the negligence of the defendants arising out of his birth at Holles Street hospital in 1978. The claim of negligence was based on the failure of the fourth and seventh defendants to carry out a caesarean section on the plaintiff's mother and the failure of the hospital to prepare adequately for a possible blood transfusion to his mother some hours before his birth. The High Court (Johnson J) dismissed the proceedings on the ground that the plaintiff failed to establish that his condition was caused by the negligence of the defendants in failing to have a blood transfusion ready. The plaintiff appealed that decision to the Supreme Court.

Keane CJ dismissed the appeal and affirmed the order of the High Court, holding that there was credible evidence to support a finding by the trial judge that, on the balance of probabilities, the damage to the plaintiff was not caused during the 20 minutes immediately preceding his birth and so was not due to the negligence of the defendants.
***Purdy v Lenihan and Others*, Supreme Court, 5/2/2003** [FL6940]

Professional negligence, tort, liability

Tort – medical negligence – professional negligence – personal injuries – liability – causation – evidence – findings of fact – whether appropriate medical procedures and practices followed – whether failure to use more conservative medical treatment negligent
The plaintiff sued for damages for personal injuries caused by a hysterectomy performed by the first defendant to stop haemorrhaging, which, she alleged, could have been arrested by more conservative treatment. She claimed to have suffered emotional trauma as a result of the operation.

Johnson J awarded the plaintiff €250,000 general damages, including €150,000 for the ten years to date and €100,000 into the future, with special damages of €23,223.27. He held that the defendant was negligent in that no obstetrician of his qualifications should have done what he did and, on the balance of probabilities, the haemorrhaging of the plaintiff could have been arrested by more conservative treatment and the operation would have been unnecessary.
***Gough v Neary and Cronin*, High Court, Mr Justice Johnson, 15/11/2002** [FL6895] G

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

Eurlegal

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

New merger control regime

The new merger control regime contained in part 3 of the *Competition Act, 2002* came into force on 1 January 2003. Part 3 of the 2002 act has introduced significant changes to the Irish system of merger control and has replaced the *Mergers, Takeovers and Monopolies (Control) Act, 1978* (as amended). Some of the principle changes introduced by the 2002 act may be summarised as follows:

Substantive test

The substantive test for vetting mergers is whether or not the result of the merger will be to 'substantially lessen competition in markets for goods and services in the state'. This test replaced the test in the 1978 act, which was whether or not the proposed merger or takeover was likely to operate against the common good. The new substantial lessening of competition test, which is modelled on that applied in the United States, has been chosen as opposed to 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 the common market. The Competition Authority has adopted the *Notice in respect of guidelines for merger analysis*, dated 16 December 2002, which gives the Competition Authority's view of the application of the 2002 act to mergers and acquisitions.

Increase in thresholds for compulsory notification

Under section 18(1) of the 2002 act, a merger or acquisition which meets the following thresholds in the most recent financial year must be notified to the Competition Authority provided that the test for carrying on business in the island of Ireland summarised below is met:

- The worldwide turnover of each of at least two of the undertakings involved must not be less than €40 million and
- The turnover in the state of at least one of the undertakings involved must be not less than €40 million. On 10 December 2002, the Competition Authority issued *Notice in respect of certain terms used in section 18(1) of the* Competition Act, 2002 (as amended on 18 February 2003) in which turnover has been interpreted by the Competition Authority to comprise sales made or services supplied to customers within the state.

Under the 1978 act, a merger or takeover was notifiable if, in the most recent financial year, each of at least two of the enterprises involved in the proposal had a turnover of not less than €25,394,761 (formerly IR£20 million) or gross assets not less than €12,697,380 (formerly IR£10 million).

The 2002 act contains a provision which specifies that a merger or acquisition is notifiable if it falls within a class of merger or acquisition specified by the minister for enterprise, trade and employment. To date, the minister has issued one such order which requires all 'media mergers' (as defined in the 2002 act) to be notified to the Competition Authority irrespective of the turnover of the undertakings involved (Competition Act, 2002 *(Section 18[5]) Order 2002*). The financial thresholds set out in the 1978 act were also disapplied for media mergers, although the definition of media mergers was different.

Carrying on business in Ireland

The 2002 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 1978 act required that at least one of the enterprises involved in the proposal carry on business in the state with no mention of Northern Ireland.

Assets

There is no asset-based test under the 2002 act as existed under the 1978 act.

Publication of notification

Under the 2002 act, the Competition Authority is obliged to publish a notice of receipt of the notification within seven days of receiving it. The Competition Authority has a section on its website to publish notified mergers. Interested third parties will have ten days within which to submit comments on the merger or acquisition. There was no requirement to publish the receipt of a notification under the 1978 act.

Informal pre-merger guidance

The mergers division of the Competition Authority will, if requested, provide informal pre-merger guidance and will meet the parties provided that a short letter outlining the transaction is received by the Competition Authority at least two days before the meeting. No similar facility existed in practice in the application of the 1978 act.

Application of sections 4 and 5 to sub-threshold mergers

A merger or acquisition which does not meet the thresholds summarised above is still subject to sections 4(1) and 5(1) of the 2002 act. Section 4(1) of the 2002 act prohibits all agreements between undertakings, decisions of associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade for any goods or services in the state or in any part of the state. Section 5(1) of the 2002 act prohibits any abuse by one or more undertakings of a dominant position in trade for any goods or services in the state or in any part of the state.

Voluntary notification

A sub-threshold merger or acquisition may be notified to the Competition Authority on a voluntary basis. A transaction voluntarily notified and approved is not subject to the prohibitions in sections 4(1) and 5(1) of the 2002 act.

Fee increase

The fee for notifying a merger or acquisition under the 2002 act is €8,000 as opposed to €5,078.95 (formerly IR£4,000) under the 1978 act.

Forms for notification

There are two forms for notifying mergers and acquisitions under the 2002 act, a long form and a short form. The short form is to be used for certain specified transactions (such as joint ventures with a turnover of less than €10 million in the island of Ireland and mergers where combined market share is less than 15% for mergers between competitors).

One month to notify

The merger or acquisition must be notified to the Competition Authority within one month after the conclusion of the agreement or the making of a public bid in a public offer situation. It appears that in situations not involving a public bid, the Competition Authority will not accept a notification until a definitive agreement has been signed. According to this view, it will be necessary to have a split signing and completion for mergers that are to be notified under the 2002 act. The 1978 act required that a notification be made within one month of an offer capable of acceptance having been made which was interpreted as allowing for the lodging of a notification well before a definitive agreement was signed.

Vendor's turnover may be excluded

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 (in other words, 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). This is a limited exemption as it appears from the wording that if the vendor remains involved in the business post-completion, the exemption may not apply. The 1978 act contained no specific exclusion for the turnover of the vendor.

Response time

The Competition Authority has 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 or the receipt of supplementary information if supplementary information is requested. This broadly reflects the procedure under the EU *Merger control regulation*. A practical downside for the notifying parties is that the Competition Authority will have one month within which to make a decision and, given that interested third parties will be invited to comment, the Competition Authority may well in practice not issue approval until the end of the one-month period even in the most straightforward of cases. Under the 1978 act, the minister for enterprise, trade and employment was obliged to respond in cases not being referred to the Competition Authority 'as soon as practicable', which often meant a period of between one and two weeks in practice.

Joint ventures

The 2002 act defines mergers and acquisitions as including joint ventures that perform on a lasting basis all the functions of an autonomous economic entity. This parallels the EU model under the EU *Merger regulation*.

Corporate group exemption widened

Under the 1978 act, an exemption was provided for corporate group situations but was very limited in that it applied only to transactions between two or more bodies corporate each of which was a wholly-owned subsidiary of the same body corporate. The 2002 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 provided that the requisite level of control is found to exist.

Transitional regime

The 2002 act contains certain transitional provisions in regard to mergers or takeovers notified under the 1978 act. The 2002 act specifies that if a merger or takeover has been notified to the minister for enterprise, trade and employment in accordance with section 5 of the 1978 act before the merger provisions of the 2002 act came into force, the merger or takeover so notified is to continue to be dealt with under the 1978 act even though the merger provisions of the new act have come into force.

Media mergers

As noted above, the minister has adopted a statutory instrument which specifies that 'media mergers' are to be notified to the Competition Authority irrespective of the turnover of the undertakings involved. Furthermore, the 2002 act contains specific procedures and criteria for the vetting of media mergers, including provisions, which empower the minister effectively to override a decision of the Competition Authority. G

Marco Hickey heads the EU and competition law unit of the Dublin law firm LK Shields Solicitors.

Tetra Laval judgment: CFI outlines approach to conglomerate mergers

On 25 October 2002, the Court of First Instance overturned the decision of the European Commission to prohibit the merger between Tetra Laval BV, the well-known manufacturer of liquid food carton packaging, and Sidel SA, a French company involved in the design and production of packaging equipment and systems used in the production of 'PET' plastic bottles (case T-5/02 *Tetra Laval BV v Commission of the European Communities*, 25 October 2002).

The case is significant as the court considered in detail the approach to be taken when considering conglomerate mergers and the various elements that must be proven in order to prohibit such a merger.

The commission's approach

When assessing conglomerate mergers, the commission considers various factors. First, the merged firm must have market power in one of the markets in which it operates. Second, the firm must have both the ability and the economic incentive to engage in the leveraging strategy. Third, the commission assesses whether leveraging has the consequence of reducing competition in the markets in question as a result of the foreclosure, marginalisation or elimination of competing firms.

The commission is wary of arguments equating practices of a conglomerate firm with efficiencies. As regards price incentives, for example, it is of the view that short-term strategic price reductions cannot be considered as efficiencies in the sense that they do not correspond to a sustainable reduction in the cost of production of the merged firm likely to be passed on permanently to customers and consumers. On the contrary, the commission considers that once such price reductions have succeeded in driving competitors out of the market, the merged firm will have the ability to raise prices above the competitive level.

Consistent with its practice in relation to other types of mergers, the commission does not consider behavioural remedies as appropriate to address conglomerate concerns. Its preference for structural remedies as part of an *ex-ante* merger control policy is also combined with a belief that *ex-post* control based on article 82 (which prohibits the abuse of a dominant position) is not capable of eliminating the creation or the strengthening of a dominant position resulting from conglomerate mergers.

Background to the *Tetra* case

The commission prohibited the merger between Tetra Laval and Sidel on the basis that the merged entity would be able to leverage Tetra's dominant position on the market for carton packaging to gain a dominant position on the market for PET packaging. In addition, the commission concluded that the merged entity's dominant position on the markets for carton packaging would be strengthened.

The commission concluded that the market structure resulting from the merger would be particularly conducive to leveraging effects. It considered that leveraging could take place by two types of measures. First, through pressure leading to tied sales or sales which bundle equipment and consumables for carton packaging jointly with PET packaging equipment. Second, measures could be adopted to offer incentives, such as predatory pricing and loyalty rebates.

In an attempt to address these concerns, the merged entity had offered behavioural commitments to the commission, but the commission considered that these were not sufficient to address the competition concerns raised by the transaction and were therefore excluded from its analysis.

The court's view

The court found that the commission's decision did not establish to the requisite legal standard that the merger would give rise to significant anti-competitive conglomerate effects and concluded that the commission committed a manifest error of assessment in prohibiting the merger on the basis of the evidence it relied on relating to the foreseen conglomerate effect.

The court stated that 'as the effects of a conglomerate-type merger are generally considered to be neutral, or even beneficial, for competition on the markets concerned, the proof of anti-competitive conglomerate effects of such a merger calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects' – namely, the future conduct of the merged entity (para 155 of the judgment).

However, the court stressed that the commission cannot assume that following the merger the merged entity would engage in conduct that would constitute a breach of article 82 of the *EC treaty* and that therefore, in the absence of evidence to the contrary, the consideration of leveraging strategies likely to be engaged in must be limited to legal activity such as tied or bundled sales that are not forced, loyalty rebates that are objectively justified, and offers of reduced prices that are not predatory.

Further, both the likelihood of detection of any illegal behaviour engaged in by the merged entity under article 82 and commitments regarding future conduct offered by the merging parties must also be taken into account

Issues raised by conglomerate mergers

Conglomerate mergers are mergers between firms that do not have a pre-existing competitive relationship, either as direct competitors or as suppliers and customers. Therefore, mergers of this type do not give rise to true horizontal overlaps between the activities of the parties to the merger or to a vertical relationship between the parties in the strict sense of the term.

While there is no presumption that conglomerate mergers produce anti-competitive effects, competition concerns may arise in certain cases. In particular, where the merging firms produce complementary products and the merged entity would enjoy market power in one or more of the complementary products, it may attempt to leverage this market power into one or more of the other products that constitute the combined product range.

The extent of the competitive harm of conglomerate mergers depends on the industry concerned. Conglomerate mergers in industries which display imperfect competition (for example, with high sunk costs or high barriers to entry) are considered more likely to lead to the permanent exclusion of competitors and the subsequent monopolisation of the market by the merged firm. Conversely, conglomerate mergers may not lead to competitive harm when the merging firms lack sufficient market power or where there is significant countervailing buyer power.

in assessing whether it is likely that the merged entity would act in a manner which could result in the creation of a dominant position on one or more of the relevant PET equipment markets.

As a result, the court found that it would be possible for the merged entity to engage in leveraging although its possible means of leveraging would be much more limited than the commission had alleged.

The court then examined whether the merged firm would have an incentive to leverage by assessing the foreseeable consequences of leveraging by it. The court concluded that the evidence relied on by the commission was not sufficient to show that, if leveraging were to take place, the foreseeable consequence would be to enable the merged entity to achieve a dominant position on the PET markets. In addition, as the merged entity would not be able to marginalise Sidel's competitors through leveraging, they would be still able to promote PET to Tetra's customers on the cartons market, therefore the merged entity's dominant position on the cartons markets would not necessarily be strengthened either.

Points of note in the court's judgment

Although the court overturned the commission's decision to prohibit the merger between Tetra Laval and Sidel, it did so on the basis of the quality of the evidence relied upon by the commission. It confirmed that conglomerate mergers, in certain circumstances, can have anti-competitive effects and should be prohibited.

In this regard, EU practice differs from that in the USA, where the dominant view is that anti-trust authorities should rarely, if ever, interfere with a conglomerate merger. The US view is based on the belief that conglomerate mergers produce short-term welfare benefits and that anti-trust authorities are not able to predict future activity with sufficient certainty to be able to conclude that competitors would be foreclosed from the market.

However, the court has placed the burden of economic and factual proof firmly on the commission's shoulders. In particular, the commission must in future rely on economic evidence to prove that a firm has the incentive, as well as the ability, to leverage its monopoly power in one market to an adjacent market. It is clear that there is certainly no presumption that firms, if able, will always find it commercially attractive to pursue a leverage policy and the commission must show that the circumstances for profitable leveraging are actually to be found in the market under review.

As regards the consideration of leveraging strategies that a firm may engage in, it is clear that the commission may not assume that a firm will engage in conduct that would breach article 82 of the *EC treaty*. When assessing likely future conduct of parties to a conglomerate merger, the commission must also consider any disincentive to act illegally given the likelihood of detection and punishment under article 82 and similar national laws. This would appear to suggest that the commission should consider *ex-post* remedies to competition concerns arising out of conglomerate mergers.

In addition, the commission will in the future be obliged depart from its practice of preferring structural remedies to conglomerate issues, as the court made it clear that behavioural commitments must be considered as a means of resolving these.

Although the commission has appealed the court's findings to the European Court of Justice, it has since cleared the merger between Tetra Laval and Sidel. Whether the Court of Justice agrees with the Court of First Instance remains to be seen. What is clear, however, is that the commission must re-visit its examination of conglomerate mergers in the future. G

David Geary is a Brussels-based solicitor with the UK law firm Wragge & Co.

Recent developments in European law

COMPANY LAW

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

FREE MOVEMENT OF PERSONS

Case C-459/99 *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v État Belge*, 25 July 2002. The Belgian government had issued a circular requiring a visa for non-EU-nationals to marry in Belgium or for re-uniting a family on the basis of a marriage outside Belgium. MRAX argued that the circular was incompatible with EC legislation on movement and residence within the EU. The Belgian Council of State made a reference to the ECJ. It asked whether member states could send the spouse of an EU citizen who is a non-EU-national back at a national border where they seek to enter the state without a valid identity document and a visa. It also asked whether the state could refuse a residence permit to such persons where they entered the state unlawfully or they entered it lawfully but applied for issue of a residence permit after expiry of their visa. The ECJ confined the scope of its judgment to non-nationals married to EU citizens exercising their freedom of movement within the EU as workers or through freedom of establishment or the freedom to provide services. The ECJ indicated that EU legislation does not appear to preclude sending back non-nationals who do not have a visa or identity document. However, EC legislation provides that member states are to accord to such persons every facility for obtaining the necessary visas. Visas are to be issued without delay and, as far as possible, at the place of entry into national territory. It concluded that a non-EU-national, married to an EU citizen, who is able to prove his identity and conjugal ties should not be sent back from a border as to do so is disproportionate, provided that he does not represent a risk to the requirements of public policy, public security or public health. The court went on to hold that such a person's right of residence is derived directly from rules of EC law irrespective of the issue of a residence permit by a member state. On the same basis as its answer to the first question, the court held that a decision refusing a residence permit, or ordering expulsion, based exclusively on a failure to comply with the legal formalities relating to the control of foreign nationals is a disproportionate measure.

Case C-224/98 *Marie-Nathalie D'Hoop v Office national de l'emploi*, 11 July 2002. Ms D'Hoop is a Belgian national who completed her secondary education in France. Her diploma was recognised in Belgium as equivalent to a Belgian secondary school diploma. She studied in university in Belgium until 1995. In 1996, she claimed a state allowance. This was refused as she had undertaken her secondary schooling in another state. She challenged that decision before the Belgian courts. A reference was made to the ECJ to establish whether this refusal could be consistent with article 48 of the treaty and regulation 1612/68. Her parents had continued to reside in Belgium while she undertook her secondary education in France. On this basis, the ECJ held that she could not rely on article 48 or secondary legislation on the rights conferred on the families of migrant workers. Her alternative argument was based on her citizenship of the EU. The ECJ held that article 8 confers the status of a citizen on each person holding the nationality of a member state. As the applicant is Belgian, she is an EU citizen. EU citizens are to be given the same treatment in member states in matters of EC law as is given to nationals of those states. It would be incompatible with the rules on free movement if a citizen in a member state receives treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the treaty in relation to freedom of movement. These opportunities would not be fully effective if he is deterred from availing himself of them by obstacles raised on his return by legislation penalising the fact he has used them. By linking the grant of allowances to the condition of having received a diploma in Belgium, national legislation disadvantages its nationals who have exercised their freedom to move in order to pursue education in another member state. This inequality of treatment is contrary to the principles that underpin the status of citizen of the union. The condition could only be justified if it was based on objective considerations independent of the nationality of the people concerned and was proportionate to the legitimate aim of the national provisions. The ECJ held that a single condition concerning the place where completion of secondary education occurred was too general and exclusive in nature. It therefore goes beyond what is necessary to attain the objective pursued – to ensure a real link between the applicant for the allowance and the geographic market concerned.

LITIGATION

Brussels convention

Case 96/00 *Rudolf Gabriel*, 11 July 2002. Schlank & Schick GmbH is a German company that sells goods by mail order in Germany, Austria, France, Belgium and Switzerland. In October 1999, Mr Gabriel received a number of letters from Schlank & Schick, which led him to believe that following a draw he had won 49,700 Austrian schillings and he would receive that amount if he ordered goods to the minimum value of 200 schillings from an attached catalogue. In the small print there were a number of statements indicating that there was no firm promise to pay the prize. Mr Gabriel filled out the appropriate documents and ordered goods with a value in excess of the minimum value. The goods he ordered were delivered to him but he never received any prize money. Under Austrian consumer legislation he started legal proceedings for the prize money, together with interest and costs. The Austrian court made to a reference to the ECJ seeking guidance on whether such a claim fell under the consumer protection rules in article 13, was contractual under article 5(1) or related to a tort and fell within article 5(3) of the convention. The ECJ was satisfied that Mr Gabriel ordered the goods for his personal use and thus as a consumer within the terms of article 13. The dispute concerned a consumer contract. His action was so closely linked to the consumer contract that it was governed by the consumer protection rules in the convention. G

Parched and proud
Newly-qualified solicitors pictured at the presentation of parchments ceremony on 7 March, with Law Society president Geraldine Clarke and director general Ken Murphy. The Deirdre M Casey memorial prize for the highest mark in conveyancing on the PPCII went to Averil Field *(middle row, third from right)*

Moot point
Pictured after the moot court final are *(front row, from left)*: Catherine Dolan from sponsors Round Hall Sweet & Maxwell; High Court president Mr Justice Finnegan; the winners, Niall MacGoillabuí and Janice Walsh; and Law Society director general Ken Murphy. (*Back row, from left)*: TP Kennedy, director of education, Mr Justice Michael Peart and Judge Patrick McCarten

Stepping it up
At the recent jointly-run Law Society/STEP conference on administration of estates were *(from left)*: Michael O'Connor; Susan O'Connell; Maureen Carolan, Bank of Ireland Trust Services; Declan O'Neill; Cyril O'Neill & Company; and John O'Connor, chairman of the Law Society's Probate, Administration and Taxation Committee, who is also chairman of STEP

EU did it
Conferees and lecturers are pictured at the conferring ceremony for the *Diploma in EU law*. They include *(starting third from left, front row)*: Wendy Hederman, chief regulatory officer with the E-Tel group; Geraldine Clarke, president of the Law Society; TP Kennedy, director of education; and Stuart Gilhooly, vice-chairman of the Education Committee

Talk your way out of this
The law school negotiations competition ran from January to March. Pictured with Antoinette Moriarty *(second from left)* are winners Douglas Sadlier and Gareth Murphy, and runners-up Aimee Madden *(far left)* and Margaret Malone *(far right)*. Gareth and Douglas will represent the Law Society of Ireland at the international negotiations competition in Calgary, Canada in July

Winning counsel
Padraic Courtney *(second from left)* is pictured with the winners of the law school client counselling competition, Edward Bradbury and Conor Brady, and the runners-up Jenny Dempsey *(far left)* and Helen Coughlan *(far right)*

Take cover
Pictured at the continuing legal education seminar *Recent developments in insurance law* were *(from left)*: barrister David Barnville, Mr Justice Adrian Hardiman and John Campbell

Sharing title
A continuing legal education seminar on co-ownership agreements took place in Cork on 31 January. In the photo are *(from left)*: Patrick Dorgan, Dr Michael Twomey, CLE's Lindsay Bond and Alan Murphy

Finding the will
The continuing legal education seminar *Recent developments in probate litigation* was held in Sligo on 28 February. Pictured here are (*from left*): Michele O'Boyle, Vinog Faughan and Lindsay Bond

Farm tips
Discussing conveyancing and taxation issues on farm disposals in Thurles on 24 February were *(from left)*: Owen Binchy, Donal Binchy, Lindsay Bond and Brian Bohan

Kingdom come

The Kerry Law Society met in Tralee on 11 March 2003. In the photo are *(front row, from left)*: Angela Condon, Louis O'Connell, Siobhán Foley, Joe Mannix, Law Society president Geraldine Clarke, Pat Mann, Angela O'Connor, director general Ken Murphy and Deirdre Quinn; *(middle row, from left)*: Deirdre Walsh, Donal Kelliher, Mary Twomey, Blánaid Lynch, Noreen Broderick, Ursula Quinlan, Fionnuala Murphy, Katie McCarthy, Marie Ford, Margaret Sheehan, Carol Anne Coolican, Canice Walsh and Helen Fitzgerald; *(back row, from left)*: Pat Sheehan, Pádraig Burke, Michael Kelly, Donal Browne, Michael O'Donnell, Michael Gleasure, John Baily, Matt Breslin, Larry Power and Peter Callery

Commerce diploma

At the conferring ceremony for the *Diploma in commercial law*, the conferees and lecturers are pictured here with *(starting third from left, front row)*: Law Society president Geraldine Clarke; Wendy Hederman, chief regulatory officer with the E-Tel Group; TP Kennedy, director of education; and Stuart Gilhooly, vice-chairman of the Education Committee

SADSI
Solicitors Apprentices Debating Society of Ireland

A brief history of (committee) time

It is a black hole. It has to be. To explain: before I got into this job, well, 'things' just happened. The wages were adjusted, money appeared for evenings out and oratory prizes. Debates, soccer and rugby games were organised, and funds appeared for those too. In striking similarity to the emitted x-rays and gas plumes and other cosmological phenomena that suggest a black hole, in Blackhall Place you could see very tangible results and you could intellectually attribute them to a SADSI committee beavering away at the centre of our trainee galaxy, but you didn't directly observe all the work that was going on.

Once you're 'in' it, of course, once you do cross the threshold – that 'event horizon' – there is absolutely no escape. This is SADSI exactly. You see first hand the shocking amount of work that is put in by a bunch of volunteers who already do fairly long hours when judged against other careers. You see the barrage of e-mails that fly around every day; the ideas, the comments, the good-natured insults – and you have absolutely no choice but to pretty much join in and get on with it.

With PPC I finishing up their exams (best of luck to everybody) and PPC II lining up to take their place, this black hole is going to be a busy place.

Des Barry,
Auditor

In-office training

Our second, and more serious, task centres on the in-office training of trainees. The present SADSI committee has been in existence a couple of months now and in-office training is the second biggest area of concern being brought to our attention by our fellow trainees, after the issue of trainees' wages. Our indentures chart the course that our education should follow, but it appears that quite a few of our trainees aren't hitting all the waypoints. In the first few weeks of May, SADSI will be circulating a survey aimed at PPC II, where we will be asking direct questions concerning the level of training that our members are getting. I would encourage all trainees to take part in this endeavour. If your SADSI committee lacks comprehensive information, it cannot take action on your behalf or in aid of those that will follow.

NEW SADSI COMMITTEE

(Back row, left to right): Eamonn Kelly (treasurer), Des Barry (auditor), Cormac O'Regan (southern rep), Sonya Heney (mid-western rep), *(front row, left to right)*: Nessa Barry (PRO), Lorraine Rowland (eastern rep), Sinead Lynch (secretary), Dawn Carney (western rep). *Not pictured: Simon Hannigan (PPC I rep)*

PPC II kicks off in style

Following a couple of weeks of frantic organisation, the venue for the PPC II welcome back party has been organised. On Tuesday 29 April, the PPC II social calendar begins with a party in the Odeon Bar at the top of Harcourt Street. Meet the folks you haven't seen since May and catch up on all the goss. SADSI has booked the Odeon's first floor function room with a DJ. We will also be providing 'light refreshments' for all, with not a textbook in sight. The antics start at 8.30pm and will continue into the early hours. As this is the first night out for PPC II, we hope that as many trainees as possible from all the courses turn up.

Nessa Barry,
PRO

Southern regional event

SADSI has kindly agreed to fund a night out for all Southern trainees on Friday 11 April. Whether pre-PPC I or post-PPC II, all trainees are welcome. We will be delighted to see you. Hopefully, pre-PPC I trainees should find it an opportunity to meet their colleagues before they attend the PPC I course. We hope to see all trainees from the southern region and those from other regions are welcome also. Full details will be announced on the SADSI website.

Cormac O'Regan,
Southern rep

Maiden speakers' debate

Once PPC II arrives back on the Education Centre's doorstep, SADSI has two immediate tasks. The first is the maiden speakers event which will be held in May (check SADSI website for details). We are aware that the formality of typical debates can suck the fun out of participation. As such, it is our intention to get complete novices in to speak on a variety of entertaining subjects and it will really be aimed at those trainees who have never spoken before. Every competitor will receive a small award, and prizes will be on offer for the best/funniest/most entertaining speakers. A wine reception will follow to reward the brave souls who show up and give it their all.

SADSI WEEKEND AWAY

Running into the middle of May, there are plans for a SADSI weekend away. Sonya Heney, south western rep, and Dawn Carney, western rep, have done the preliminary work on a trip to the Aran Islands directly following the PPC II ethics exams, and we are hoping to get 50 to 60 trainees for a weekend of blazing sunshine and great craic. More details as they become available (check website).

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 April 2003)

Regd owner: Sean Fennelly; folio: 8151F; lands: Kilcarry, Clonegal in the county of Carlow; **Co Carlow**
Regd owner: Mary Lynch of Feeard, Cross, Co Clare; folio: 14424; lands: Feeard and Kilttrellig and barony of Moyarta; **Co Clare**
Regd owner: Stephen McDevitt; folio: 87806F; lands: a plot of ground being part of the townland of Desert and barony of Carbery East (East Division) in the county of Cork; **Co Cork**
Regd owner: Gobnait Cronin (deceased); folio: 24598; lands: a plot of ground being part of the townland of Ballymakeera situate in the barony of Muskerry West in the County of Cork; **Co Cork**
Regd owner: Finbarr Murphy; folio: 243L; lands: a plot of ground known as 'St Anthony's' situate on the south side of Doyle Road in the parish of St. Nicholas in the County Borough of Cork; **Co Cork**
Regd owners: Joseph James Roantree (deceased) and Carmel Mary Roantree (deceased); folio: 10338F; lands: a plot of ground situate in the townland of Laharan West and barony of Bantry in the County of Cork; **Co Cork**
Regd owners: Graham and Edith Roberts; folio: 47061; lands: a plot of ground being part of the townland of Kilmoney and barony of Kerrycurrihy in the County of Cork; **Co Cork**
Regd owners: Laurence Sexton & Johanna Sexton; folio: 29578; lands: a plot of ground being part of the townland of Ardacrow situate in the barony of Carbery East (East Division) in the County of Cork; **Co Cork**
Regd owners: Donal Turner and Mary Turner; folio: 52212F; **Co Cork**
Regd owners: Joseph McFadden & John McFadden, Bunbeg, Co Donegal; folio: 39446; lands: Magheraclogher in the barony of Kilmacrenan, Co Donegal; **Co Donegal**
Regd owner: John Allen, Glenmaquin Lower, Knockbrack, Letterkenny, Co Donegal; folio: 19994; lands: Glenmaquin Lower; area: 12.225; **Co Donegal**
Regd owner: Margaret McCormack; folio: DN19626; lands: a plot of ground known as 10 Broadmeadows situate in the townland of Glebe and barony of Nethercross; **Co Dublin**
Regd owners: Paul Kelly and Dolores Kelly; folio: DN3946L; lands: property situate in the townland of Commons and barony of Uppercross; **Co Dublin**
Regd owner: Bridget Neary; folio: DN11084F; lands: property situate in the townland of Lusk and the barony of Balrothery East; **Co Dublin**
Regd owner: Rita Cooke; folio: DN62701L; lands: property known as no 139 Ballygall Parade situate in the parish of Finglas; **Co Dublin**
Regd owner: Breda Keane; folio: DN3718; lands: property situate in the townland of Killshane and barony of Castleknock; **Co Dublin**
Regd owner: Trustees of Willow Park Lawns Ltd; folio: 17272; lands: two plots of ground situate in the parish of Glasnevin and district of Glasnevin North; **Co Dublin**
Regd owners: William Murphy and Delia Murphy; folio: DN79105F; lands: property situate in the townland of Cornelscourt and barony of Rathdown; **Co Dublin**
Regd owners: Jarlath Heneghan, Anne Burke Heneghan, Clooniff, Moycullen, folio: 31023F; lands: townland of Clooniff in the barony of Moycullen; area: 0.163 hectares; **Co Galway**
Regd owner: Michael Burke; folio: GY10920F; lands: townland of Dungory West and barony of Kiltartan; area: 0.4576 hectares; **Co Galway**
Regd owner: John Dunne; folio: 32552; lands: townland of Carrowmore, (Ed) Aughrim and Cooltymurraghy and barony of Kilconnell; **Co Galway**
Regd owner: John Forde, Castletown, Fort, Co Galway; folio: 48091; lands: townland of (1) Carrownavohanaun (2) Coole Demesne (3) Coole Demesne (4) Coole Demesne and barony of Kiltartan; area: (1) 16.5030 hectares, (2) 5.8780 hectares, (3) 61.8890 hectares, (4) 3.0350 hectares; **Co Galway**
Regd owner: Patrick Hardiman; folio: 15676F; lands: townland of (1) Kiltormer East, (2) Kiltormer West and barony of Longford; area: (1) 9.4460 hectares, (2) 2.5167 hectares; **Co Galway**
Regd owner: Patrick Hynes, Mountpelier Athenry, Co Galway; folio: GY32574F; lands: townland (1) Carrowntober East and (2) Mountain North and barony of Athenry, (3) Knockbrack and (4) Knockbrack and barony of Tiaquin, (5) Carrowntober East and (6) Carrowntober East and barony of Athenry; **Co Galway**
Regd owner: Dundian Limited; folio: 34180F; lands: townland of Rathangan Demesne and barony of Offaly East; **Co Kildare**
Regd owner: Patrick J Byrne; folio: 14762F; lands: Ennisnag, Stoneyford in Co Kilkenny; **Co Kilkenny**
Regd owner: James Hartigan; folio: 27062; lands: townland of Stradbally North and barony of Clanwilliam; **Co Limerick**
Regd owner: James Hartigan; folio: 16720; lands: townland of Coolreiry and barony of Clanwilliam; **Co Limerick**
Regd owner: John W Riordan; folio: 15480; lands: townland of Abbeyfeale West and barony of Glenquin; **Co Limerick**
Regd owner: John Tobin; folio: 22553F; lands: townland of Newtown and barony of Clanwilliam; **Co Limerick**
Regd owner: Thomas Faughnan, Briskill, Newtownforbes, Co Longford; folio: 188R; lands: Ballagh area: 2.8 acres and 0.2375 acres; **Co Longford**
Regd owner: Patricia Gueno, Newtown Cottages, Termonfeckin, Drogheda, Co Louth; folio: 10682; lands: Newtown; **Co Louth**
Regd owner: Eugene Matthews, Ravel, Dunleer, Co Louth; folio: 6218F; land: (1) Mountaintown, (2) Ravel, (3) Trean, (4) Drumcar; area: (1) 25 acres, (2) 63.232 acres, (3) 12.01 acres, (4) 30.175 acres; **Co Louth**
Regd owner: James Vahey and Ann Vahey, Rahard, Robeen, Holly-mount, Claremorris; folio: 4003F; lands: townland of Rahard and barony of Kilmaine; area: (1) 26 acres 3 roods 20 perches, (2) 21 acres 1 rood 5 perches; **Co Mayo**
Regd owner: Peter Higgins; folio: 20565F; lands: Rosdooaun and barony of Burrishoole; **Co Mayo**
Regd owner: Walter McNicholas, Carrowtleva, Shraheens, Castlebar; folio: 41748; lands: townland of Carrowtleva and barony of Gallen; area: 13.1624 hectares and 3.374 hectares; **Co Mayo**
Regd owner: Patrick Foy; folio: 36397; lands: Carrowkeeran; **Co Mayo**
Regd owner: John Carney; folio: 10555F; lands: Gorteen; **Co Mayo**
Regd owner: John Boland, Oldtown, Navan, Co Meath; folio: 7770; lands: Oldtown; area: 9.8933 hectares and 0.0404 hectares; **Co Meath**
Regd owner: Seamus Morris; folio: 3419; lands: townland of Emlagh (Ed Castlereagh) and barony of Castlereagh; **Co Roscommon**
Regd owner: Patrick Mel Lane; folio: 13086; lands: townland of Tiratick and barony of Tirerrill; **Co Sligo**
Regd owner: Agnes Rogers, Clooneigh, Gurteen; folio: 5097; lands: townland of Clooneagh and barony of Coolavin; area: 4.135 hectares; **Co Sligo**
Regd owner: Philip Ryan; folio: 10231; lands: townland of Lisdonowley and barony of Eliogarty; **Co Tipperary**
Regd owner: Mary Fitzgerald; folio: 611F; lands: a plot of ground being part of the townland of Kilcullen Upper situate in the barony of Gaultiere in the county of Waterford; **Co Waterford**
Regd owner: Christopher Connery (deceased); folio: 9273; lands: a plot of ground being part of the land of

Janeville situate in the barony of Coshmore and Coshbride in the county of Waterford; **Co Waterford**

Regd owners: S Bertram Allen, Raymond Bowe, C Miriam Warren, Maurice Lancelot Allen; folio: 11674; lands: Ballinatray Lower and barony of Ballaghkeen North; **Co Wexford**

WILLS

Bell Chambers, Bridget (deceased) late of Maryfield Nursing Home, Chapelizod, Dublin 20 and formerly of Camac House, Bluebell, Dublin 12. Would any person having any knowledge of the whereabouts of a will made by the above named deceased, please contact BCM Hanby Wallace Solicitors, 1 High Street, Dublin 8, tel: 01 6056900; e-mail: info@bcmhanby-wallace.com

Cantillon, Noel (otherwise Albert Noel), late of 'Patrice' Rhodaville Estate, Douglas Road, Cork. Would any person having any knowledge of a will made by the above named deceased who died on 24 January 1999, please contact Barry M. O'Meara & Son, Solicitors, 18 South Mall, Cork, tel: 021 4273305 or fax: 021 4274693, ref: MD/DMC/CA2146/2

Coonan, Patrick (deceased) late of Cullina, Ballina, Killaloe, Co Clare. Would any person having knowledge of a will made by the above named deceased, please contact Ms Rachel Stokes of Connolly Sellors Geraghty Fitt, Solicitors, 6-7 Glentworth Street, Limerick, tel: 061 414355, fax: 061 414738, e-mail: rstokes@csgf.secure-mail.ie

Gibson, Joseph Stafford (deceased) late address unknown. Would any person having knowledge of the whereabouts of the original or a copy of a will dated 24 June 1916 made by the above named deceased who died on 3 February 1919 and/or the whereabouts/identity of any beneficiary of the aforesaid will please contact O'Flynn Exhams & Partners, 58 South Mall, Cork, tel: 021 4277788, ref: SEL/617/139

MacInerney (or McInerney), David (deceased) late of Flat 1, 17 Chelmsford Road, Ranelagh, Dublin 6, and formerly of Kilkee, Co Clare. Date of death 24 October 2002. Would any person having knowledge of the whereabouts of a will of the above named person please contact Maurice E Veale & Co; Solicitors, 6 Lower Baggot Street, Dublin 2, tel: 01 6764067 or fax: 01 6763436.

Neary, Ann (deceased) late of Flat 4 Iveagh Trust Hostel, Rathmines, Dublin 6 formerly of 4 Mount Anthony, Ardee Road, Dublin 6. Would any person having knowledge of a will made by the above named deceased who died on the 20 November 2002, please contact Murphys Solicitors, Mount Clarence House, 91 Upper George's Street, Dun Laoghaire, Co Dublin, tel: 01 2800261; fax: 01 2841588

O'Connor, Kathleen (deceased) late of 2 Park Villas, Victoria Road, Cork. Would any person having knowledge of a will executed by the above named deceased, who died 9 October 1985, please contact O'Donovan Murphy and Partners, Solicitors, Wolfe Tone Square, Bantry, Co Cork; tel: 027 50808; fax: 027 51554; e-mail: odmcc@securemail.ie

O'Sullivan, Kay (deceased) late of St Colmcilles Hospital, Dun Laoghaire, and formerly of 24 Mangerton Road, Drimnagh, Dublin 12. Would any person having knowledge of the whereabouts of a will made by the above named deceased, please contact BCM Hanby Wallace Solicitors, 1 High Street, Dublin 8; tel: 01 6056900; e-mail: info@bcmhanbywallace.com

EMPLOYMENT

Semi-retired country solicitor will undertake conveyancing and probate work from home; modern office facilities; might suit firm unable or unwilling to employ full-time assistant; would consider limited attendance at employer's office. **Box No 22**

Experienced solicitor (5 years + PQE) seeks full time position in Galway city or county. Areas of experience: litigation and conveyancing. Please reply to **Box No 30**

Locum solicitor required from mid August to end December. General practice experience required. Please apply to Patricia Holohan & Co, Solicitors, 57 Flower Hill, Navan, Co Meath, e-mail: patriciaholohan@eircom.net

Locum solicitor required for Hussey Fraser, Solicitors for period from June to October, experienced in the areas of conveyancing/probate. Replies to Hussey Fraser Solicitors, 17 Northumberland, Dublin 4. Re: SK.

Solicitor required with experience in conveyancing and probate for a busy West Cork practice. Please apply with CV to **Box No 31**

Solicitor required for general practice in Thurles, Co Tipperary. Reply to **Box No 32**

Experienced litigation/family solicitor available. For full/part-time or locum position in Offaly/Laois/Westmeath areas. Reply to **Box No 33**

Solicitor required to work as family law specialist with some general litigation experience. Attractive salary and good prospects for advancement for the right candidate. Apply with CV to The Office Manager, Augustus Cullen & Son, Solicitor, 7 Wentworth Place, Wicklow

Locum solicitor required with experience of general practice particularly conveyancing, litigation and probate for friendly medium sized firm in Limerick city to start immediately. Full/part-time option. Please apply in confidence to the attention of ref: DW/gmem Dennehy & Company, Accountants, 74 O'Connell Street, Limerick

Experienced solicitor required with a view to a partnership and subsequent acquisition of firm. Reply to **Box No 34**

Solicitor seeks full-time work in Mid West, South East, or Midlands region or in surrounding areas. Experienced in conveyancing, litigation and family law. Reply to **Box No 35**

Locum required – experienced solicitor or legal executive/law clerk required immediately for 3-6 months for West Limerick practice to do general work. Reply to Philip J Culhane & Co, Solicitors, The Mall, Glin, Co Limerick, tel: 068 34444

Are you a medium to large size firm? Do you have excess workload? Experienced practitioner, Dublin-based, is available for conveyancing, litigation, probate or commercial work. Will work in your office or from his own office. **Box No 26**

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MISCELLANEOUS

Northern Ireland solicitors providing an efficient and comprehensive

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

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

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

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

Wanted Publican's ordinary 7-day licence. Replies to Carmel Sreenan, Sreenan & Company, Solicitors, Kenmare, Co Kerry; tel: 064 42656; fax 064 42658

England & Wales solicitors will provide comprehensive advice and undertake contentious matters. Offices in London, Birmingham, Cambridge and Cardiff. Contact Levenes Solicitors at Ashley House, 235-239 High Road, Wood Green, London 8H; tel: 0044 208817777, fax: 0044 2088896395

TITLE DEEDS

Byrne, Anthony and Margaret of 24 Pinewood Avenue, Artane, Dublin 5. Would any person having knowledge of the whereabouts of the title documents of property held in the name of Anthony and Margaret Byrne known as Trotters' Restaurant, 9 and 9a Fairview Strand, Dublin 3 in the parish of Clonturk, in the City of Dublin, please contact Haughtons Solicitors, Ashton House, 6 Martello Terrace, Dun Laoghaire, Co Dublin, tel: 01 2841291

O'Driscoll, Kathleen Mary, (deceased). Would any person knowing the whereabouts of the title deeds of the deceased's properties at 'Brosna', Kerrymount Avenue, Foxrock, Dublin 18 and at 83 The Briary, Blainroe, Co Wicklow, please contact Matheson Ormsby Prentice, Solicitors, 30 Herbert Street, Dublin 2, tel: 01 6199000, fax: 01 6199010

MISCELLANEOUS

Indenture of Lease dated 11 August 1922 between Sir Samuel Chisholm Baronetlld, Sir Malcolm Cambell Knight and Sir John Anthony Knight of the first part, J & R Thompson Ltd, of the second part and James Ennis of the third part.

Indenture of Assignment dated 24 September 1931 – James Ennis to Patrick Hegarty.

Property: Piece or parcel of ground on the North side of Waverley Avenue, part of the lands of Annadale Park, parish of Clonturk and barony of Coolock in the City of Dublin.

L Trant, McCarthy, Solicitors, 4 Chancery Place, Dublin were in possession of the documents in 1931 or thereabouts, one or more of which may have been handed to T Leslie Condron, Solicitor, 14 South Frederick Street, Dublin in 1950.

Would anybody having any knowledge of the whereabouts of the above title documents, please contact the undersigned solicitors:
Signed: Derivan Sexton & Co, Solicitors, New Street, Carrick-on-Suir, Co Tipperary

In the matter of the *Landlord and Tenant Acts, 1967-1994* and in the matter of *the Landlord and Tenant (Ground Rents) (No 2) Acts, 1978*: an application by Margaret O'Rourke
Take notice that Margaret O'Rourke intends to submit an application to the county registrar for the city of Dublin for the acquisition of the freehold interest in the property known as 235 Richmond Road, Dublin 3 and any party asserting that they hold a superior interest in the aforesaid properties are called upon to furnish evidence of title to the aforementioned properties to the below named, solicitors within 21 days from the date of this notice.

In default of any such notice being received the said Margaret O'Rourke 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 person beneficially entitled to the superior interest including the freehold reversion in the aforesaid properties are unknown or unascertained.
Date: 4 April 2003
Signed: Sean O'Ceallaigh & Co Solicitors, (solicitors for the applicant),
363 North Circular Road, Dublin 7

In the matter of the *Landlord & Tenants Acts, 1967 – 1994* and in the matter of the *Landlord & Tenants (Ground Rents) (No 2) Act, 1978*: an application by Chi Leung Ng and Ctse Lun Eng
Take notice that Chi Leung Ng and Ctse Lun Eng intend to submit an application to the county registrar for the county of Wicklow for the acquisition of the freehold interest in the following property: All that and those the hereditaments and premises known as 85 Main Street, Bray in the county of Wicklow.

And take notice that any person having an interest in the freehold estate of the aforesaid property and any party asserting that they hold a superior interest in the aforesaid property (or any of them) are called upon to furnish evidence of title to the aforementioned premises to the below named within 21 days from the date if this notice.

In default of any such notice being received, Chi Leung Ng and Ctse Lun Eng intend 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 Wicklow for directors 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: 26 February 2003
Lockhart & Company, (solicitors for the applicants), 99 Vernon Avenue, Clontarf, Dublin 3

In the matter of the *Landlord & Tenants Acts, 1967 – 1994* and of the *Landlord & Tenants (Ground Rents) (No 2) Act, 1978*: an application by Sean Clifford and Cyril Smyth Trustees of Bray Runners Club
Take notice Sean Clifford and Cyril Smyth as Trustees of Bray Runners Club intend to submit an application to the county registrar for the County of Wicklow for the acquisition of the freehold interest in the following property: - All that and those the hereditaments and premises known as An Lar, Dargle Road, Bray in the County of Wicklow.

And take notice that any person having an interest in the freehold estate of the aforesaid property and any party asserting that they hold a superior interest in the aforesaid property (or any of them) are called upon to furnish evidence of title to the aforementioned premises to the below named within 21 days from the date of this notice.

In default of any such notice being received, Sean Clifford and Cyril Smyth as Trustees of Bray Runners Club intend to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the County of Wicklow for directors 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: 26 February 2003
Lockhart & Company, (solicitors for the applicants), 99 Vernon Avenue, Clontarf, Dublin 3

In the matter of the *Landlord and Tenant (Ground Rents) Act, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents)*

***(No 2) Act, 1978:* an application by Laurence Woods and Sinead Moore.**

Take notice that any person having interest in the freehold estate of or superior interest in the following property: all that and those the premises known as 62 Rathgar Avenue, situate in the barony of Newcastle formerly in the county but now in the city of Dublin held with other property under an indenture of lease dated 6 September 1843 and made between Allen Jackson of the one part and John Conroy of the other part for a term of 999 years from the 29 September 1843 subject to the yearly rent of £7 thereby reserved (but indemnified against payment of the entirety thereof in the manner provided in an indenture of lease dated 31 December 1944 and made between Elizabeth Cashin of the one part and Raymond Vincent Judd of the other part) and the covenants on the part of the lessee and the conditions in said lease contained insofar as same relate to or affect the said premises.

Take notice that Laurence Woods and Sinead Moore intend to submit an application to the county registrar for the county of the city of Dublin for the acquisition of the freehold interest and any intermediate interests in the aforesaid premises and any party asserting that they hold a superior interest in the aforesaid premises are called upon to furnish evidence of title to the aforesaid premises to the below named within 21 days from the date of this notice.

In default of any such notice being received, the applicant intends to proceed with the application before the county registrar for the county of the city of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the aforesaid premises are unknown or unascertained.

Date: 27 February 2003

Signed: Gerard O'Shea, (solicitors for the applicants), Meridian House, 13 Warrington Place, Dublin 2

***In the matter of the Landlord & Tenant Acts, 1967-1989 (as amended)*: an application by Francis Harmon**

Take notice that any person having interest in the freehold estate in respect of property known as 2 Lower Kilmacud Road held under lease dated 29 December 1954 and made between Michael Murray & Co Ltd, of the one part and Muriel Dee of the other part for the term of 144 years from 25 March 1954 at a yearly rent of £20.

Take notice that Francis Harmon, the applicant, intends to submit and application to the county registrar in the county of the city of Dublin for the acquisition of the freehold interest together with any intermediate interest; in the aforesaid property and any persons asserting that they hold a superior interest in the aforesaid premises are called upon to furnish evidence of title to the aforementioned premises to the undersigned within 21 days from the date of this application.

In default of any such notice not being received by the undersigned solicitors the said Francis Harmon intends to proceed with an application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar in 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 to the aforesaid property are unknown and unascertained.

Date: 11 March 2003

Signed: Dixon Quinlan, (solicitors for the applicant), 8 Parnell Square, Dublin 1

In the matter of the Landlord and Tenant Acts, 1967-1989 (as amended): an application by Raffaele Vozza

Take notice that any person having an interest in the freehold estate in respect of property known as 4 Lower Kilmacud Road held under lease dated 21 February 1955, and made between Michael Murray & Co Ltd, of the one part and Robert Reilly of the other part for the term of 144 years from 25 March 1954 at a yearly rent of £20.

Take notice that Raffaele Vozza, the applicant, intends to submit an application to the county registrar in the county of the city of Dublin for the acquisition of the freehold interest together with any intermediate interest in the aforesaid property and any persons asserting that they hold a superior interest in the aforesaid premises are called upon to furnish evidence of title to the aforementioned premises to the undersigned within 21 days from the date of this application.

In default of any such notice not being received by the undersigned solicitors the said Raffaele Vozza 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 in 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 to the aforesaid property are unknown and unascertained.

Dated: 11 March 2003

Signed: Dixon Quinlan, (solicitors for the applicant), 8 Parnell Square, Dublin 1

In the matter of the *Landlord and Tenant Acts, 1967-1989 (as amended)*: an application by Francis Harmon

Take notice that any person having an interest in the freehold estate in respect of property known as 24 Lower Kilmacud Road held under lease dated 27 August 1957, and made between Michael Murray & Co Ltd, of the one part and Patrick O'Leary of the other part for the term of 144 years from 25 March 1954, at a yearly rent of £20.

Take notice that Francis Harmon, the applicant intends to submit an application to the county registrar in the county of the city of Dublin for the acquisition of the freehold interest together with any intermediate interest in the aforesaid property and any persons asserting that they hold a superior interest in the aforesaid premises are called upon to furnish evidence of title to the aforementioned remises to the undersigned within 21 days from the date of this application.

In default of any such notice not being received by the undersigned solicitors the said Francis Harmen intends to proceed with the application before the county register in 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 to the aforesaid property are unknown and unascertained.

Dated: 19 March 2003

Signed: Dixon Quinlan, (solicitors for the applicant), 8 Parnell Square, Dublin 1

In the matter of the *Landlord and Tenants Acts, 1967-1989* (as amended): an application by O'Malley McCarthy Developments Ltd

Take notice that any person having an interest in the freehold estate of property situate at Emmet Road, Kilmainham, Dublin, held under lease dated 1 May 1964, and made between George A Campbell of the one part and James Gray of the other part for the term of 860 years from 25 March 1963, at a yearly rent of £5 now €6.35.

Take notice that O'Malley McCarthy Developments Ltd, the applicant intends to submit an application to the county registrar in the county of the city of Dublin for the acquisition of the freehold interest together with any intermediate interest in the aforesaid property and any persons asserting that they hold a superior interest in the aforesaid premises are called upon to furnish evidence of title to the aforementioned premises to the undersigned within 21 days from the date of this application

In default of any such notice not being received by the undersigned solicitors, the said O'Malley McCarthy Developments Ltd, intend to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar in 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 to the aforesaid property are unknown and unascertained.

Date: 19 March 2003

Signed: Dixon Quinlan, (solicitors for the applicant), 8 Parnell Square, Dublin 1

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 Breda Lyne

Take notice that any person having an interest in the freehold estate of the following property 26 Brookfield Road, Kilmainham, Dublin 8 that Breda Lyne intends to submit an application to the county registrar for the city of Dublin.

For the acquisition of the freehold interest in the aforesaid property and any party asserting that they hold a superior interest in the aforesaid premises are called upon to furnish evidence of title to the aforementioned premises to the below named within 21 days from the date of this notice.

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

Dated: 5 March 2003

Signed: Barror & Co, (solicitors for the applicant), 45 Lower Baggot Street, Dublin 2