Law Society Gazette

Regulars

FRONT COVER: JACK NICHOLSON AS THE JOKER FROM *BATMAN* (1989). PIC: SNAP/REX FEATURES

Cover Story

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LAWTECH RETURNS
The Law Society's annual LawTech exhibition and seminar will be held on Friday 28 February in Blackhall Place, starting at 10.30am. Further details about the event will be circulated to the profession shortly.

ARTHUR COX DOES IT AGAIN
For the fourth consecutive year, Arthur Cox has been named the top Irish law firm in the *Global Counsel 3000 Survey* of in-house lawyers. Arthur Cox received the highest rating among law Irish firms in Ireland in nine different categories, including banking and debt finance, communications, competition/antitrust, company and corporate transactions, dispute resolution, employment and employee, and M&A.

WORKING WITH EMOTIONAL CLIENTS
Marriage and Relationship Counselling Services (MRCS) is to run a workshop designed to help family lawyers 'foster effective communication' with clients who are undergoing separation or divorce. The workshop will be held over two evenings from 6.30pm to 9.30pm on Tuesday 25 February and Tuesday 4 March and costs €300 per person. For further information, contact MRCS on 01 6443901 or by e-mail at *mrcs@eircom.net*.

KEEP ON RUNNING
The Calcutta Run, the annual charity event organised by solicitors and supported by the Law Society, will take place on Saturday 17 May. It comprises a 10K fun run/walk, followed by a barbecue at Blackhall Place. The participants raise money through sponsorship for their participation. Last year's event saw some 1,400 runners and walkers raise €225,000 for GOAL and Fr Peter McVerry's shelters for homeless youths in Dublin.

Clonmel *Nationalist* scoops Law Society media award

Margaret Rossiter, a columnist with the *Nationalist* newspaper in Clonmel, has been named Overall Winner of the Law Society's *Justice Media Awards* competition. This is a competition aimed at rewarding outstanding journalism in the print or electronic media which contributes to the public's understanding of the law, the legal system or any specific legal issue.

Margaret Rossiter *(centre)* receives her award from immediate past-president Elma Lynch and director general Ken Murphy

Rossiter won the top prize for her series of articles in the paper on sentencing policy, juvenile crime, the probation service and public order offences. At a ceremony in the Law Society's Blackhall Place headquarters recently, Immediate Past-President of the Law Society, Elma Lynch, presented the prize to Rossiter, whose columns also won the non-daily newspaper category in the *Justice Media Awards*. As Overall Winner, she received a *Dublin Crystal* vase and a cheque for €1,500.

Explaining the judges' decision, Law Society Director General Ken Murphy said: 'There have been times in the history of this competition when an entry is just so good that there is virtually no discussion among the judges. This was one of those occasions. Margaret Rossiter has produced an outstanding series of articles, any one of which would have been a worthy winner.

'Each of these pieces captured the essence of the issue, with elegance and insight, and they were often illustrated with telling pen-pictures and real-life examples. Margaret's understanding of the nuts-and-bolts of the law and the legal system would put many experienced lawyers to shame. The readers of the *Nationalist* are lucky to have a columnist of the calibre of Margaret Rossiter and we are delighted to present her with this award'.

The winners in each of the four other categories in the competition won a *Justice Award*, comprising a *Dublin Crystal* Joyce plate (and a €750 cheque), with the runners-up receiving a Certificate of Merit (and a cheque for €250).

The winner of the *Justice Award* in the **Daily Newspapers** category was Vincent Power of the *Evening Echo* in Cork for his six-part report on urban violence, entitled *Danger on our streets*, published in February 2002.

A Certificate of Merit went to John Breslin of the *Irish Examiner* for his articles entitled *Time to act for the children* and *Court awaits committee's judgment*, published in July 2002.

In the **Non-Daily Newspapers** category, Certificates of Merit went to Kieron Wood of the *Sunday Business Post* for a series of articles pointing up the inconsistencies and potential injustices of the *in camera* rule in courts, and Aileen Power of the *Sunday Business Post* for her articles on the financial implications of divorce.

In the **Magazine** category, the *Justice Award* was presented to Barry O'Halloran of *Business and Finance* magazine for a series of articles on issues as diverse as tobacco litigation and Ireland's arcane gambling laws. The judges awarded two Certificates of Merit, one to Kathy Burke of *Consumer Choice* (now the *Law Society Gazette*) for an article on children's rights as consumers and the other to Mairead Carey of *Magill* for her articles on garda interrogation techniques and the Church's handling of clerical sexual abuse.

In the **Books** category, the *Justice Award* was presented to Paul Cullen for *With a little help from my friends* (Gill & Macmillan), his account of the rise of corruption in Irish politics that culminated in the Flood Tribunal.

The *Justice Award* for **Television** was presented to RTÉ's Angela Daly and Sinead McCarthy for their *Prime Time* report, entitled *The Irish baby*, on the phenomenon of pregnant asylum-seekers who come to Ireland to have their children and claim Irish citizenship. A Certificate of Merit went to Emma O'Kelly of RTÉ's Six-One News for a report examining four high-profile criminal cases where the judiciary had strongly criticised the behaviour of the investigating Garda officers.

Society reviews its regulation policy, asks members for submissions

The Law Society has set up a special task force to examine the way it carries out its regulatory functions. Explaining the move, the president said: 'We are committed to the principle of efficient and effective self-regulation of the solicitors' profession and regularly update and improve our regulatory systems to ensure that their quality is maintained and enhanced. In this context, a task force has been set up with the following terms of reference: *to examine the procedures and systems whereby the society a) regulates its members and b) deals with complaints concerning solicitors, having regard to best practice in similar professional organisations both in Ireland and abroad and to make recommendations arising from such examination*'.

Members of the Regulatory Review Task Force, chaired by Joe Brosnan, former secretary general of the Department of Justice and until recently director general of the Institute of European Affairs. Front row (*from left*): director general Ken Murphy, Joe Brosnan and Cecil Donovan, former president of the Institute of Chartered Accountants; back row (*from left*): Linda Kirwan, Gerard Doherty, registrar of solicitors PJ Connolly, John D Shaw, junior vice-president John Fish and Tina Beattie

The task force says that it welcomes submissions from members, particularly their views on the current regulatory systems and procedures in place and any specific suggestions they have to make on how they could be improved. Written submissions should be forwarded to Tina Beattie, secretary to the task force, at the society no later than 15 March.

Clothes maketh the man, in the District Court

The President of the District Court, Judge Peter Smithwick, has issued a clarification on the appropriate garb to be worn by barristers in the District Court. The subject gained national prominence following an exchange between Judge Michael Patwell and senior counsel Colm Allen in the course of the recent Tim Allen trial. In response to a query from the *Gazette*, Judge Smithwick said: 'Counsel are expected to robe in all District Courts. The exceptions are: 1) where there is statutory provision to the contrary, as in family law, children courts, and 2) where there is no robing room for counsel, as is frequently the case in small rural venues'.

Judge Peter Smithwick

Advanced advocacy for solicitors course

The Law Society is to run its second *Advanced advocacy course for solicitors* (see this month's CLE brochure for details). The course starts in late spring with a series of weekly seminars/workshops in evidence. This will be led by Dr Paul Anthony McDermott, and followed by a practical five-day, full-time intensive course in advocacy from 15 to 19 September, led by tutors from the US-based National Institute for Trial Advocacy (NITA). Demand is expected to be high for the limited number of available places, and anyone interested in the course should apply by completing the form in this month's CLE brochure.

Procedures for changing company names

The Companies Registration Office has issued a notice telling companies how they can change their names by special resolution, provided they have the approval of the registrar of companies. But the CRO says that where the company is in default of its annual return filing obligations under sections 125 and 127 of the *Companies Act, 1963*, the registrar may withhold his consent to any name change. As a result, a company seeking approval of a name change should ensure that it is up to date with its annual returns because an application will not be approved if it is behind with its annual returns.

BRIEFLY

FIGHTING TALK

Marc Weller, deputy director of the Centre for Public International Law at Cambridge University, is to give a lecture to the Irish Society of International Law (ISIL) entitled *The use of force in a unipolar world: recent developments relating to Iraq*. The lecture will take place on Thursday 27 February at 7.30pm in the Law Society's Education Centre at Blackhall Pace. For further information, see *www.isil.ie*.

TIME WAITS FOR NO MAN

Probate specialists Fallon & Stephenson, Solicitors, will be a hosting a seminar entitled *How to get a grant in four weeks!* on 28 February in Dublin's Westbury Hotel. For further information, contact Fallon & Stephenson on tel: 01 2756759 or e-mail: fallonstephenson@eircom.net.

Australia continues to push envelope on reforming law of tort

Australia's experiments in tort law reform have continued with the recent release of the second part of the federal government's review of the law of negligence (the IPP report). Although prompted by concerns over personal injury law, the IPP report is a bold attempt to harmonise the law across all jurisdictions, and has ramifications well beyond its original focus of personal injury law.

Reasonably foreseeable risk

Although intended to apply to personal injury claims, the IPP report's rewriting of the test of negligence is widely applicable to other negligence claims. It is divided into two parts: reasonable foreseeability and the 'negligence calculus'.

It says that courts can often conflate two separate issues: whether a risk is foreseeable, and whether the risk is more than fanciful or far-fetched. The report proposes three key elements be put into legislation.

- A person is not negligent by reason only of failing to take precautions against a foreseeable risk of harm (that is, a risk of harm of which the person knew or ought to have known).
- It cannot be negligent to fail to take precautions against a risk of harm unless that risk can be described as 'not insignificant'
- A person is not negligent by reason of failing to take precautions against a risk that can be described as 'not insignificant' unless, under the circumstances, the reasonable person in that person's position would have taken precautions against the risk.

The second part of the analysis is the negligence calculus. In determining whether the reasonable person would have taken precautions against a risk of harm, it is relevant to consider (among other things):

- The probability that the harm would occur if care was not taken
- The likely seriousness of that harm
- The burden of taking precautions to avoid the harm, and
- The social utility of the risk-creating activity.

Other attempts at reformulating the test of negligence – such as that in the State of New South Wales' draft *Civil Liability Amendment (Personal Responsibility) Bill 2002* – have not been as clear and structured as the IPP report proposal, and this could be the model across all jurisdictions in Australia.

Splitting responsibility

Currently, where there are two or more tortfeasors, a plaintiff can sue one, two, or all – meaning that the tortfeasors often have to turn to each other to ensure each pays their fair share. A remedy for this is proportionate liability, in which a defendant will be liable only for that part of the loss it is responsible for. The IPP report rejects proportionate liability for personal injury and expressly declines to consider any reform of the law as it relates to pure economic loss or property damage. It is, however, to be noted that other proposed reforms in Australia do deal with this, in particular, both the NSW draft bill and the federal government's corporate law economic reform programme (CLERP).

The federal government has indicated in CLERP9 that it will seek the states' agreement to introduce proportionate liability in relation to property damage and economic loss in order to limit auditors' liability and allow recovery from other tortfeasors such as directors. Part 6 of the NSW draft bill allows for a defendant's liability to be limited to an amount reflecting the proportion of the loss that the court considers just.

(With thanks to the Issues Alert *bulletin of Clayton Utz, Solicitors, Sydney, Melbourne, Brisbane, Perth, Canberra, Darwin. Thanks also to Michael V O'Mahony)*

Subscriptions to the *Legal diary*

Following the recent liquidation of Mount Salus Press, the company that used to publish the *Legal diary*, the Law Society has been asked by the Courts Service to ascertain from members whether they would be prepared to subscribe to a new *Legal diary* in print format. (The Courts Service has been publishing the diary in downloadable form on its website at *www.courts.ie* since the collapse of Mount Salus Press.) Members should bear in mind that the level of subscription charged for any new printed version of the diary will depend on the degree of take-up by the profession.

To help the society and the Courts Service to determine the level of demand, please return the form below (or a photocopy) to the *Law Society Gazette*, Blackhall Place, Dublin 7 (fax: 01 672 4877)

Please tick appropriate box:

☐ **I would be prepared to subscribe to the *Legal diary***

☐ **I would not be prepared to subscribe to the *Legal diary***

Society's anger over building VAT hike

The Law Society has protested to finance minister Charlie McCreevy over the increase in VAT on building agreements from 12.5% to 13.5%, describing the issue as 'of paramount importance'. The change was announced in the recent budget and applies to contracts from 1 January. On 9 December last, John O'Connor, chair of the society's Probate, Administration and Taxation Committee, wrote to the minister pointing out that the change could have 'significant and perhaps unintended consequences' in relation to building and land purchase contracts.

'Purchasers entered into these contracts in good faith at the agreed contract price', said O'Connor. 'It would be inequitable if a purchaser, perhaps having stretched himself to the limit in order to acquire a property, should be faced with an additional VAT charge in relation to payments arising under a contract that he had bound himself to prior to the budget'.

This view was backed up by the Conveyancing Committee, whose chairman Pat Dorgan has also written to minister McCreevy, arguing that building agreements should be exempt from the VAT increase 'in the interests of stabilising house prices' or, alternatively, that there should be a transition period during which purchasers who had signed contracts on or before budget day will be allowed 'a reasonable period within which to have their homes constructed and completed to their satisfaction and that the old VAT rate would apply in respect of these contracts until completion'.

McCreevy: bland reply

However, it looks as if the arguments have fallen on deaf ears. In a bland reply to O'Connor, the minister's department restated the new position introduced by the budget and baldly declared that there would be no transitional measures. 'The minister hopes that this explains the position for you on this occasion', the letter concludes.

Advertising ban comes into force

Severe restrictions on personal injury advertising by solicitors came into effect at midnight on 31 January. Phrases such as 'no foal, no fee', 'most cases settled out of court' and others that might encourage personal injury litigation are now banned, as is 'advertising in inappropriate locations', such as hospitals, funeral homes or on the backs of buses. Strict compliance with the new regime will be required. Law Society president Geraldine Clarke welcomed 'the closing of a controversial chapter on personal injury advertising by solicitors', and added: 'We are delighted that, as a result of the new legislation and the society's regulations, all objectionable personal injury advertising by solicitors, which has diminished the public esteem in which the profession is held, will now become a thing of the past'.

UNFAIR CONDITIONS: A CORRECTION

The article *Unfair conditions: has the penny dropped?* in the last issue (page 6) contained a few errors, as published. In particular, the words 'after closing' should not have appeared in the final paragraph. To clarify, any problems arising from implementation of any of the 15 prohibited special conditions in building contracts will invariably arise prior to closing. Following the ruling by the High Court in December 2001, and as noted by the Conveyancing Committee in the October 2002 issue of the *Gazette*, these 15 sample conditions are unenforceable. But they are only unenforceable in practice if we, as solicitors for purchasing clients, know that they are unenforceable. If we don't know, our clients certainly won't. If we allow them to be enforced, our clients will proceed on their unhappy way … *Pat Igoe*

ONE TO WATCH: NEW LEGISLATION

The *Domestic Violence (Amendment) Act, 2002*

After a quick passage through the Oireachtas, this act came into force on 19 December last to remedy the effects of a Supreme Court decision of 9 October 2002 (*K v Crowley and the AG*), delivered by Keane CJ. He held that the provision in the *Domestic Violence Act, 1996* which permits a court to grant an interim barring order without a time limit on an *ex parte* application was unconstitutional. It deprived the respondent in such a case of 'the protection of the principle of *audi alteram partem* in a manner and to an extent which is disproportionate, unreasonable and unnecessary'. The chief justice stressed that the principle of an *ex parte* order in these matters was not objectionable. The problem lay with the time for which such an order could continue before a full hearing to discharge it or confirm it. In Mr K's case, the return date given was almost three months later.

The new act remedies this by providing for a return date of no longer than eight working days after the granting of the interim barring order.

The minister also used the opportunity to address one of the other principle concerns with the 1996 act. The amendment act additionally provides that an application for an *ex parte* order must be grounded on an affidavit or information sworn by the applicant and that a note of the evidence given is to be made by the judge, by the applicant's solicitor and approved by the judge, or as otherwise directed by the judge. This addresses the concern that orders were being granted on the evidence of one party, in the absence of the other, and that when the full hearing with both parties present took place, the respondent did not know what had been said at the time of the application and what case he had to answer. The respondent could therefore be at a serious disadvantage.

Now the injustice of the respondent not knowing what has previously been said in court should no longer occur. G

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

ASBESTOS – EMPLOYER'S AND OCCUPIERS' NIGHTMARE?

In recent times Asbestos has exploded into the news as an issue that faces many employers and occupiers. On the World's Stock Markets major PLC share prices have slumped on rumours of enormous liabilities. Many employers and occupiers are facing claims from persons with no physical symptoms who have been exposed to asbestos often described in the media in graphic terms. Many people are deeply alarmed when they discover that there is Asbestos in their environment and litigation can quickly ensue.

Yet Asbestos can be found in one form or another in almost every building and home in Ireland constructed before the '90's. Production of Asbestos Cement Sheeting and roof tiles in Ireland only ceased in 1998. Much of the drinking water consumed in Ireland passes at least some of its journey through Asbestos Cement pipes. Countless commercial and agricultural buildings are clad in Asbestos Cement sheets. No one is suggesting that these should be ripped down and that anyone near them is at risk of sudden death. However Asbestos related illness is now the number one killer work related disease in the UK. Practitioners in Personal Injury need to understand the issues in order to advise clients faced with Asbestos exposure.

The Association of Consulting Forensic Engineers is holding a Seminar to inform Practitioners in this important area. The speakers will be Professor Muiris Fitzgerald, Dean of UCD Medicine Faculty and leading Irish authority who will speak on the health risks facing a person exposed to Asbestos. Peter Byrne (formerly with Eolas) of Asbestos Consultancy Services will speak on where you might find harmful asbestos and what must be done. Finally Paul Romeril, Consulting Forensic Engineer will consider the difficult issue of who an affected Occupier might consider pursuing for losses from Asbestos problems.

ACFE Seminar on Asbestos – Employers and Occupiers Nightmare?

Friday 21 February 2003 @ The Institution of Engineers of Ireland, 22 Clyde Road, Dublin 4

Registration:	1.30 pm
Seminar Closes:	5.00 pm
Cost:	€175 per delegate

To reserve your place, please send cheque and details before 14 February 2003, to ***Aisling*** at Romeril Forensic Engineers, 26 Upper Pembroke Street, Dublin 2 (places are limited so register early).

Tel: 01 662 0448
Fax: 01 662 0365

Cheques payable to "Association of Consulting Forensic Engineers"

[FURTHER TO OUR BROCHURE FEATURED IN THE DECEMBER ISSUE, AVAILABILITY IS NOW LIMITED]
CLOSING DEADLINE 21ST FEBRUARY 2003 - DETAILS OVERLEAF

Istanbul 2003

LAW SOCIETY OF IRELAND ANNUAL CONFERENCE

23-27 April, 2003

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PLEASE COMPLETE THE ENCLOSED RESERVATION FORM AND RETURN WITH YOUR DEPOSIT AS SOON AS POSSIBLE TO AVOID DISAPPOINTMENT

PACKAGE A – based on Charter Flight - Cost: €1,050.00 per person sharing

The cost includes return flights (Dublin/Istanbul/Dublin), taxes, transfers, four nights' bed and breakfast at the Conrad Istanbul, Welcome Reception, Conference Seminar and Gala Banquet. Surcharges could apply in respect of changes in air fares or increases in insurance premiums or VAT/tax rates in respect of the hotel.

Note: Connecting flights from Cork, Shannon etc. can be arranged by Abbey Travel. Please complete relevant section on the reservation form.

PACKAGE B – based on Scheduled Flight

Delegates travelling on scheduled flights will travel via various European cities and will have the option of extending their stay subject to airline and hotel availability.

Price will be based on the charter package but will **not** include airport transfers and may incur airline and hotel surcharges.

REGISTRATION FEE

Payable by delegates only and **not** accompanying persons - €100.00

BOOKING ARRANGEMENTS

The closing date for receipt of bookings is 21st February 2003.
Please complete the reservation form and return with deposit of €400.00 per person travelling.

CONTACT DETAILS

If you would like any further information please contact:
Sarah Ellins (Law Society) Tel: (01) 672 4823 Email: s.ellins@lawsociety.ie

CANCELLATIONS

- Delegates are advised that cancellations made after 21st February 2003 will be subject to a 100% cancellation charge (full invoiced amount).
- Travel insurance will be automatically invoiced at approximately €26.00 per person unless delegates indicate on the reservation form that they have their own insurance and provide the name of the company with whom they are insured.
- No contract shall arise until a full deposit has been received and a reservation form (which will be sent with written confirmation of acceptance of the reservation) has been signed and returned.

ACCOMMODATION

Conrad Istanbul
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Istanbul 2003

All delegates will be accommodated in the Conrad Istanbul****. The hotel offers a choice of restaurants, bars and tea lounges, room service, TV, air-conditioning, healthclub, fully equipped gym, indoor and outdoor swimming pool, hair and beauty salon.

PROGRAMME

WEDNESDAY, 23RD APRIL 2003

- Arrival at Istanbul Airport. Transfer to hotel for check-in and conference registration
- **Welcome Reception** for all participants – sponsored by **Osborne Recruitment**
  Venue: **Conrad Istanbul**

THURSDAY, 24TH APRIL 2003

- Day tour on a Bosphorus Cruise departing at 10.30am. Followed by a visit to the Spice Market with a stop-over for shopping and lunch (not included) at leisure
- Evening at leisure.

FRIDAY, 25TH APRIL 2003

- **Conference Business Session – *The European Convention on Human Rights*: Its Implications for Lawyers - sponsored by Jardine Lloyd Thompson Ireland Limited and Solicitors' Mutual Defence Fund Limited**
  The distinguished speakers will guide delegates through the principles of the Convention, the proposals to implement it into Irish Law, its implications for solicitors and other lawyers in the EU and in Eastern European Countries aspiring to join the EU
  Venue: **Junior Ballroom, Conrad Istanbul**
- Half-day tour to the Blue Mosque (2pm – 5.30 pm)
- Evening at leisure

SATURDAY, 26TH APRIL 2003

- Half-day tour to Topkapi Palace (10.30am – 1.00pm)
- Afternoon at leisure
- **Reception, Conference Banquet** and Dancing – sponsored by **Bank of Ireland**
  Venue: **Ciragan Palace** (Dress: smart informal)

SUNDAY, 27TH APRIL 2003

- Morning departure

'The European Convention on Human Rights: Its Implications for Lawyers'

Letters

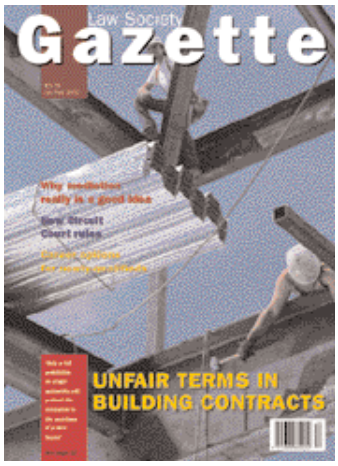
Conveyancing for slow learners?

From: Mark Fitzgerald, Edward Fitzgerald & Son, Solicitors, Co Mayo

I am writing to remind practitioners representing builders of the practice note on hybrid agreements contained in the July/August issue of the *Gazette* (page 46), together with the article *Safe as houses* in the January/February 2002 issue (page 12).

I recently received a 'building agreement' from a firm of solicitors which was not only a hybrid of the standard building agreement and of certain aspects of the general conditions of sale, but also contained nearly all the terms which were specifically designated as being unfair in the article. It appears that they were reproduced, word for word, from the very article outlawing them!

I am writing not only to remind practitioners that the use of hybrid contracts/building agreements and the inclusion of terms which breach the *European*



Communities (Unfair Terms In Consumer Contracts) Regulations have both been specifically dealt with by means of practice notes, and that use of same must be resisted by purchasers' solicitors. Second, I would remind practitioners that where they accept these conditions and/or hybrid agreements, they are not only placing themselves and their clients in an invidious position, but also that they will not be in a position to give an unqualified certificate of title to the financial institution involved.

A few more bob for the builders

From: Anthony Harris, Anthony Harris & Company, Solicitors, Dublin

I note that the Law Society has made an appeal to Charlie McCreevy to revoke the application of the VAT increases for purchasers who signed contracts to buy properties from builders before the budget. This plea is presumably on the basis that hard-pressed purchasers, who signed up for a fixed price contract, cannot afford the increase. It is my belief that an examination of the *2001 Law Society building agreement*, under which most contracts arise, shows that they don't have to.

Under the terms of that agreement, 'contract price' is said to mean 'the sum of euro xxx (to include VAT), being the price of works (as in hereinafter defined)'. It does not state whether this gross contract price includes VAT at 13.5% or 12.5%.

On the other hand, the price variation clause contained in paragraph 6(b) of the contract states: 'the contract price shall be adjusted by the amount of any increase or decrease *in the cost to the contractor of performing this agreement*, due to any alteration after the date of this agreement in the rate of VAT'.

Although VAT is charged on purchases by the contractor, the recent adjustment in VAT has a neutral effect on *'the cost to the contractor of performing these agreements*' because, presumably, all such contractors are VAT-registered and can, therefore, reclaim the VAT whether it is 12.5%, 13.5% or 50%.

This, it appears to me, obliges the builder to accept their gross price, but now inclusive of VAT at 13.5% rather than 12.5%, if the sale closes and the VAT invoice is, therefore, dated after 1 January. I would welcome other practitioners' comments on this interpretation.

Not a good war, but a great war

From: Johnnie McCoy BL, Law Library, Four Courts

On behalf of the Bar Great War Commemoration Committee, may I, through your publication, congratulate the members of the Law Society on the recent installation of the war memorial to those solicitors and apprentices who paid the supreme sacrifice in the Great War. In my opinion, the Law Society memorial complements the bar memorial exceedingly well.

On a practical note, the corridor in which the bar memorial is situated has become known as 'memorial corridor'. I wonder what name will emerge for the site of the Law Society memorial?

The future's so bright I have to wear shades

From: David Hodnett, Competition Authority, Dublin 1

It has been discerned, in the past, that some lawyers hold quite a high opinion of themselves. I wonder if this explains the significant amount of solicitors to whom age is apparently 'not applicable' as represented in the age profile of members shown on page 34 of the annual report? I can only conclude (age being immaterial) that these members are immortal. I look forward to the upcoming CLE seminar on how to attain immortality as a solicitor. Presumably, someone will know the name of a good conference centre in Tir na nÓg?

I don't know much about investing, but ...

From: John de Vere White, de Veres Art Auctions, Dublin 2

I would like to take issue with Mr Brian Weber's article in your December issue (page 38), where he asserts that: 'Art is a poor investment'.

In making his case, Mr Weber devotes a lot of attention to the infamous British Rail Pensions Fund's involvement in the art market in the mid-1970s. The *modus operandi* was the acquisition of 2,400 works over a five-year period. In my opinion, quantity rather than quality must have been the yardstick used by the fund. The article goes on to say that 'no attempt was made to manage the portfolio'. This is hardly a prudent way to go about investing in art – or investing in anything for that matter.

Mr Weber discusses a study of three exhibitions: one in Paris in 1900 and two in America (1913 and 1939). The study showed some 50 years later that, of the 850 American artists that were included in these exhibitions, the vast majority had disappeared without trace. I do not think this is a realistic basis for drawing a conclusion that 'art is a poor investment'. Sole concentration on one school of painting, linked to bulk buying, is a recipe for disaster.

In my opinion, art will show a good financial (not to mention aesthetic) return if one follows certain guidelines. At the outset, I believe one has to be prepared to take a long-term view – about ten years. It is also important to time one's entry into the market. The art market, like all financial markets, swings up and down and it is important not to come into the market at the top.

James Joyce by Louis le Brocquy

This is especially relevant to specific artists, as the popularity of an artist can jump overnight.

Louis le Brocquy is a prime example. In the late 1990s, the highest price ever paid for his work was stg£120,000, and between €15,000 and €20,000 would purchase a major work. Yet last year the nation was donated a le Brocquy (under a sensible tax scheme) which cost in the region of stg£1.5m. Thus, investors have possibly missed the boat in the case of Le Brocquy.

If you are going to invest in art, you must allow yourself time. Quality works are scarce and collections cannot be built overnight. Unfortunately, the majority of investors are impatient and advisers (who are hard to find) believe they must strike while their client is enthusiastic, and thus quality is sacrificed for quantity.

Mr Weber concludes his article by quoting valued investor Scott Black, who makes the point that you should only buy art for the love of art. I would echo these sentiments. However, I would also add that if you love your art and go about acquiring it in an ordered professional manner, it will turn out to be a sound investment. One striking example of this is the Allied Irish Bank collection. Here, all the correct criteria were used in assembling this wonderful collection and the shareholders can rest assured that a very healthy investment has been created.

Camden Quay Courthouse 2002

From: An anonymous tall practitioner, Cork

Oh sloping floor Courthouse with low level ceilings,
Heaving with throngs of half washed beings,
A steaming writhing sweaty melee,
A dirty old place where we go – for a fee

Once a place of seed and animal feed,
Recently a place where rats would breed,
Slop paint on the wall and cover the faults,
By magic it's suitable for Silks to lead!

Court 3 is lop sided, though the bench is upright,
Your head's near the ceiling in artificial light,
It stifles your plea and it's oxygen free,
And you're grateful for any respite

If a Judge from abroad came to Cork to sojourn,
Or a horse or a dog for a bed was to yearn,
They would look at this place, do a quick about face,
And our facilities they promptly would spurn.

Oh, save us from Civil Servants and every committee,
Just give us a nice Courthouse in Cork by the Lee,
While wasting our money, remember this Sonny,
It's ye serve the people, not the people serve ye!

Return of post

From: Frank O'Mahony, Bantry, County Cork

Unanswered mail! The golden rule
Is always broken by legal mules
The sods, the clods, the hoors' ghosts
Ignore requests – 'Return of Post'

I'm upright, just, with standards high,
My practice quite exemplary –
But colleagues' standards? Hoors' ghosts
Will not respond – 'Return of Post'

Their bloody motions never halt,
Those claims for judgment in default.
But for themselves, those tardy ghosts,
Still never answer – 'Return of Post'

But when the trumpet sounds above
With confidence I'll write the Dove
'Send down the keys, Oh Holy Ghost –
And beam me up – 'Return of Post'

The editor notes:
Poetry Ireland can be contacted at Upper Yard, Dublin Castle, Dublin 2.

No such thing as a free lunch

From: Jack Phelan, Cork

I refer to the photograph published in the December issue of the *Gazette* (page 53) which showed those persons who attended the lunch to mark '50 years as solicitors', from the 'final of 1952 – Michaelmas term'.

I was shocked to learn that 'the Law Society recently hosted a lunch'. I was particularly shocked as the 1952 bunch not alone paid for the lunch, but also paid for the lunches of both the Law Society president and director general. Indeed, it was us – 'the last of the summer wine' – who hosted the lunch and were honoured that the distinguished president and director general were able to take the time off from their busy schedules to lunch with us.

So, please print this letter to correct any misconceptions which might arise from what was published. Lastly, very many thanks to Colm Price for his amazing energy not only in organising our 50th anniversary lunch, but also our 45th and 40th anniversary get-togethers as well.

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CRAZY

Things were a bit different back in 1883: 'moron' and 'imbecile' were recognised medical terms, and criminals could plead 'lunacy' as a defence. Over a century later, the government has finally got round to updating the law on criminal insanity. Dara Robinson discusses the main points in the long-overdue *Criminal Law (Insanity) Bill, 2002*

It is a long time since psychiatrists have used the term 'lunatic' to describe a person who was mentally ill, but the expression lingers in the law on criminal insanity. A person arguing that they should be excused liability from guilt on a criminal charge by virtue of mental disorder must still persuade a jury to bring in a special verdict under the *Trial of Lunatics Act 1883*. Not surprisingly, this state of affairs has been the subject of increasing criticism, both from academics and from within the legal profession.

With the publication of the *Criminal Law (Insanity) Bill, 2002*, it is proposed to bring this often contentious area of our law and procedure up to date. In this long-neglected field, almost any change would have been welcome, but the legislative proposals are both comprehensive and considered, and offer a framework appropriate to the 21st century.

Roughly a generation ago, the Henchy Committee was asked to advise on the law relating to insanity and the criminal law. Its recommendations, delivered in 1978, were far from radical.

Among other things, it suggested redrafting the provisions relating to insanity verdicts, a system of tribunals to monitor and advise on the release of those persons accused who were found not guilty by reason of insanity, and importing the UK concept of diminished responsibility. But despite many promises of action, no legislation has been brought until now.

The new bill addresses all of these issues, and more besides. It sets out to affirm and codify the Irish common-law decisions on criminal insanity. It provides for a comprehensive treatment, both legally and medically, for those whose mental state may make it impossible to participate in the trial process by providing a framework for determining 'fitness to be tried'. It introduces the long overdue

situation

notion of 'diminished responsibility'. Finally, it sets up a system for the on-going review of the need to detain those who have offended while suffering from mental disorder.

How do you define insanity?

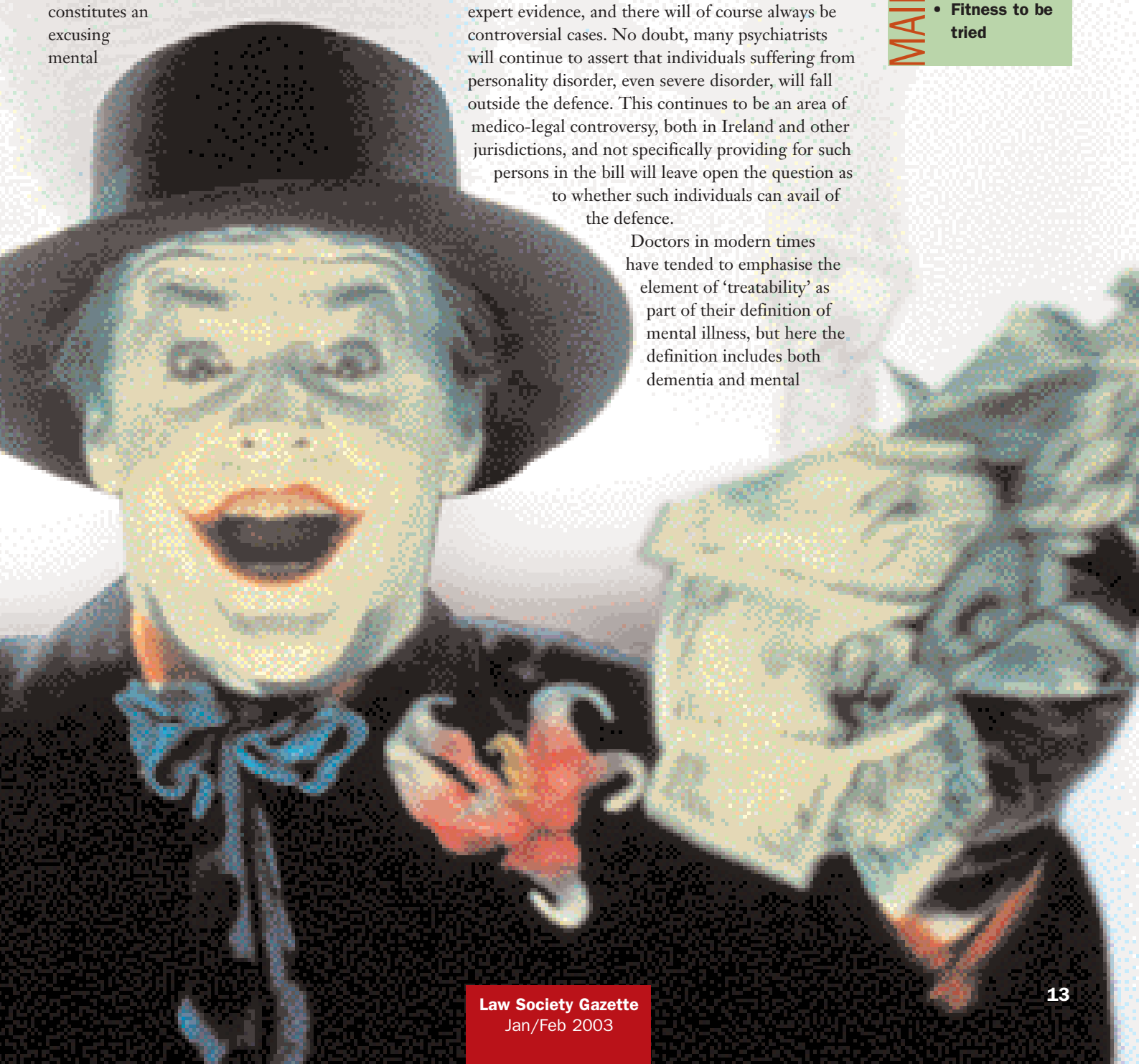
The nub of the bill is a new definition of what constitutes an excusing mental illness, and this is now reduced to the single issue of 'mental disorder'. This will be defined in section 1 as including 'mental illness, mental handicap, dementia or any disease of the mind'. Intoxication is specifically excluded.

Whether a given individual comes within this widened definition will continue to be a matter for expert evidence, and there will of course always be controversial cases. No doubt, many psychiatrists will continue to assert that individuals suffering from personality disorder, even severe disorder, will fall outside the defence. This continues to be an area of medico-legal controversy, both in Ireland and other jurisdictions, and not specifically providing for such persons in the bill will leave open the question as to whether such individuals can avail of the defence.

Doctors in modern times have tended to emphasise the element of 'treatability' as part of their definition of mental illness, but here the definition includes both dementia and mental

MAIN POINTS

- New definition of mental illness
- Diminished responsibility as a defence
- Fitness to be tried



The Joker: Gotham City's clown-prince of crime. And he's mad as a bag of cats

handicap, conditions which tend not to respond to treatment.

Once expert evidence establishes the appropriate level of mental disorder, section 4 of the bill provides for the defence to be raised in either summary proceedings or trial on indictment. Our common-law rules on the situations in which the defence is available are expressly preserved by section 4(1).

These are that the accused was suffering from a mental disorder to the extent that they ought not be held responsible because:

- They did not know the nature and quality of the act
- They did not know that what they were doing was wrong, or
- They were unable to refrain from committing the act.

The latter principle, of course, derives from the Irish case law, particularly *Doyle v Wicklow Co Council* ([1974] IR 55), and the former two were laid down as the *McNaghten Rules*, the original English authority on the insanity defence.

If the court – be it judge and jury in the Circuit and Central Criminal Court or judges sitting alone in the District or Special Criminal Court – is persuaded that the defendant has made out the defence, the court shall return a 'special verdict' of 'not guilty by reason of insanity', as opposed to the existing 'guilty but insane'.

Notifying the prosecution

The bill also provides, in section 14, for the advance notification by the defence of evidence to be led that will touch on the insanity issue. Although a new rule of law, this provision in reality merely codifies long practice in the courts, as the prosecution would always expect, and get, an opportunity to instruct its own expert on the question raised, and for that reason would always be put on notice by the defence.

Thus far, there is very little alteration to existing practice. The major changes in this part of the bill come into effect once there is a finding of the special verdict.

On-going assessment of mental health

At present, under the provisions of the act of 1883, the court is obliged to commit the defendant to the Central Mental Hospital, until released by the executive. Prior to *Gallagher v DPP* ([1991] ILRM 339), it was assumed that the courts would determine the release date on a finding of insanity. However, the Supreme Court in Gallagher's case vested the decision in the government.

In turn, the fact-finding exercise, as to whether the person still suffered from a mental disorder and might be a danger to himself or others, has over the last 12 years been delegated to an ad hoc advisory committee reporting to the minister for justice. The advisory committee's findings are non-binding on the executive. All of that will now change.

Since the finding of insanity at trial relates to the time of the commission of the offence, the first task for the court under the new provisions is to consider the state of mental health of the defendant at the time of the return of the special verdict. Section 4(2) now obliges the court to commit to hospital in the old way only if the court has evidence that the accused is still suffering from a mental disorder and is in need of in-patient care or treatment.

Section 4(3) provides a completely new power to remand a person in custody for assessment, initially for 28 days, but extendable for up to six months. This is the first appearance in Irish criminal law and procedure of a power to remand a person to hospital for assessment, and is a power that has been sadly lacking to date.

A consultant psychiatrist must now assess and report on the detained person, and the court can only commit a person without limit of time, as was the practice heretofore, on receipt of evidence from a psychiatrist that detention is necessary. There is no power in the bill for the court to remand such a person on bail for the assessment.

New Mental Health Review Board

If the court commits the person without setting a time limit, the entirely new Mental Health Review Board will assume jurisdiction over the case. Although it hasn't been established yet, the board will hold sittings at intervals of no more than six months in respect of every person who is the subject of the special verdict, including all those who were so acquitted prior to the commencement of the act.

Under a legally-qualified chairperson of no less than ten years' standing, the board is to be independent in its functions and to have many of the powers and privileges of a court. The board can assign legal representation to the person (now a patient), hear evidence, commission reports, compel the attendance of witnesses, and, most importantly, make orders in relation to the future of the patient.

The questions for on-going determination by the board differ, depending on whether the patient was detained on foot of a finding of unfitness to be tried (discussed below) or insanity. In the case of the latter, the board must be satisfied that the person needs on-going care and treatment as an in-patient.

The bill does not specifically provide for immediate discharge once the need for treatment has ceased, but rather section 12(9) permits the board to make 'such order as it thinks proper for the patient's disposal'. Presumably, once the need for treatment has ceased, the board will order early discharge so as to comply with constitutional imperatives. This compares with the existing position, where people can only be detained by the executive if mentally disordered and a danger to themselves or others.

Where the patient has been found unfit to be tried, the board has two options: if the patient is no longer unfit, he is to be brought before the court for disposal; if he is still unfit, the board can order his continued detention or conditional or unconditional release.

The powers and obligations of the board are set out in sections 11 and 12 and the first schedule to the bill. It is clearly anticipated that the board will take an active role in the review of patients under its aegis, and it may, under the bill as drafted, review patients on its own initiative.

One area of existing uncertainty that remains to be resolved is granting the board the power to order the conditional release of a patient. This is an open question at the moment but has presented no great practical problems, in part because the numbers of patients coming before the ad hoc advisory committee are low, but also because patients tend to be pleased to have the process of release initiated and so are happy to comply with conditions for a period of time in the knowledge that full release is down the road.

Diminished responsibility

The other major change in the bill is the introduction of the verdict of diminished responsibility. This has, as noted earlier, long been considered a significant lacuna in Irish criminal law. Based on, but narrower than, the provisions of the UK *Homicide Act 1957*, this defence is applicable only to charges of murder.

In essence, the defendant will have to show a mental disorder as defined in section 1, but not so severe a disorder as to justify a full insanity defence. The defence operates to reduce a charge of murder to one of manslaughter, and sentence (up to life imprisonment) is then at the discretion of the court.

It should be noted that in the Central Criminal Court on a trial for murder, the bill provides that only the jury can return a verdict of diminished responsibility, so strictly it cannot be put forward by way of an 'acceptable plea'. In practice, no doubt, if the DPP is prepared to accept such a plea, a jury will be empanelled in the ordinary way, and a limited body of evidence put before the jury who will then be directed by the trial judge as to the available verdicts.

Many lawyers who practise regularly in the Central Criminal Court are critical of the narrow basis for the insanity verdict, and the difficulty in persuading juries to return such a verdict. Hugely controversial cases such as those of John Gallagher and Brendan O'Donnell are believed to have instilled in juries an air of caution, possibly in the mistaken belief that the defendant will walk free if they acquit on an insanity basis.

The availability of diminished responsibility will hopefully mean that many cases where there is a substantial element of mental disturbance, but short of a full insanity defence, will be treated more sympathetically and humanely from now on.

Batman: Gotham's caped crusader. He's not much better, but dresses more conservatively

'Hugely controversial cases are believed to have instilled in juries an air of caution, possibly in the mistaken belief that the defendant will walk free if they acquit on an insanity basis'

Fitness to be tried

The remaining substantial area addressed by the bill is that of fitness to plead, now to be known as 'fitness to be tried'. Section 3 of the bill is devoted entirely to this topic. It both restates existing law on the subject and provides for the proper disposal of people found 'unfit'.

The issue can, as before, be raised by the court, prosecution or defence, and the person must suffer the appropriate level of mental disorder as defined. They must then, essentially, be unable to participate meaningfully in the case by reason of the disorder. The determination will be made by the judge alone, be it the District Court or on indictment. As before, there is provision to hear the evidence as to likely guilt or innocence so that people may be acquitted, even if arguably unfit, on the basis that the case against them is weak.

In the event of a finding of unfitness, the power to commit arises, but is optional. As will be seen below, the prosecution has a right of appeal against a refusal to commit. The court may also remand, in custody only, for an assessment of the need to commit. The making of a committal order will trigger the powers of the review board.

Sections 6, 7 and 8 set out a comprehensive statement of rights of appeal in respect of all findings under virtually all of the insanity or fitness questions. The diminished responsibility verdict, no doubt

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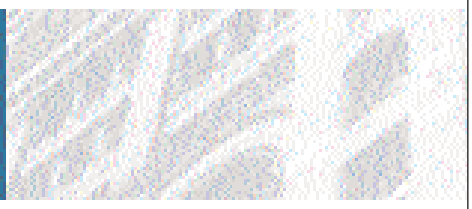

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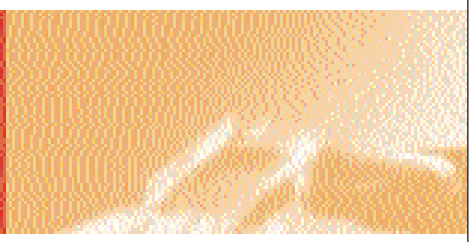

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because it is a jury verdict, is excepted and is not appealable. It would appear that only the erstwhile defendant is entitled to appeal an insanity acquittal, on the grounds of unfitness to be tried, no relevant mental disorder or insufficient evidence as to the *actus reus*.

Either the prosecution or defence can appeal a finding of unfitness or the making of an order remanding in custody for assessment. An appeal against a finding of unfitness can result in an acquittal, an order for a trial or for a retrial on the unfitness issue.

Likewise, either prosecution or defence can appeal against an order in respect of a remand or committal, or a failure by a court to remand or commit, and the appellate court shall enjoy the same jurisdiction on a successful appeal as the original court.

Given the delay in bringing forward this draft legislation, it is fervently to be hoped that there will be no delay in implementation following its passage through the Oireachtas. The diminished responsibility provisions seem quite straightforward and might produce a significant saving of resources if trials are to be shortened as a result of agreement between prosecution and defence as to the appropriateness of the verdict in particular cases.

However, the Mental Health Review Boards will require significant funding, and hopefully they will not be delayed to the same extent as their counterparts in civil law, the Mental Health Commission, set up under the *Mental Health Act, 2001* to supervise civil committals and still nowhere near being operative.

Who says money can't buy you happiness?

With universal agreement among judges, practitioners and academics that our insanity laws are embarrassingly anachronistic, the government, with at least half an eye on the *European convention on human rights*, has at last published legislative proposals which threaten to bring our outmoded law into the modern era. G

Dara Robinson is a partner in the Dublin law firm Garrett Sheehan & Co.

Requiring property developers to include a portion of social and affordable housing in their developments was a brand new idea in 2000, but this requirement has since been modified and tightened by the *Planning and Development (Amendment) Act, 2002.* John Gore-Grimes outlines the new planning regime

CHANGE

The *Planning and Development Act, 2000* established the concept of social and affordable housing as an objective of planning legislation, and introduced a mechanism whereby developers of residential developments were required to cede land, at its existing use value, to the planning authority. Section 96(2) of the act provides that before granting planning permission a local authority (or the board on appeal) *may* insist that the developer enters into an agreement with the planning authority over the development of housing land to which a specific objective applies (for example, a housing strategy or development plan).

The *Planning and Development (Amendment) Act, 2002* has removed any discretion the planning authority had, and provides that a planning authority *must* impose such a condition in a relevant residential or mixed (including residential) planning permission.

The 2000 act offered three types of conditions which the planning authority may impose by way of agreement between the authority and the developer:

a) The transfer of ownership of land (that is subject to an application for permission to develop residential property specified in the agreement) from the developer to the planning authority for the provision of social and affordable housing

b) Instead of transferring land, the developer may build and transfer completed houses to the authority or to persons nominated by the authority. The number and description of the houses will be specified in the agreement, and they will be transferred at a price determined on the basis of the site cost of the houses. This is calculated at the existing use value and the building and development costs, including profit, as agreed between both parties. The houses to be transferred must be located on the developer's site in respect of which an application for permission has been made

c) Alternatively, the developer can transfer fully or partially serviced sites to the local authority or its nominee. The number of sites will be specified in the agreement and the developer is entitled 'to be paid attributable development costs as agreed between the authority and the developer to include the site costs calculated at existing use value and the development costs, including profit, as agreed between both parties'. The sites to be transferred must be located on the developer's site in respect of which an application for permission has been made.

Purpose of the amendment

Although it has often been misunderstood in press reports and Dáil debates, the amendment act of 2002 does not in any way undermine the principle of a housing strategy. The purpose of the amendment act

MAIN POINTS

- ***Planning and Development (Amendment) Act, 2002***
- **Additional options for developers**
- **Withering permissions**

is to ensure the delivery of social and affordable housing in a less bureaucratic way by providing new options for developers as to how they can comply with social and affordable housing conditions.

The existing options listed in a), b) and c) above have not been altered. Section 3(3)(a) of the amendment act makes it absolutely clear that the planning authority may still enter into an agreement with an applicant for housing permission to reserve land within the proposed development for the local authority, or to provide houses or sites within that development.

The percentages to be transferred depend on the housing strategy of the local authority. A common figure is 20%, which cannot be exceeded, but in Fingal County Council, for example, some areas are zoned for 14% and others for 7%.

The amendment act preserves the right of an applicant to enter into an agreement under sub-paragraph 3(a) as a matter of right (namely, the transfer of land within the site only), and no applicant can be forced to adopt the alternatives which are offered by the amendment act. However, it would probably be in the interest of the developer to use the new alternatives in finalising an agreement with the planning authority.

Additional options

The amendment act offers additional options to the options a), b) and c) listed above:

1) The transfer to the planning authority of the ownership of any other lands within the functional area of the planning authority
2) The building or transfer, on completion, to the ownership of the planning authority or to the ownership of persons nominated by the authority of new houses on other lands within the functional area of the planning authority. The number and description of these houses may be specified in the agreement

OF PLAN

WHAT THE 2002 ACT SAYS

Section 4(96)(b) of the *Planning and Development (Amendment) Act, 2002* contains a number of definitions.

A **house** means:

- A building or part of a building which has been built for use as a dwelling, and
- In the case of a block of apartments or other building or part of a building comprising two or more dwellings, each of those dwellings.

Market value in relation to a house means the price which the house might reasonably be expected to fetch on sale in the open market.

Relevant house means a house for which permission would have ceased to have effect or expired but for section 4 of the *Planning and Development (Amendment) Act, 2002.*

Note: There has been some discussion on the wording of this definition, and some feel that the reference to section 4 should, in fact, be a reference to section 3. Section 3 got rid of the special type of withering permission which withered on 31 December 2002, or two years from the date of grant of permission, whichever was the later, if permission had been applied for after 25 August 1999.

Strictly speaking, section 4 does not cause a social and affordable housing permission 'to cease to have effect or expire'. Section 4 restores sections 40, 41 and 42 time limits to social and affordable withering permissions, and it imposes a levy where a social and affordable withering permission would have withered but for the provisions of the amendment act. It is doubtful if this potential error will affect the provisions of the amendment act.

Additional provisions

Section 4(96)(b) makes additional provisions. Where houses are not sold, the levy is determined by the market value of the house at the time of its completion. If the market value equals or exceeds €270,000, the levy is 1%; if it is less than that sum, the levy again is 0.5%.

Another change is that the section providing for the levy will not apply to permissions for development consisting of four houses or less, or for a house on land of 0.1 hectares or less. It should be noted that the amount of ground specified in the act of 2000 was 0.2 hectares. This has now been reduced overall to 0.1 hectares, and for exemption purposes.

Sub-section 96(b) does not provide any definite time for the payment of the levy but merely states that the levy shall be made at such time as the planning authority specifies (and the time that is so specified may be before the date on which the disposal concerned of the relevant house is effective). Any amount paid to the planning authority in accordance with this section shall be accounted for in a separate account, and shall only be applied as capital for its functions under this part by a housing authority, or for its function in relation to the provisions under the *Housing Acts, 1996 to 2002.*

One further apparent drafting error appears in section 96(8)(b) of the amendment act of 2000 which reads: '*... or if the dispute relates to a matter falling within sub-section 7, refer the dispute under that section to the property arbitrator etc*'. The sub-section referred to as sub-section 7 should in fact be sub-section 6.

3) The transfer of such number of fully or partially serviced sites on any other land within the functional area of the planning authority as the agreement may specify to the ownership of the planning authority or to the ownership of persons nominated by the planning authority
4) Payment of an amount of money, as specified in the agreement, to the planning authority
5) Combination of the transfer of land within the site of the developer, but for a lesser amount of land than is specified in the housing strategy, and the doing of one or more of the things referred to in options a), b) and c) and 1 to 4 above
6) Combination of doing two or more of the things referred to in options a), b) and c) and 1 to 5 above.

If any of these alternative options are used, the value of the property or amounts of money paid under the agreement must be equivalent and never greater than the value of the land that the planning authority would have received, if the agreement solely provided for a transfer of land within the site that is the subject matter of the planning permission, and it must be equivalent to the percentage specified in the relevant local authority's housing strategy.

Number of considerations

If one of these new alternative agreements is finalised, as envisaged by the amendment act, there are a number of considerations that must be addressed by the local authority before completing the agreement. These include the following:

1) Does the proposed agreement contribute effectively and efficiently to the achievement of the objectives of the housing strategy?
2) Will the agreement constitute the best use of the resources available to the local authority to ensure an adequate supply of housing? And what are the financial implications of the agreement for the local authority's functions as a housing authority?
3) Will the agreement address the need to counteract the undue segregation of housing between people of different social backgrounds in the area of the authority?
4) The terms of the agreement must be in accordance with the provisions of the local authority's development plan
5) The timing of delivery of social and/or affordable housing.

The local authority's housing strategy specifies an estimate of the amount of social and affordable housing required in an area of the development plan during the period of that plan, and the estimates may state the different requirements for different areas within the area of the plan. In order to comply with the estimate provided in the housing strategy, the agreement must ensure that the actual estimate of social and affordable housing required for the area during the period of the development plan will, in fact, be achieved as a consequence of the agreement.

From all this, it can readily be appreciated that the minister for the environment is committed to making part V of *the Planning and Development Act, 2000* an effective piece of legislation and that the changes, depending entirely on how they are operated, might potentially make very little difference. It is clear that the decision whether or not to allow the new options offered to developers by the amendment act of 2002 will be entirely at the discretion of the local authority, because these new options can only be

incorporated in an agreement with the developer where the planning authority is satisfied that items 1 to 4 above have been complied with.

The Minister for the Environment, Martin Cullen, has said: 'Alternatively, the developer could make a payment to the local authority which will be used for the provision of social and affordable housing. However, I intend to convey to local authorities my view that financial compensation to authorities, while an option, is the final option. All other aspects will have to be exhausted'.

The reality is that setting aside 20% of land for transfer to local authorities in the present restrained financial climate is of little use in assisting a policy of social and affordable housing. On the one hand, the local authorities will have to negotiate with developers in such a way that the agreement reached delivers the best possible results in terms of social and affordable housing supply for their areas. On the other hand, because they are left without money in the present financial climate, they will inevitably have to look for cash in spite of the guidelines that the Department of the Environment will inevitably issue to local authorities. At the time of writing this article, those guidelines have not yet been produced.

The minister has also said: 'I am determined that this new flexibility in part V will not lead to builders providing new estates at the edges of communities with no social links and no infrastructure. I will be setting firm guidelines for local authorities as to the types of alternative arrangements that will be acceptable in terms of social integration'.

The provisions in section 96(6) of the 2000 act are now replaced by sub-section 6 of the restated section 96 contained in section 3 of the 2002 amendment act, which sets out the level of compensation payable where the ownership of land is transferred to the planning authority to be applied to social and affordable housing. If, instead of a land transfer, houses or sites are transferred, the equivalent site cost must also be calculated.

In effect, the provisions dealing with the consideration to be paid by the planning authority to the developer have not changed and the developer is entitled to either of the following options, whichever is of greater value:

- The existing use value of land, or
- If the land was bought (or a contract or option to purchase the land was entered into) before 25 August 1999, the price paid for the land together with interest thereon.

A developer remains entitled to recover the building and attributable development costs in relation to fully or partially serviced sites or provision of houses, whether provided on or off site, together with an element of profit.

Any dispute relating to the consideration shall be referred to the property arbitrator by the planning authority or by any other prospective party to the agreement. Any dispute relating to an agreement under section 96 (other than an agreement relating

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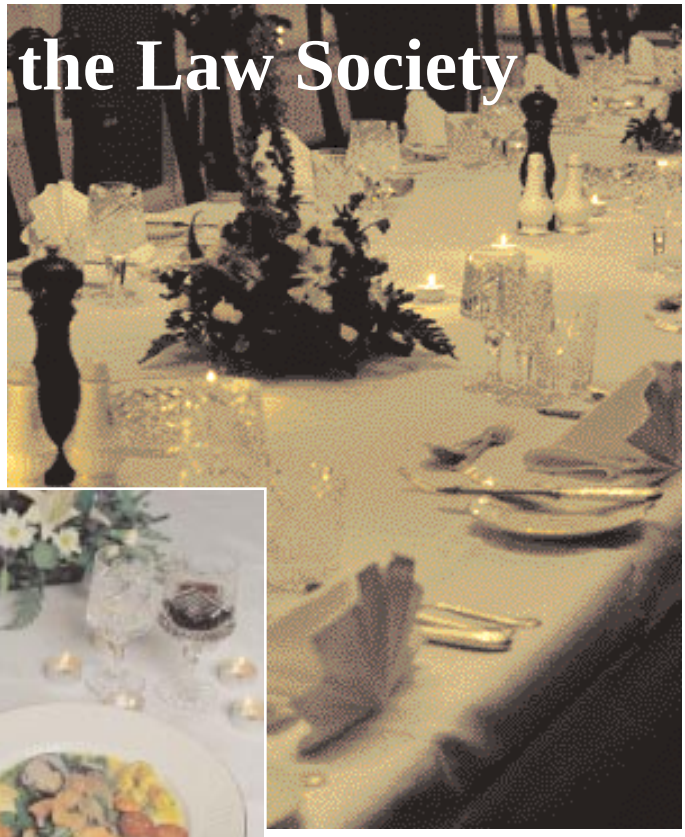

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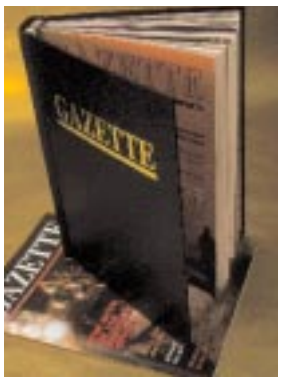

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to value) may be referred by the planning authority or any other respective party to the agreement to An Bord Pleanála for determination.

A further option that the amendment act should probably have considered was the possibility of providing the local authority with existing completed houses.

The planning authority is further restricted in making an agreement with a housing developer in that it is also bound to consider the following matters for the purposes of the agreement:

- The proper planning and sustainable development of the area to which the application relates
- The housing strategy and the specific objectives of the development plan which relate to the implementation of the strategy
- The need to ensure the overall coherence of the development to which the application relates, where appropriate, and
- The views of the applicant in relation to the impact of the agreement on the development.

The act of 2000 provided a special category of 'withering permissions' (**see panel**). It effectively meant that any permission granted on foot of an application lodged after 25 August 1999, relating to housing where the external walls of the houses or apartments had not been completed prior to 31 December 2002, would lapse either on 31 December 2002 or within two years of the date of grant of permission, whichever is the later.

The 2002 amendment act removed this category of withering permission in relation to social and affordable housing. The time limits set out in sections 40, 41 and 42 of the act of 2000 now apply to all grants of planning permission. However, section 4 of the amendment act provides that any house built on foot of a permission, which would otherwise have withered but for the provisions of the amendment act, will be subject to a levy of 1% of the sale price if equal to or in excess of €270,000, or 0.5% of the sale price if less than that amount.

This section takes considerable trouble to ensure that the levy is not passed on to the purchaser. The planning authority is required to issue a receipt similar to a receipt for a financial contribution as soon as the levy has been paid. The purchaser's solicitor will have to look for this receipt, in addition to the receipts for financial contributions contained in the planning permission. Once the receipt has been issued by the local authority, it shall be *prima facie* evidence that the liability for payment of that amount has been discharged.

The act specifically provides that:

a) A provision of a contract of a sale of a house
b) A provision of a contract for a building for a person of a house for his or her occupation
c) A covenant or other provision of a conveyance of an interest in a house
d) A covenant or other provision of a lease or tenancy agreement in respect of a house, or
e) A provision of any other agreement (whether oral or in writing),

which purports to require the purchaser, the person referred to in (b), the grantee of the interest or the grantee of the lease or tenancy (as the case may be) to pay the levy or to indemnify another person in respect of that other's paying the levy shall be void.

It might be observed here that it would be very difficult indeed to prevent a builder from anticipating the levy and putting it in as part of the purchase price in an indirect or general way. G

WITHERING PERMISSIONS

The concept of 'withering permissions' has existed for many years. The normal life of a planning permission is five years, or such other period as may be specified in the permission, or as may be allowed by way of extension during the course of a development (see sections 40, 41 and 42 of the 2000 act). Once the provided time limit expires, the permission is said to 'wither'.

WHEN IS THE LEVY PAYABLE?

The situation as to whether or not a levy is payable may be summarised as follows:

i) There is no levy payable in respect of a house built on foot of a planning permission, the application for which was lodged before 25 August 1999
ii) No levy is payable in respect of a 'qualifying permission' (where the application for planning permission was lodged after 25 August 1999, and before the relevant planning authority incorporated its housing strategy in its development plan) if either the entire house *or* the external walls have been completed before 31 December 2002, or within two years of the date of grant of planning permission, whichever is the later
iii) No levy will be payable in respect of a house or houses or an apartment or apartments (not exceeding four units), built on land which is 0.1 hectares or less, even if built under a qualifying permission
iv) A housing levy *is* payable in circumstances where either the house built under a qualifying permission has not been built, or the external walls have not been completed before 31 December 2002, or within two years of the date of the grant of permission, whichever is the later
v) In the case of a building estate, those houses built under a qualifying permission which have been fully built, or the external walls of which have been completed prior to 31 December 2002, or within two years of the date of the grant of planning permission, whichever shall be the later, are exempt from the levy. However, the levy will apply to any houses which have not been fully completed, or of which the external walls have not been completed prior to 31 December 2002, or within two years of the date of grant of planning permission, whichever is the later
vi) Any house built on foot of a planning permission, application for which was lodged after the local authority incorporated its housing strategy into its development plan is not liable for a levy, but the social and affordable housing conditions will apply.

John Gore-Grimes is a partner in the Dublin law firm Gore & Grimes, and author of Key issues in planning and environmental law *(Butterworths, 2002).*

Interim measures

A recent Supreme Court ruling means that the District Court can no longer grant *ex parte* interim barring orders under the *Domestic Violence Act, 1996*. Alan Shatter examines the reasons for the decision and its impact on those at risk

MAIN POINTS

- ***Domestic Violence Act, 1996***
- **The Supreme Court judgment explained**
- **Protection orders still available**

The Supreme Court in *DK v Judge Timothy Crowley, Ireland, the Attorney General and Ors* (9 October 2002) ruled that provisions in the *Domestic Violence Act, 1996* on the making of interim barring orders were unconstitutional. This judgment and its implications are widely misunderstood. This brief article aims to clarify the actual legal consequences of the decision and highlight the family law protections still available to spouses at risk from domestic violence.

The interim barring order in question in the Supreme Court case had been granted *ex parte* to a wife by the District Court. In other words, the District Court had ordered the husband to be excluded from the family home without any prior notice and without him being given an opportunity to respond to allegations made by his wife.

Section 4(3) of the *Domestic Violence Act, 1996* provides for the possibility of such interim barring orders being granted 'in exceptional cases', where there is an immediate risk of significant harm to the applicant spouse or a dependent child. The act envisaged that once such an order was made, it could remain in force until a subsequent application for a full barring order was heard or until the person barred applied to the District Court to have the interim order discharged. Consequently, the order could remain in place for a long time before any further court hearing took place.

Dispelling the myths

A number of myths have developed in a short period of time, arising from the Supreme Court decision. The judgment is essentially concerned with the granting of *ex parte* interim barring orders by the District Court. It does not in any way prevent the District Court granting either safety orders or full barring orders to protect the safety and welfare of a spouse or child or a co-habitee (in the limited circumstances in which the 1996 act applies to co-habitees). Nor does the decision prevent the Circuit Court or the High Court from granting a safety or

THE SUPREME COURT DECISION

Delivering the judgment of the Supreme Court, Keane CJ fully recognised the rights of spouses and children to be protected against physical violence and the entitlement (I would say the obligation) of the houses of the Oireachtas to deal with the social evil of domestic violence. The court also recognised that where 'spouses are still living together and one is being subjected to violence by the other which may also extend to the children, it may simply not be practical' for the spouse seeking a barring order to notify the other spouse that such application is being made.

The Supreme Court emphasised that 'it is not the existence of a jurisdiction to grant interim barring orders on an *ex parte* basis which creates a serious constitutional difficulty', but rather the manner in which the legislation provides for the granting of such orders. And it went on to stress the importance of 'fair procedures' in the hearing of court proceedings, stating that a court order unilaterally excluding a spouse from a family home has 'draconian consequences', in that the person against whom the order is made is forcibly removed from the family home on the basis of allegations that he has had no opportunity to answer.

A person so excluded automatically commits a criminal offence if he or she fails to comply with such order, 'even if it should subsequently transpire that it should never have been granted'. The Supreme Court also noted that a person alleged to be in breach of an interim barring order can be arrested without warrant by a garda having a reasonable suspicion that he is in breach of that order. It also acknowledged that an interim order could prejudice the ultimate outcome of family court proceedings.

In the court's view, the failure of the Oireachtas to impose any time limit on the operation of an interim order, even when granted *ex parte* in the absence of the person barred, was inexplicable and constitutionally unacceptable. As a consequence, upon issue of a District Court barring summons, the District Court can no longer grant an *ex parte* interim barring order.

In theory, under the 1996 act, the court can still grant an interim order if the person against whom the order is sought is given prior notice and an opportunity to be present in court to present his case. But there currently exist no District Court rules for the making of an interim application in this way.

The Supreme Court acknowledged that 'in exceptional circumstances', where there is a risk of 'significant and immediate harm', it is justifiable for a court to make an *ex parte* order and anticipated the likely enactment of reforming legislation. Such legislation should require that an order of this nature can remain in force for no more than eight days, after which time a further court hearing must take place and at which, each party is entitled to give evidence to the court to enable it to determine what order (if any) it should make.

In its judgment, the Supreme Court specifically expressed approval for similar provisions contained in the *Child Care Act, 1991*. These allow health boards to get *ex parte* care orders in respect of children at risk and require that, within eight days of the making of such order, the parents are given an opportunity to come before the court.

barring order pending the hearing of either judicial separation or divorce proceedings.

Where it is necessary to do so, the Circuit or the High Court can, under existing legislation, still grant an interim or a full barring order pending the hearing of judicial separation or divorce proceedings as long as a notice (known as a 'notice of motion') is first served on the other spouse, giving him the opportunity to respond to the allegations made. However, it is probable (but not certain) that, as a result of the Supreme Court's decision, both of these courts will regard themselves as being currently unable to grant *ex parte* barring orders. This is the case, even though the Circuit and High Court rules ensure that no such order can remain in force for more than eight days without the person barred being given an opportunity to be heard in court.

Where emergency *ex parte* protection is required, Circuit or High Court injunctions will now be sought which can result in immediate protection, without the party against whom the injunction is granted being at risk of arrest without warrant or criminal prosecution. However, non-compliance with such injunctions can ultimately result in the person injuncted being committed to prison for contempt of court.

Other protection orders

Finally, the Supreme Court decision has not directly affected the entitlement of the District Court to grant a protection order. A protection order can be made by the District Court pending the hearing of an application for a safety or a barring order. It is also often made *ex parte*.

Such orders do not exclude a spouse or co-habitee from the home but direct the person against whom it is made 'not to use or threaten to use violence against, molest or put in fear, the applicant or a dependent child'. Where the couple are not living together, the order is 'not to watch or beset the place' where the applicant or dependent children reside.

The availability of protection orders should ensure that, pending the enactment of new legislation, there remains in place at least some legal measure to provide a limited amount of protection for a spouse at risk. However, it is important to note that non-compliance with a protection order can result in a person being arrested by a garda without warrant and is a criminal offence.

An *ex parte* District Court protection order, like an *ex parte* interim barring order, can remain in force for a substantial period of time without the spouse against whom it is made having an opportunity to present his side of the case to the court. A constitutional challenge to the validity of the statutory provisions, which allow for the making of protection orders as currently framed, must therefore have a realistic chance of success.

To allow for the making of *ex parte* orders by the District Court (be they protection orders or interim barring orders), amending legislation and rules of court should prescribe a time limit within which such orders can remain in force. They should afford an early opportunity to the person subject to the order to go court, so that the court can properly assess, in a fair hearing, whether the order should continue or be varied or discharged.

The new legislation required is relatively simple and straightforward. It is not difficult to draft. The challenge to the government is to give to it the priority it deserves so that it is enacted without undue delay. G

Alan Shatter is a partner and consultant on family law in the Dublin law firm Gallagher Shatter and author of Shatter's family law *(Butterworths, 1997).*

Human rights advocacy has turned into a virtual industry in England on the back of the *Human Rights Act*. But many Irish lawyers doubt that our version of the legislation will have a similar impact here, while others believe the constitution is already performing the same function. Barry O'Halloran reports

AN UNCONVENTIO

MAIN POINTS

- Human rights advocacy booming in UK
- The *Human Rights Bill, 2001* to enact the *European convention on human rights* into Irish law
- Key procedural differences with the UK

Human rights have managed to make English lawyers sexy. Mark Darcy, Colin Firth's character in the film *Bridget Jones' diary*, is a human rights lawyer. Not only that, he's reputedly based on a real practitioner, barrister Ben Emmerson, who practices in Matrix Chambers in London, professional home to, among others, Cherie Blair.

Emmerson is one of a new generation of lawyers who have become media darlings by representing the 'right' (some would say 'right on') side in high-profile human rights cases in the English courts. Last August, as the law term was drawing to a close across the water, Emmerson caused two major embarrassments for the British government.

First, he won the right for 900 prisoners to go free after the European Court of Human Rights ruled that prison governors could not add days to sentences as punishment. Then he convinced a panel of English judges that the detention of nine terrorist suspects in the wake of 11 September was unlawful. With their usual restraint, the UK media described the victory as a 'devastating blow' for Home Secretary David Blunkett's anti-terrorism policy.

Emmerson celebrated these victories and the beginning of the long vacation in a London pub with another high-profile human rights law practitioner, Kier Starmer, who acted for renegade spy David Shayler (who doesn't have much to celebrate at the moment). Starmer was made a Queen's Counsel (QC) in March. Many of the barristers practising in this area have taken silk, despite the fact that the majority of them are still in their thirties and considered young for the honour. Their promotions are an indication of how seriously the English legal establishment takes them.

Starmer is a member of Doughty Street Chambers, another high-profile practice specialising in human rights. Like Matrix, it is home to a raft of young lawyers whose names regularly pop up in British newspapers. Doughty Street was established in 1990 with the specific aim of taking cases with a human and civil rights focus, says its spokeswoman Christine Kings.

The original idea was to get away from the conventional chambers model used in England, where the clerks, who get a percentage of each practitioner's earnings, heavily influence the type of cases taken. 'A couple of people with a commitment to human rights law came together with the object of taking these cases', she says. 'What we look for in each situation is the vulnerable client'.

While they took a proportion of the cases on a *pro bono* basis, public funds paid for those in the criminal arena and civil liberties groups such as Liberty footed the bill for others. The chambers' members are frequently involved in these groups. That balance is maintained today, according to Kings. She estimates that 50% of the chambers' cases are criminal defence work, while 50% are general common law.

Putting the dough in Doughty Street

In the past, Doughty Street lawyers have taken appeals against the death penalty handed down in Caribbean members of the commonwealth to the Privy Council (work that Kings maintains was unpaid). They have also taken actions against the police. Many non-criminal cases can relate to a range of issues including social welfare, mental health, patients against hospitals and just about anything that fits the vulnerable individual against the faceless institution mould.

And thanks to the *Human Rights Act 2000*, which enacted the *European convention on human rights* into English law, business is now booming. According to a recent assessment by Kier Starmer of the legislation's impact on general litigation in English courts, it was 'substantively considered' in 431 cases at High Court level or above between October 2000 and April of this year.

In the two decades between July 1975 and July 1996, the *European convention on human rights* (on which the act is based) was considered in 316 cases at the same level in the English courts. The figures for the last two years do not account for the number of times the act has been dealt with in the lower courts, where English practitioners do most of their business.

'The *Human Rights Act* is being relied on at every level in domestic proceedings in the UK', says Starmer's colleague, Kate Beattie. 'That's the most obvious change it has brought: human rights points can be raised in almost any case'.

She adds that most of the work now done in Doughty Street revolves around the act. Beattie says that solicitors are taking more and more notice of the

NAL APPROACH

PIC: JONATHAN EVANS/REX FEATURES

Eye-spy: M15 whistleblower David Shayler – a rare defeat for the elite of England's human rights lawyers

act and its implications for their clients. The chambers exploits its skills in this area by providing advice and training for other lawyers who do not specialise in the area, but who are aware that the act could affect their clients' fortunes.

'We are giving advice on human rights issues to others, so they can use our experience', Kings says. 'We train solicitors to find the human rights issues in cases'. Beattie agrees that 'solicitors are thinking more and more about it' (the *Human Rights Act*).

One experienced human rights lawyer, Edward Fitzgerald QC, has compared the explosion in human rights advocacy to the French enlightenment. That's probably pitching it a bit strong, but people like Christine Kings and Kate Beattie say the events of the last two years speak for themselves. However, those events are tied specifically to the arrival of the *Human Rights Act* on the English statute book.

At this stage, no-one is willing to predict for definite the likely impact of the *Human Rights Bill, 2001* on litigation in this country once it is enacted into law. Solicitor Garrett Sheehan, principal of Garrett Sheehan and Company, points out that the constitution allows ample scope for many kinds of human rights advocacy. He says some analysts believe there are stronger protections for rights like the right to a jury trial in the constitution than there are in the European convention.

'There's not that much extra. A lot of rights are already stated or implied in the constitution', he says. 'We may have been slower in terms of defining certain rights, but the protection for certain other rights is stronger', he adds. The terms of the *Human Rights Bill* are made subject to the constitution, a fact that has drawn a lot of fire from the legislation's critics.

Kate Beattie agrees that in some ways it appears that the Irish constitution is already filling the role now assumed by the *Human Rights Act* in England. In that jurisdiction, judges can declare legislation to be incompatible with the act. Similarly, Irish High and

Supreme Court judges can find statutes and statutory instruments repugnant to the constitution.

However, she says the effect of the declaration is different in that an English court's declaration of incompatibility can have a number of effects: it can be overturned, as it is here, or it can be partly overturned, or the ruling can act as a 'sub-amendment' to the legislation. In this country, the provision falls.

'The thing is that you already have a kind of incompatibility, whereas that's quite a new thing here', says Beattie. In fact there is still some confusion in this area, as it appears that the original intention was that the courts would flag incompatibility rather than rule on it.

'The fact is that there are clearly cases where European convention rights are stronger than those in the Irish constitution. That's why we have had so many cases going from here to Strasbourg'

Right from the start?

But the Irish and English legislation were designed to do two different things. According to the last minister for justice, equality and law reform, John O'Donoghue, the Irish *Human Rights Bill* does not set out to create new rights for this country's citizens. 'It has to be remembered that we in Ireland already have an extremely effective method of safeguarding individual rights through the medium of the written bill or rights as set out in the 1937 constitution – a factor that has assisted the state in maintaining its very good record before the Court of Human Rights over that time', he told a press conference to launch the bill last year.

He stressed that the legislation's purpose was to facilitate actions being taken in this country's courts rather than in the European Court of Human Rights in Strasbourg. The Irish High or Supreme Courts will be able to declare that a provision of Irish law is incompatible with the *European convention on human rights*.

Pending a decision by the government of the day on its response to the declaration, it will not affect the provision's continuing operation or validity. But where someone has been granted a declaration and has suffered loss, injury or damage, he can apply to the government for payment of *ex-gratia* compensation in respect of that.

Catherine Pearce of solicitors Kelleher O'Doherty in Dublin predicts that, based on similar payments made by the European Court of Human Rights, these payments are not likely to be large. She is doubtful that the legislation will have a big impact when it is passed into law as it has been constructed to ensure that it does not affect the *status quo*.

'What they have done is very different from what happened in England. They have been very careful to ensure that it complies with the Irish constitutional regime', she says. 'The government has tended to be very defensive about the constitution all along'. According to John O'Donoghue, the main provisions of the bill are to ensure that Irish courts 'in interpreting and applying any statutory provision do so, as far as possible, in a manner compatible with the European convention'.

It also demands that every organ of state performs its functions in a manner that is compatible with the state's obligations, and there is a right to damages should they fail to do this, unless the law of the state prevented them from acting otherwise. Solicitor James MacGuill argues that the legislation has been qualified to the point where the convention has no real meaningful effect in Irish law.

'They have emasculated it so much', he says, and adds that the courts are not defined as a public body under the act, which means that they themselves are not subject to the provisions requiring organs of the state to ensure they behave in a manner compatible with the act.

He points out that there are a number of practical differences with the UK. Under their act, public funds are used to pay for human rights litigation where there is no other source of cash. Here, litigants have to rely on their own funds or on the chances of lawyers taking a case *pro bono*.

Also the UK act facilitates litigants by putting special, straightforward procedures in place. The Irish bill makes no such concessions. MacGuill says that this is despite the fact that there is a clear need to facilitate human rights litigants. He also complains that the remedies are ineffective and incomplete.

'The fact is that there are clearly cases where European convention rights are stronger than those in the Irish constitution. That's why we have had so many cases going from here to Strasbourg', he says.

Parallel universe

On top of this there is the question mark over the role of the District and Circuit Courts. They account for 95% of all litigation in this country, but they do not appear to have any role under the *Human Rights Bill*. This is another central difference with the English regime, which allows human rights points to be raised in courts with parallel jurisdiction to the Irish District and Circuit Courts.

'The bill seems to be very much focused on the High Court', says Catherine Pearce. 'But the District Court is the place where rights are litigated. That's the interface of society and the law for the most part, and that's the place where most people look for vindication of their rights'.

One lawyer speculated that the delays in publishing and passing the bill have been caused by the fact that the government wanted to be careful to keep litigation of this area of the law firmly in the superior courts. 'Otherwise, there was a question that people could have done things like sued health boards or got injunctions against them in the Circuit Court', he said.

The bill itself is now being considered by an Oireachtas committee, and it could still be some time before it is finally passed into law. After that, there will be a further six-month wait before it comes into force, which leaves plenty of time for speculation about its ultimate impact on the law. G

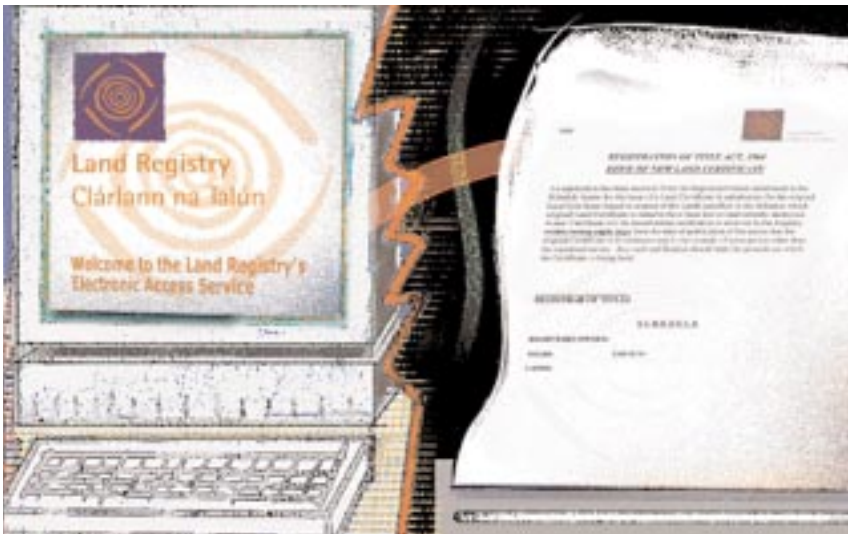
Barry O'Halloran is a staff reporter with Business & Finance *magazine.*

The paper chase

The Land Registry's drive to move from a paper-based system to a full electronic service continues apace, writes Michael Treacy

The Land Registry's Electronic Access Service (*www.landregistry.ie*) was launched in July 1999, at the same time as time as its Integrated Title Registration Information System (ITRIS). It provides Land Registry customers with on-line access to the organisation's database of land ownership records. Users of the Electronic Access Service (EAS) can:

- Conduct on-line searches of the electronically available indices and register
- View and print computerised ownership records
- Discover the applications pending in the Land Registry against a particular registered property
- Make on-line applications for official copies of Land Registry records



- Track the progress of applications through their lifecycle, and
- Prepare and submit applications for registration/lodgement forms.

On the introduction of this new technology, the registry successfully transferred all the existing electronic ownership records to the new system. But the bulk of the ownership records, 'folios' and 'filed plans' (some of which go back as far as 1892), continued to be held in paper form, a situation which clearly could not continue in the light of the organisation's strategy to deliver an increasing range of its services electronically.

MAIN POINTS

- **New document imaging system in place**
- **Folios and filed plans being scanned**
- **Project to finish by end of next year**

New document-imaging system

With financial assistance from the government's Information Society Fund, the Land Registry undertook a major project to implement document-imaging technology, accompanied by a programme to systematically convert all its paper folios and filed plan maps into electronic records and to make these available on-line to customers through the EAS.

The conversion programme began in January 2002 and is expected to be complete by the end of 2004. It will result in the scanning and indexing of approximately 6.4 million pages of unique Land Registry records, which are being made available to internal staff on a phased basis to assist casework processing and on-line to customers through the EAS. As the electronic images are created, they are loaded nightly onto the system, following a thorough quality assurance examination. At present, approximately 10,000 to 12,000 new pages are made available over the Internet each day.

Customer survey

As part of the preparation of the registry's *Statement of strategy and business plan 2002-2005*, a comprehensive customer survey was undertaken. The main purpose of the survey was to help identify customers' priorities in order to address them. Over 160 firms and organisations were canvassed, and 92 completed surveys were received. The responses represented almost 1,000 practising solicitors. At least two firms from each county were included in the survey and they included a mix of small, medium and large firms. Customers ranked the registry's services in order of priority and the results demonstrate that the development of ITRIS and the EAS is the preferred route for the delivery of services.

The majority of the Land Registry's customers are legal practitioners, professional law-searching firms, financial institutions, local authorities and other public bodies. Since the launch of the EAS, the number of customers has grown steadily and the number of accounts now exceeds 4,200. This pattern is also reflected in the substantial increase in the number of transactions conducted on-line. For example, during January 2002, an average of 672 business transactions were undertaken through the EAS each day. By September, this had grown to over 1,200 business transactions a day and, by the end of the year, over 600,000 transactions had been conducted electronically. Much of this growth can be attributed to the increasing number of records available on-line. These figures do not include the many thousands of on-line enquiries made to its system each month for information for which no fee is charged.

The Land Registry document-imaging programme is all about giving customers access to the information they need in a timely and convenient manner. As the size of its electronic database increases, the organisation expects to see the current upward usage levels for its on-line services to continue into the foreseeable future. G

Michael Treacy is the Land Registry's corporate services manager.

COMPLETION NOTICES: *a word of*

Every practitioner knows what a completion notice is and what it is intended to do. But a recent High Court decision could have far-reaching implications for vendors who are not 'ready, willing and able to complete', as Patrick Mullins explains

MAIN POINTS

- Background to *Tyndarius v Nicholls*
- High Court judgment explained
- Implications for both vendors and purchasers

The question of completion notices was considered by Mr Justice Smyth in *Tyndarius Limited v Nicholls Limited and Others* (judgment of 11 January 2002). In these proceedings, the plaintiff entered into a written contract to purchase a property in Dublin under the terms of a written tender document incorporating the Law Society's *General conditions of sale* (1995 edition). The intermediate title to the property was not furnished in accordance with general condition 7. In response to the objections and requisitions on title, the reply to the requisition in relation to the capacity of the vendor to sell the property was stated to be 'to follow'. A deed in relation to the intermediate title was missing at the time and this was subsequently disclosed to the purchaser's solicitors.

The solicitors for the purchasers wrote to the solicitors for the vendors, indicating that the purchaser was considering putting an end to the contract entirely on the basis of the failure to address the difficulties over the title. The vendor replied by serving a completion notice, making time of the essence in the contract.

Ready, willing and able

The purchaser's solicitors replied, rejecting the purported completion notice and reserving a right on behalf to the purchaser to rescind the contract. Further correspondence ensued and ultimately the vendor's solicitors wrote to the purchaser's solicitors indicating that, as far as they were concerned, they had adduced title in accordance with the contract and were ready, willing and able to complete. The vendors went on to furnish details of the interest charged per week and indicated their intention to deal with the property after the expiration of the time set out in the completion notice. Some further correspondence ensued, and the purchaser's solicitors eventually wrote indicating that they had received a senior counsel's opinion in the matter and that the vendor was in breach of contract. Furthermore, they indicated that, as a result of this breach, their client was entitled to an immediate return of the deposit, together with interest and costs.

At trial, the purchaser contended that its last letter reaffirmed a decision on its part to regard the failure to provide proper title and the service of the completion notice as a repudiation by the vendor, and that this letter was an effective notice of rescission.

Some days later, the vendor's solicitors replied, indicating that deeds had been located which were previously missing and enclosing copies of these deeds.

Unreasonable objections

The vendor contended at trial that it was at all times ready, willing and able to furnish title in accordance with the terms of its contract and that the objections or requisitions raised by the purchaser were unreasonable and were in fact properly met. It further argued that the completion notice was a valid notice in that it stated that the vendor was ready, willing and able to complete the sale in accordance with its obligations.

The purchaser contended that the completion notice was invalid and that it had by letter validly and properly rescinded the contract and that the contract was at an end. Accordingly, it was entitled to have its deposit returned, together with the costs of investigating title and the costs of these proceedings.

High Court's decision

Mr Justice Smyth indicated that he was satisfied as a matter of law that the giver of a notice to complete a sale under which terms time is made of the essence is as equally bound by it as a recipient of the notice. He held that the party giving the notice must be ready and willing at the time to fulfil its own outstanding contractual obligations. In this particular case, he found as a matter of fact that there were too many inconsistencies and frailties in the documentation proffered by the vendor to oblige a purchaser to

warning

accept the title in the piecemeal fashion it was being advanced.

He further held that a term under which time becomes of the essence binds both parties and that, upon expiration of the completion notice, the purchaser was entitled to terminate the contract, both because of the failure by the vendor to make good title and the vendor's inability to complete the contract in accordance with the completion notice. He found that there was no waiver by the purchaser of its entitlement to treat the inability of the vendors to close the sale as a repudiation of the contract. He further held that protest about the validity of the completion notice did not amount to such a waiver. He was satisfied that the right to rescind the contract on the grounds of repudiation had been exercised promptly in this case.

Right to rescind

Importantly, he indicated that as long as the vendor maintained a position that gives the right of election to the purchaser, then the vendor preserves and keeps open the purchaser's right in that regard. He found as a matter of fact and as a matter of law that, as of the date of service of the completion notice, the vendor was not ready, willing and able to comply with its obligations under the contract. In his view, the purchaser had unequivocally and promptly exercised its right of election to rescind. He therefore held that the plaintiff – the purchaser – was entitled to recover the amount of the deposit, together with interest on it.

This case is particularly important because it highlights the implications that a completion notice has not only for the purchaser but also for the vendor. It is clear that in some circumstances the vendor can put himself at risk by serving a completion notice because, if at the end of that period he is not in a position to complete, the purchaser has a right to rescind the contract. It is therefore advisable that, when acting for a vendor, practitioners should consider the effects and possible ramifications of serving a completion notice. G

Patrick Mullins is a partner in the Cork law firm Dillon Mullins & Company.

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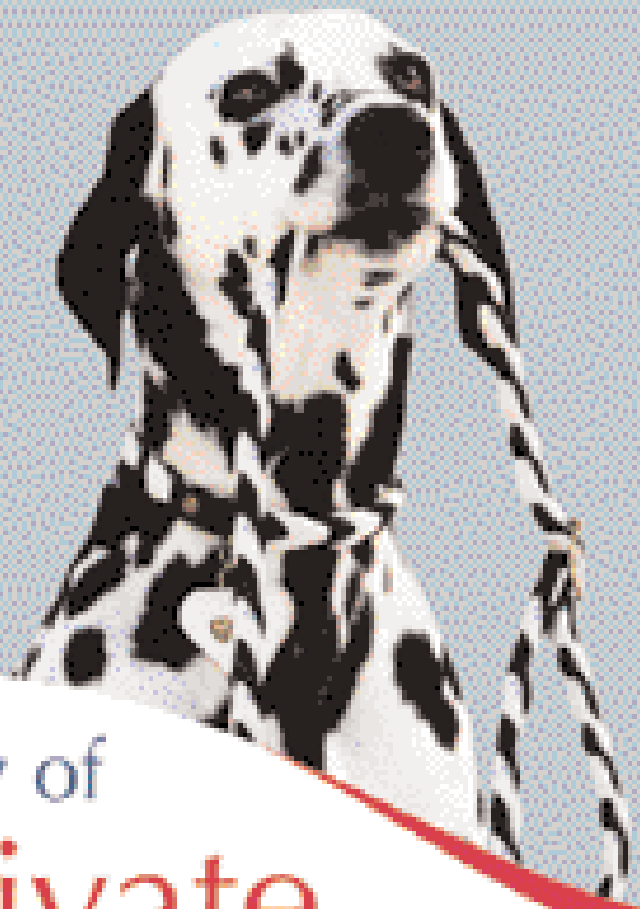

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Book reviews

Social inclusion and the Irish legal system: public interest law in Ireland

Gerry Whyte. Institute of Public Administration (2002), 57-61 Landsdowne Road, Dublin 4. ISBN: 1-902448-66-9. Price €45.

Gerry Whyte has created an indispensable guide for any solicitor with an interest in using the Irish legal system to fight social exclusion by taking on the state on behalf of marginalised or neglected clients. The phrase 'public interest law', as used by Whyte, means trying to use the law and legal services on behalf of the disadvantaged and often involves marginalised groups in society using the legal system to gain financial support from the state, usually based on perceived constitutional rights. Social welfare claimants, children from dysfunctional families and children with mental handicaps, travellers and litigants seeking legal aid are four such groups.

The obvious difficulty with using the legal system to compel the government to spend money on specific areas of education or social welfare is that the judiciary could thus be contravening the doctrine of separation of powers. Whyte argues that a commitment to social inclusion can be inferred from the text of the constitution, and that the judiciary are the most appropriate agency to police this constitutional norm, based on the failure of the political system to look after the needs of its least-able citizens.

Once the legitimacy of judicial activism has been established, the author examines how civil procedures and remedies in the courts could develop to accept public interest litigation, before going on to analyse the success of public interest law (limited to date) in the Irish courts. The final part of this book is concerned with access to legal services for the disadvantaged and provides a fascinating history and critical analysis of the system of civil legal aid in Ireland, and the contribution of FLAC to the creation and development of this system.

Lawyers are faced with a formidable task in implementing Whyte's strategies for social inclusion, based on the attitude of the current Supreme Court to social and economic rights as expressed in the recent cases of *Sinnott v Minister for Education* and *TD v Minister for Education*. The latter case is particularly damaging to Whyte's thesis, as many of the justices made it clear that they do not recognise implied socio-economic rights in the constitution.

Murphy J put it like this: 'With the exception of the provisions dealing with education, the personal rights identified in the constitution all lie in the civil and political, rather than the economic, sphere'. Mandatory injunctions vindicating constitutional rights will only be granted against the executive in the narrowest of circumstances, and in reviewing executive action courts are essentially restricted to the remedies of prohibitory injunctions, damages and declarations, according to the Supreme Court in the *TD* case. This severely limits the judiciary's ability to order the state to spend on services to particular groups.

All is not lost, however, as these limited remedies still have the power to provoke, if not to compel, political action – and, at the very least, they will highlight the problem. Whyte sees litigation as complementary to political action, but not replacing it, so the legal system can only provide part of the solution. Lawyers must be aware that additional political pressure on government departments may be required. Whether solicitors wish to move outside the legal system in pursuit of social justice will depend on the case and on the solicitor.

Readers of this excellent book will be as struck by Whyte's huge commitment to social inclusion as they are disappointed by the reality of the current political and legal climate in Ireland. In a sense, Whyte spends much of this book debating ways and means of how 'David could beat Goliath', before finally deciding that if the fight were to take place according to current Supreme Court rules, then Goliath would win. It is up to the lawyers and politicians of today and tomorrow to ensure that the rules of this country's legal, social and political environment are developed and litigated to accommodate the marginalised as full citizens, and to increase access to justice for all. By recognising the urgent need for change and suggesting changes to and by the legal system, Whyte has stood up to the legal orthodoxy on social and economic rights and is a true advocate of both social inclusion and the socially excluded. G

Keith Walsh is a solicitor in the Dublin law firm Fawsitt Whitefriars.

Office of Director of Equality Investigations 2001: legal review and case summaries

Madeline Reid. Free of charge from the ODEI, The Equality Tribunal, 3 Harcourt Street, Dublin 2.

The *Employment Equality Act, 1998* came into force on 18 October 1999, amplifying Irish equality legislation in the employment sphere. Until then, the legislation merely covered discrimination based on sex or marital status. The most notable innovation of the 1998 act was the introduction of seven new categories of protected groups, based on family status, age, disability, religion, race/nationality, sexual orientation and membership of the travelling community.

The transformation was taken a step further in October 2000 with the introduction of the *Equal Status Act, 2000*. This represented a giant leap forward in Irish equality, as it extended the principles of equality embodied in the 1998 act beyond the employment sphere to include access to, and provision of, goods and services.

It is not surprising that these significant legislative innovations have resulted in burgeoning jurisprudence from the Office of the Director of Equality Investigations (ODEI), the Labour Court, the Circuit Court and, in time no doubt, the High Court. Neither is it surprising, therefore, that individuals are somewhat confused in respect of their rights and obligations under this new equality legislation and would welcome guidance on the main facets of the legislation and the case law that has emanated from it to date. The ODEI's annual report *Office of Director of Equality Investigations 2001: legal review and case summaries* to a considerable extent provides such guidance on the key issues which came to the fore during the first full year following the introduction of the 2000 act.

The legal review of the ODEI case law is written by Madeleine Reid, its legal adviser. It is published as part of its 'overall policy of transparency and accessibility'. The criterion for inclusion in the review is said to be 'whether the issue is likely to be relevant, and of interest, to parties involved in cases before the ODEI'. In this respect, it will provide practitioners with useful pointers to the ODEI's approach and thinking when investigating complaints within its remit, as well as being an authoritative guide to many of the key principles embodied in this important area.

The introduction provides a brief explanation of the jurisdiction of the ODEI; a useful reminder that it is not only responsible for dealing with complaints under the 1998 and 2000 acts, but that it also has residual jurisdiction to deal with some outstanding claims of discrimination under the *Anti-Discrimination (Pay) Act, 1974* and the *Employment Equality Act, 1977*.

In chapter 2, *The grounds of discrimination*, Ms Reid makes the point that before 2001, gender accounted for the majority of new claims, but that during 2001 a significant number of decisions arose in relation to the 'new' grounds. She then provides a brief overview of the claims brought in that year. She outlines how many claims were taken and highlights the main cases under each ground.

Under the 'family status' ground, for example, she highlights the controversial case of *Maughan*. A complainant was refused service in a pub in the afternoon because he was accompanied by his 13-year-old son. The policy of the pub was not to admit anyone under 18 to its premises, therefore it would not serve parents accompanied by children. The equality officer concluded that this was a discriminatory policy against parents of children under 18 years, since there was no risk of the son's presence giving rise to any risk of, say, disorder (prohibited by the *Intoxicating Liquor Act, 1988*). On the other hand, the equality officer held that publicans could be entitled to refuse service to a parent accompanied by a minor in a number of situations, for example, if the child was seen to consume alcohol.

Under the ground of 'gender', it was held in the *McKenna* case that when an employee was absent from work due to a pregnancy-related illness, the reduction of her salary to half-pay for the latter part of her pregnancy and the deduction of her absences from sick leave entitlements amounted to direct discrimination on the gender ground under Community law in breach of article 141 of the *EC treaty* as well as the equal pay and equal treatment directives. The equality officer stated that she was bound to apply the 1998 act that implemented the EU law. This decision is on appeal to the Labour Court. However, in *Rattigan v Boots*, the equality officer found that neither Community nor national law created an entitlement to special protection for a female employee in respect of gynaecological illness generally.

The third chapter is *General equality issues* and deals with these issues under several headings, with reference to 2001 cases. The nature of discrimination is defined by reference to EU law, and the relevance of EU law to the case law of the ODEI is also highlighted by an exposition of the cases in which it was considered and applied.

Concepts pertinent to direct and indirect discrimination are explored, namely: the distinction between the two concepts; the definition of indirect discrimination; the EU concept of 'disproportionate impact' relating to gender equality; issues relating to family responsibilities; and 'justification'. It then considers the necessity of comparators; the fact that intention to discriminate is not a necessary condition to liability; the concepts of discrimination by association and by imputation under the *Equal Status Act*; the burden of proof in both employment equality and equal status cases; and the fact that discrimination can be inferred from the facts of a case.

The penultimate issue considered is harassment. There were no substantive decisions on this topic under either the 1998 or 2000 acts. The issue was, however, considered in cases brought under the *Employment Equality Act, 1977*. When discussing the issue of harassment under this act, reference is made to the case of *Two female claimants and the Equality Authority v A boys' secondary school*. The equality officer in this case held that two teachers had been sexually harassed by secondary school pupils, but also found that there was no general practice of gender discrimination and that the school had taken all reasonably practicable steps to address the complaint. The equality officer did hold that the teachers had been penalised by the school for bringing the complaint, and awarded them compensation for the victimisation. The report notes, however, that this recommendation was overturned on appeal to the Labour Court, which imposed liability on the school. It held

that there was sufficient evidence of a general practice of discrimination and also that the steps taken by the school were not sufficient. 'Victimisation' arises when a person is penalised or adversely treated for having sought redress against discrimination, and it is stated that the equality officers take a serious view. This is subsequently discussed in the text.

Chapter 4 deals with issues specific to the *Equal Status Act, 2000*. The concept of 'services' under the act is discussed with reference to the case of *Donovan v Garda Donnellan*. Four horses strayed onto the road, but only the owner of one of them – a traveller – was prosecuted. He argued that the prosecution was discriminatory. It was held that services provided by the state, including certain policing functions, are covered by the 2000 act, but that the investigation and prosecution of crime are not available to the public within the meaning of 'service' as defined under the act.

The report then gives examples of the kind of activities found to constitute discrimination under the 2000 act. Many of the cases taken concern the travelling community, and it is noted that a large number of cases related to refusals to serve members of the travelling community in pubs, hotels and restaurants. Many respondents in such cases had argued that they had no policy of discriminating against travellers, and the report discusses the effect of evidence tendered in respect of this. It states that in several cases the absence of any evidence that a respondent operated a discriminatory policy against travellers, and evidence that other travellers were served normally, had been considered to weigh against the complainant, where the respondent produced evidence of non-discriminatory factors grounding their decision not to serve the complainant.

Two defences provided by the 2000 act are also considered. Under section 15(1), a person may refuse to provide goods or services to a customer on non-discriminatory grounds if to do so would involve substantial risk of criminal or disorderly conduct or behaviour or damage to property at, or in the vicinity of, the place in which the goods or services are sought. The report states that to successfully invoke this defence, there must be a reasonable belief on the part of the respondent that the individual refused was likely to cause trouble. It is not sufficient to show that the person refused was a traveller and that other travellers had previously caused trouble. Several cases are analysed in relation to this defence.

The second defence, under section 15(2), is refusal on the basis that the action was taken in good faith to comply with the licensing acts. In the case of *Moorehouse v Ayleswood*, it was stated that this defence imposed a less severe test for the respondent than the section 15(1) defence, since it did not require a 'substantial degree of risk'. Several cases are considered where this defence was invoked.

Chapter 5 concerns issues specific to the *Employment Equality Acts*, including equal remuneration and the definition of remuneration under the act. One case mentioned is that of *Eng*, in which it was held that a Malaysian doctor occupying an unpaid 'supernumerary' internship who performed 'like work' to Irish and EU doctors who were paid a basic salary was an employee and was being discriminated against because of his nationality. In many other cases, however, the equality officers had found that the claimant was not performing 'like work' to the comparators.

In the *Kennedy* case, the equality officer awarded equal pay to a female employee. She considered the argument that the pay differential reflected the later hour shift worked by the comparator and found a lack of transparency in the calculation of an anti-social hours element. She stated: 'In circumstances where the employer applies a non-transparent pay practice which can have the potential to undermine the effectiveness of equal pay legislation, I consider that an order for equal pay is the appropriate remedy'.

Several other cases raised issues of discrimination in interviews and recruitment. Discriminatory questions or comments, for example, arose in three cases. The case of *Sheils O'Donnell* raised the question of whether it may be discriminatory for an employer to ask detailed questions about a prospective employee's willingness to work atypical hours, considering family commitments, if the same questions are put to both male and female candidates. The equality officer considered it arguable that such questions may tend to disadvantage female candidates disproportionately.

She tested first for objective justification with reference to High Court and European jurisprudence, and concluded that in this case the questions were objectively justified. The job (home school community liaison officer) required flexibility to work outside normal working hours. The questions were unrelated to the candidate's gender and met the tests prescribed by the ECJ – that the condition met a genuine need, was suitable to attain its objectives, and was necessary to achieve them.

The case of *O'Hanlon v EBS* is also worthy of note. It was pointed out that it was undesirable practice for interview panel members to destroy their notes, since such a practice could well form part of an evidential chain on which a claim for discrimination could be made out.

The report states that access to job-sharing or part-time working was considered in three decisions, in which the equality officers reviewed a range of Irish and EU law and concluded that no legal right is provided under either for a full-time employee to transfer to job-sharing or part-time work. They also noted the provisions of section 13 of the 1977 act, to the effect that an employer is not obliged to employ a person who will not accept the conditions under which the duties attached to that position are performed. However, in all three cases, it was emphasised that an employer was obliged to decide on an application for flexible working conditions in a non-discriminatory manner.

Two cases which involved class actions were also examined in the context of what constitutes a class action, and to what extent one may be brought.

Chapter 6 examines procedural issues. Of particular note is the decision under the 1998 act, *A complainant v A company*, that the correct date of the start of the six-month limitation period is the date of the last alleged incident of discrimination, and not the day after. This was also held in two cases that the 1998 and 2000 acts respectively did not have retrospective effect.

With regard to parallel claims, in *O'Hanlon v EBS* it was held that a complaint of discriminatory treatment could be referred to the ODEI where a complaint of constructive dismissal had been made to the Labour Court on the same facts.

The issue of 'extension of normal time limits' is also discussed. It is interesting to note that of the seven applications made to the director in 2001 for extension of time to refer cases, none were\ successful. Three of the applications were under the 1998 act. In deciding one of these applications, the director

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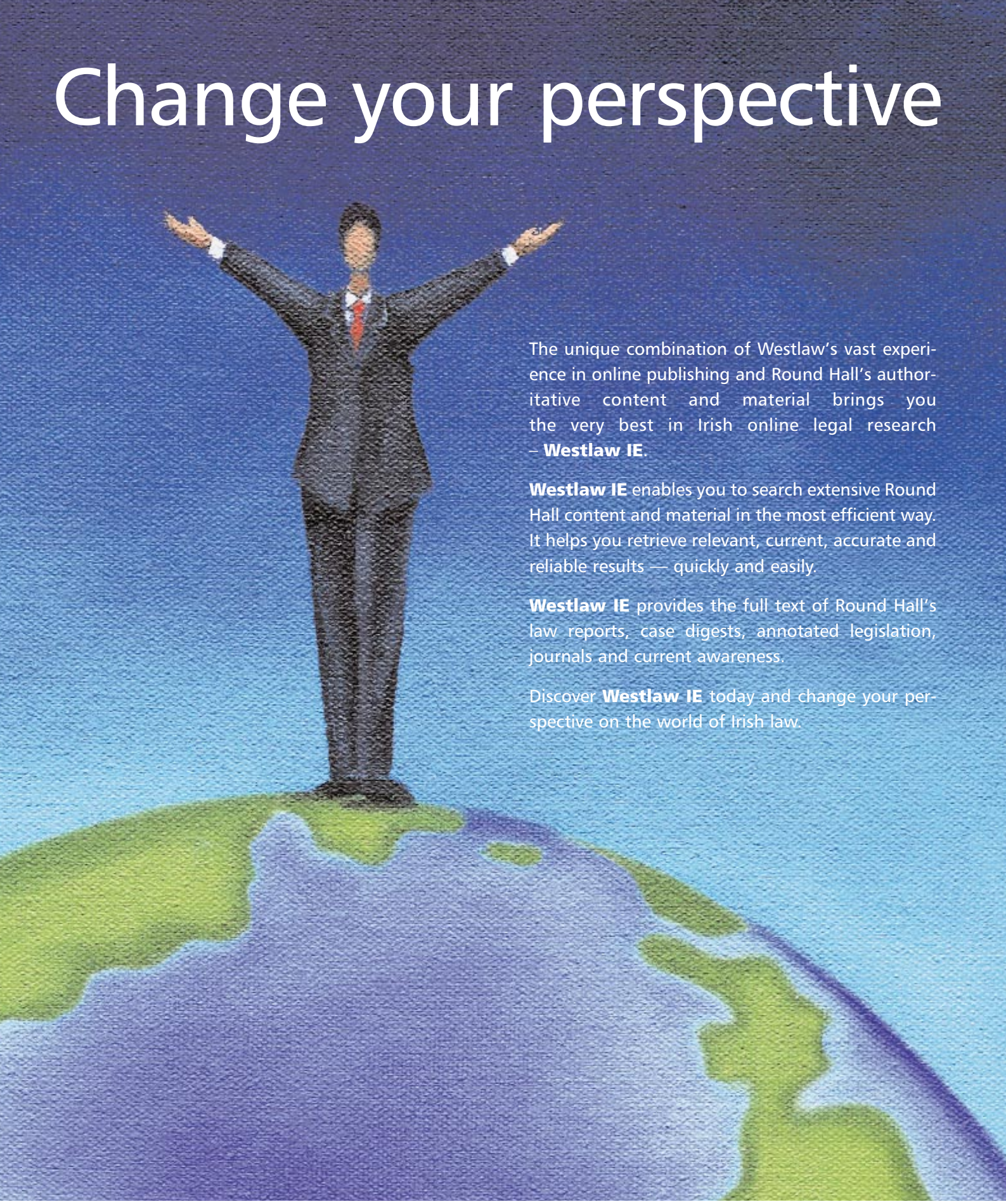

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held that the fact that the incident was still the subject of an internal investigation did not constitute the 'exceptional circumstances' required by the 1998 act in order to grant an extension. The director said that it is was not unusual for internal investigations to exceed six months and that the complaint could have been referred to the ODEI with a request that it be put on hold until the internal investigation had been completed.

There were four applications for an extension under the *Equal Status Act, 2000*, and none was successful. In one case, the director looked at the phrase *'exceptional circumstances prevented'* which is used in both the 1998 and 2000 acts. She concluded that it 'puts significant onus on the prospective claimant to ensure that the procedure is completed on time, or to satisfy the double test that exceptional circumstances existed, and that these prevented such completion' (DIR-S2001-004).

Chapter 7 is entitled *Outcomes* and gives some statistics about the 2001 decisions. It then gives a breakdown of the remedies and compensation awarded in both employment and equal status cases, with further breakdowns between the three main categories of remedies: equal pay, compensation and orders for a specific course of action.

Chapter 8 concerns appeals, and deals with rulings given in 2001, which the ODEI knows to have been appealed, and also with decisions of the Labour Court during the same year in respect of ODEI rulings in 2001 or previous years. No equal status appeals were heard by the Circuit Court at the time of writing the report, although some had been notified to the ODEI. Nor had the Labour Court decided any appeals from an ODEI decision under the *Employment Equality Act, 1998*, although several such appeals were pending. The lists of cases appealed under the 1998 and 2000 acts are, therefore, merely lists of cases pending. There is, however, a list of employment equality appeals decided during 2001, and the results.

The appendices include a list of the rulings of 2001 and summaries of all 2001 employment equality and equal status decisions, in numerical order.

The booklet provides a comprehensive and informative first port of call for practitioners when faced with bringing or defending an equality claim under either the 1998 act or the 2000 act. However, its use is not confined to this group. The logical structure of the book, and its clear and concise language, makes it a comprehensive and practical guide for lay persons, notably employers, retailers, customers and employees, who are considering their rights and obligations under both pieces of equality legislation, and also the possible implications of contravention of these rights and duties.

The 2002 *Legal review*, in similar format, will be published in spring 2003. G

Paul Glenfield is a partner in the Dublin law firm Matheson Ormsby Prentice and is a member of the Law Society's Employment and Equality Law Committee.

Going to court: a consumer's guide

Damien McHugh BL. FirstLaw Limited (2002), Merchant's Court, Merchant's Quay, Dublin 8. Price: €12.

This is an exceptionally good book of its kind and would make a perfect 'hand-out' to the lay person being exposed to the civil law for the first time. Mr McHugh is, of course, an old hand at lucidly communicating with the public, having for many years been a High Court reporter in the Four Courts before he himself crossed the legal threshold, with which he had become so familiar, by becoming a barrister. He then did not forget his old newspaper colleagues with his *Libel law* handbook for journalists, followed by his editorship of the *Irish courts guide 2001/2*.

Mr McHugh clearly explains every technical word he is required to use in *Going to court*, the gift of the good communicator. In his introduction, he encapsulates simply what he is out to achieve:

'Knowledge of the law and the courts' system is a very valuable asset. Indeed the old maxim "Ignorance of the law is no excuse" is a cogent reason for one to acquire that knowledge. The law prescribes our moral code, it regulates our behaviour in relation to our neighbours, and it safeguards our rights as citizens. The reality is that law, on which the whole structure of our society is formed, impinges on nearly every one of our daily actions ...

'This book is not concerned with the ingredients of any particular law but rather with equipping the lay person faced with having to go to court for any one of a multitude of reasons with sufficient knowledge of how the system and the legal process works to try and give them confidence in facing what can be, for many, the most traumatic experience of their lives'.

The book addresses a number of basic topics in short separate chapters, including: choosing a solicitor; the structure of the courts; the cost of going to court; barristers; what might happen in a case (particularly a personal injury case); stress and other pressures; family law courts; and alternate dispute resolution. It also includes appendices with explanations of the more common legal words and phrases, and the addresses of all the Legal Aid Centres and the court registrars.

Going to court could be very usefully placed in a solicitor's waiting room, perhaps with a supply available so that a copy can be given to any client who expresses an interest in what might lie ahead when embarking on litigation. How much easier it is for the legal practitioner when the client has some idea of what the law in action is all about.

Apart from the lay client, this is a basic first book that should be read by every trainee solicitor at the outset of his or her professional training as a simple means of bridging that real gap between theory and practice. Well done, Damien. G

Michael V O'Mahony is a partner in the Dublin law firm McCann FitzGerald.

Markets in review

Being active and ready to participate will be key to success in 2003, writes David Killen

Davy STOCKBROKERS

David Killen: Investors should continue to hold higher than average allocations in cash

Last year was the year the unthinkable happened – the dreaded three in a row. For the first time since World War 2, all of the major benchmarks recorded negative returns for the third consecutive year, prompting the Fed and the European Central Bank to cut rates by a further 0.5% to 1.25% and 2.75% respectively. Although the final quarter did manage to give some respite with an impressive eight-week rally, like all others before it, this petered out.

Despite mixed economic signals, there is mounting concern that what little revival there might have been in US growth this year has failed to create sufficient new jobs. Recent figures show a rise in US unemployment to 6% from a low of 3.9% in April 2000, which is casting a shadow over equity markets. Following a period of inactivity, both the ECB and the Fed were prompted to cut rates by a half-percent during quarter four of 2002. With rates in the US now at just 1.25% after 12 successive rate cuts in just two years, the effectiveness of further cuts to stimulate growth is questionable, especially since deflation is fast becoming a real threat.

Bear market almanac

With 2002 being the third down-year in a row, investors may find it worthwhile revisiting past periods of negative market performance. Undoubtedly, preservation of capital is the single most important component of investment management during bear markets. However, there have been opportunities to make significant returns even during these times. There are only two other periods in the Dow Jones Industrial Average history with three back-to-back annual declines: 1901-1903 and 1939-1941. And the only instance of four consecutive down years was the period 1929-1932, during the Great Depression. While four years in a row is an extraordinary occurrence, the precedent has none the less been set. It should also be noted that the market, since 2000, has challenged all the norms and expectations. Throughout history there have been periods where markets have not actually made any material return over long periods. For example, the Dow Jones was at the same level in 1982 as it was in 1965. However, within this timeframe, there were no less than 11 significant rallies, one of which delivered a 63% gain between December 1974 and June 1975. Clearly, if this is to be the case for the next couple of years, the 'buy to hold' mantra is no longer valid, suggesting investors should be prepared to aggressively play the rallies and take profits when perceived normality returns.

Still no recovery in earnings

For a year in which earnings were supposed to improve substantially, aggregate earnings estimates in all the major markets were actually revised downwards in 2002. At the start of the year, the earnings estimate (expressed as index points) for the S&P 500 was 53.5. This now stands at 48.6, a 9% reduction. The FTSE 100 earnings estimate has also fallen by 9%, while the DJ Eurostoxx 50's estimates have been reduced by 29%. Instead of actually recovering in the second half of 2002 (as forecast by many commentators), the earnings outlook has actually become more downbeat. According to First Call, year-on-year earnings growth expectations for the S&P 500 in 2003 is 11%. Since 1 October, the estimates have been cut from 17% to 12% for Q1 2003 and from 16% to 12% for Q2 2003. The 2002 fourth quarter earnings season in mid to late January will give investors a good indication of the health of corporate America. However, with the pre-announcements 'confession season' currently underway, there is little doubt that many earlier forecasts are not achievable.

Things to remember in 2003

There are a couple of points that equity investors should certainly bear in mind in 2003. First, we are in an era of low numbers. That means low GDP growth rates, low inflation and interest rates. The corollary of these influences is potentially lower investment returns. Investors need to be cognisant of the fact that returns of 10-15% should be taken where possible. Second, we believe that the US dollar is set to establish new lows against the euro. This view is founded on the belief that the dollar needs to fall further in order to correct the imbalances that currently exist within the US economy, most evident in the unsustainable balance of trade deficit. With further weakening of the dollar likely, investors would need very compelling reasons to invest in dollar denominated assets. Third, it is our opinion that diversification within equities is no longer as useful a strategy as it once was. During the bubble period, diversification meant you got more of the good. However, the converse is true during bear markets. Investors need to concentrate on focused investments and alternative asset classes to overcome this hurdle.

Exercise caution

We believe the earnings recovery is still some way off and, as such, recommend that investors continue to hold higher than average allocations in cash. Our focus for the coming year will continue to be on domestic and UK companies with strong track records in raising earnings and delivering sustainable dividend growth. We would advise investors to look at defensive stocks like food and energy and the Irish financials, which have been very resilient. Our underlying message remains unchanged: investors need to continue to hold cash and exercise patience and caution in this challenging environment. Being active and ready to participate will be key to success in 2003. G

David Killen works in the private client research unit of Davy Stockbrokers.

Report of Law Society Council meeting held on 8 November 2002

New Council members

The Council welcomed its newly-elected members Peter Allen, Andrew Cody, Michael Quinlan and Marie Quirke, together with the new nominees from the Dublin Solicitors' Bar Association, David Bergin and Helene Coffey, and from the Southern Law Association, James O'Sullivan, and wished them well for their term of office.

Taking of office of president and vice-presidents

The outgoing president, Elma Lynch, recorded her sincere thanks to the Council members and committee members for their advice and support during her term of office. She paid particular tribute to the director general and the staff of the society for their total dedication and commitment. She wished the incoming president, Geraldine Clarke, every success for her year of office.

Ms Clarke was then formally appointed as president of the Law Society. She thanked the Council for the tremendous honour of electing her as president. She said that she was conscious that the profession had been subjected to a severe and unjustified battering in the public arena in recent years. It seemed that, despite the best efforts of the society and its director general, it was proving nearly impossible to have anything positive about the profession published.

She noted that she had decided to establish a Public Relations and Image of the Profession Committee to look at fresh ways in which the society might develop its public relations strategy and improve the image of the profession. She paid tribute to the stamina, hard work and generosity of spirit of Elma Lynch during her year of office and complimented her for the style and grace with which she had presided over the 150th anniversary celebrations.

The senior vice-president, Gerard Griffin, and the junior vice-president, John Fish, then took office and pledged to serve the Council and the profession with diligence and commitment during the coming year.

Motion: Continuing professional development

'That this Council approves the Solicitors (Continuing Professional Development) Regulations 2002'.

Proposed: Donald Binchy
Seconded: Stuart Gilhooly

Donald Binchy outlined the contents of the regulations to the Council and noted that solicitors would be required to complete 20 hours' continuing professional development over a two-year period. The views of the profession had been canvassed widely and the reaction of bar associations was virtually 100% positive. The Council approved the *Solicitors (Continuing Professional Development) Regulations 2002*.

Motor Insurance Advisory Board (MIAB) and Personal Injuries Assessment Board (PIAB)

The president reported on the press conference to launch the MIAB action plan, held on 25 October. It was clear that there was already disagreement between the tánaiste and the motor insurance industry as to the likely impact on the level of premiums resulting from implementation of the plan. While the tánaiste was insisting on a 30% reduction in premiums, the motor insurance industry took a different view.

The president noted that the society had launched its own proposals for reform of the personal injuries litigation system on 18 October and she complimented the task force on its hard work in producing such a considered report. On behalf of the task force, Stuart Gilhooly congratulated Ward McEllin, who had been an excellent chairman and who had listened to all views and encouraged the delivery of a meaningful and comprehensive report.

The director general noted that, while it had not been invited to participate in the Interim Board of the PIAB, the society had signalled its desire to engage with the board and had written to the tánaiste in these terms.

Motions passed by the annual general meeting

As required by the bye-laws, the Council approved the following motions which had been passed by the annual general meeting on the previous day:

- *'That, pursuant to bye-law 9(3)(b) of the society's bye-laws, this general meeting approves expenditure by the society on restoration of the north and south quadrant walls of the society's premises at Blackhall Place, which expenditure will exceed €635,000 (IR£500,000)'.*
- *'That the society's bye-laws be amended by the substitution for bye-law 6(10)(a) and bye-law 6(12)(a) of the amended clauses set out in the attached schedule'.* (The amendments related to the delivery of election nomination forms by fax.)
- *'That the society should urgently review and upgrade the sports amenities in Blackhall Place, particularly the changing facilities which are in a state of serious neglect and disrepair'.* G

Report of Law Society Council meeting held on 6 December 2002

Decision of High Court taxing master

The Council considered the decision of the High Court Taxing Master, James Flynn, in *Mary Johnston v the Church of Scientology* and concluded that the taxing master had dealt with the 'no foal, no fee' issue as a matter of evidence on the day and that the media reports of the implications of the judgment for solicitors' fees had overstated its effect. Nevertheless, concerns were expressed about the various rulings issued by the taxing masters in their consideration of the statutory obligations contained in section 68 of the *Solicitors (Amendment) Act, 1994*, and it was agreed that the Litigation Committee should obtain and review copies of all of the rulings to date.

Council members representing the Law Society of Northern Ireland

The Council approved the appointment of Catherine Dixon, Joe Donnelly, Alan Hewitt, John Neill and John Pinkerton as the nominees of the Law Society of Northern Ireland to the Council for 2002/2003.

New lay member on the Registrar's Committee

The Council approved the appointment of John McDonnell of ICTU, replacing Lenore Mrkwicka, as a lay member on the Registrar's Committee.

The *Sarbanes-Oxley Act*

John Fish briefed the Council on the US *Sarbanes-Oxley Act* and its possible effect on European lawyers providing legal services to US clients. He noted that, unusually, legislation being proposed outside Ireland and the EU could have an impact on Irish legal practice, particularly in the commercial field. He said that, following the Enron collapse, US companies were subject to a higher level of reporting than had applied before. Their professional advisors were also under an obligation to report 'up the ladder' to the highest level if they became aware of any wrongdoing. This was not any different from the EU position.

However, what was different was the requirement on professional advisors to make a 'noisy withdrawal' in circumstances where a matter of wrongdoing had been reported to the highest level within a company but had not been acted upon. Under the *Sarbanes-Oxley Act*, these rules would apply worldwide and would necessitate a breach of solicitor/client confidentiality. The Securities and Exchange Commission in the US had sought observations on the proposal and the CCBE had received an invitation to meet with the commission. The Council agreed that the matter should be monitored closely by the Business Law Committee.

Approval of practising certificate form and fee for 2003

The Council approved the practising certificate fee for 2003 of €1,867, with a fee of €1,545 for solicitors in practice less than three years, noting that this represented an overall increase of 5.5% on the full fee and was broadly in line with inflation projections. The Council also approved the practising certificate declaration form for 2003, noting in particular the data protection statement contained therein.

Personal Injuries Assessment Board

The director general referred the Council to a letter from the tánaiste and noted that, in response to the society's request for representation on the Implementation Board of the PIAB, the tánaiste had indicated that she 'did not feel it would be appropriate to have nominees from the representative organisations or indeed persons currently practising in the area of personal injuries'.

Criminal Justice (Public Order) Bill, 2002

The Council approved a draft submission to government by the Criminal Law Committee on the *Criminal Justice (Public Order) Bill, 2002*.

CCBE

The president paid tribute to John Fish and said that it was a great honour for the Council to have had the president of the CCBE as one of its members for the past year. He was the first Irish solicitor to have served in this capacity and it was a matter of great pride to the Council to have one of their members chairing a plenary session of the CCBE that afternoon with the minister for justice, equality and law reform as a guest speaker. G

Committee reports

BUSINESS LAW

Sarbanes-Oxley Act and the Securities and Exchange Commission of the United States: the implications for Irish lawyers

In the summer of 2002, the US legislature passed the *Sarbanes-Oxley Act*. In November 2002, the Securities and Exchange Commission (SEC) of the United States in its implementation of the *Sarbanes-Oxley Act* issued a proposed rule entitled *Implementation of standards of professional conduct for attorneys*. This rule purports to apply to foreign lawyers (which will, of course, include Irish lawyers), and will require them to report up-the-ladder of corporate clients where they reasonably believe that there has been a material violation of US securities law by the company. In addition, if there is no appropriate response to that reporting, the lawyer will be required to make what is referred to as 'a noisy withdrawal' of their services to the SEC.

The Council of the Bars and Law Societies of the European Union (CCBE) – of which John Fish is the current president and on which your Law Society is represented – has, at the time of going to press (January 2003), made serious representations to the European Commission, which in turn made representations to the SEC.

On behalf of European lawyers, the CCBE has many concerns about the proposed rule and is seeking the exclusion of European lawyers from the proposed rule on the grounds that:

1) EU lawyers are already strictly regulated in their home jurisdictions
2) Extra-territoriality of professional regulation fails to take account of the sovereignty of nations and legal systems, undermines local regulation by bars, and creates – in this case, unnecessary – conflicts in applicable professional rules for lawyers
3) Most European lawyers are already under some form of duty to report up-the-ladder on discovering wrong-doing in a corporate client. However, European lawyers may have differently defined triggers which require them to make such reports and it is disproportionate to require European lawyers working outside the US to have a detailed knowledge of specific US reporting triggers
4) The CCBE opposes in principle any breach of European lawyers' legal professional privilege/professional secrecy on the grounds that the duty to secrecy is a cornerstone of the administration of justice in a free democratic society.

In his capacity as president of the CCBE, John Fish attended a hearing organised by the SEC in Washington before Christmas. While the SEC appears to be aware of the concerns of the international legal community, it remains to be seen what will be the effect on the SEC of the various submissions that it has received. The SEC is under a strict deadline to adopt rules by 26 January 2003.

Further updates on this proposed rule, as and when they become available, will be placed on the Business Law Committee page of the Law Society's website.

New Irish merger control regime from January 2003

Part 3 of the *Competition Act, 2002*, which came into force on 1 January 2003, introduced a new merger control regime to replace that established under the *Mergers, Monopolies and Takeovers (Control) Act, 1978*. Under the new regime, mergers above specified turnover thresholds are notifiable to the Competition Authority. Failure to notify such mergers is a criminal offence for which the act prescribes substantial fines of up to €250,000 on conviction on indictment (in addition to daily default fines of up to €25,000). A notifiable merger which purports to be put into effect before clearance is void.

Notification of a merger or acquisition to the authority is required where, in the most recent financial year:

- The worldwide turnover of each of at least two of the undertakings involved is not less than €40 million, and
- At least two of the undertakings involved carry on business in any part of the island of Ireland (including Northern Ireland), and
- The turnover in the Republic of Ireland of any one of the undertakings involved is not less than €40 million.

Mergers falling below the thresholds may be notified on a voluntary basis; this may be advisable where the proposed merger could give rise to competition concerns even though the thresholds are not exceeded.

With effect from 1 January 2003, SI no 622 of 2002 applies the provisions of part 3 of the 2002 act to all mergers in which one or more the undertakings involved carries on a 'media business' in the state, *regardless* of the turnover of the undertakings involved. The term 'media business' and related terms are defined in section 23(10) of the act.

SI no 623 of 2002 provides that the fees for filing merger notifications with the authority will be €8,000.

The authority has published a set of procedures for its examination of individual merger notification, and guidelines for merger analysis explaining the authority's position on substantive issues in merger control. Notifications must be made using either form M1 (long form) or form M2 (short form). The authority's *Notice in respect of certain terms used in section 18(1) of the* Competition Act, 2002 gives guidance on the authority's understanding of certain terms used in connection with merger notifications. These documents may be accessed via the authority's website (*www.tca.ie*).

Regulation modernising EC competition law adopted

In December 2002, the Council of Ministers adopted a new procedural regulation[1] to replace the 40-year old regulation 17 of 1962. When the new regulation comes into force in May 2004, it will radically change the manner in which EC competition law is enforced.

The key element of the new regulation is the abolition of the existing notification and exemption system. Instead of this, undertakings will be entitled to argue that the exemption in article 81(3) is directly applicable to their agreement or arrangement and can therefore be relied on without any prior decision by the commission. The new regime will allow the commission to concentrate its resources on matters other than the review of notified agreements – in particular, the pursuit of serious EC competition law infringements (such as price fixing and other cartel arrangements).

Under the new regime, it will be for businesses and their legal advisers to take a view as to whether their agreements come within the scope of article 81, and, if so, whether they meet the criteria for exemption. Block exemption regulations will continue to play an important role by excluding from the prohibition in article 81 agreements and other arrangements which might otherwise be prohibited.

The regulation also regulates the relationship between national and EC competition laws. Article 3 provides that where the compe-

tition authorities of the member states or the national courts apply national competition law to anti-competitive arrangements or behaviour which may affect trade between member states, they shall also apply articles 81 or 82 of the *EC treaty*. Member states will not be able to prohibit such arrangements under national competition law where they do not infringe article 81(1) or where they fulfil the conditions of article 81(3). For the purpose of applying articles 81 and 82, the commission and the national competition authorities will have the power to exchange information, including confidential information, in relation to particular cases.

Footnote

1 Council regulation (EC) 1/2003 on the implementation of the rules on competition laid down in articles 81 and 82 of the treaty, OJ L 1 of 4.01.2003. G

Practice notes

REVENUE NOTICES TO SOLICITORS UNDER SECTION 808 OF THE *TAXES CONSOLIDATION ACT, 1997*

The Revenue Commissioners are currently serving section 808 (formerly section 59) notices on solicitors' practices. The notice requires the recipient to supply information in respect of transactions which come within the ambit of sections 806, 807 and 809 of the *Taxes Consolidation Act, 1997*, which are anti-avoidance provisions to counteract the transfer of assets to non-resident companies/trustees.

Section 806 applies tax to an individual ordinarily resident or ordinarily resident in this state where there is:

a) A transfer of assets
b) Made by an individual resident or ordinarily resident in this state
c) Whereby income becomes payable by or by virtue of the relevant transfer either on its own or in conjunction with associated operations to a person resident outside the state, and either –
   i) the chargeable person has as a result of the transfer and any associated operations the 'power to enjoy', whether immediately or in the future, the income of the foreign person, or
   ii) the chargeable individual receives or is entitled to receive any 'capital sum' the payment of which is in any way connected with the relevant transfer or with any associated operation.

If this occurs, the income arising to the foreign person is deemed income of the transferor for all Irish income tax purposes.

If it can be proved, however, that either a) the purpose of avoiding taxation was not the purpose of the transaction or any associated transactions, or b) the transaction was a *bona fide* commercial transaction and not designed for the purpose of avoiding a liability to tax, then income arising was not chargeable to tax in this section.

Section 808 empowers an officer of the Revenue Commissioners to serve notice in writing requiring any person to furnish particulars as felt necessary for the purpose of section 806, 807 and 809. The notice must specify a time limit which must not be less than 28 days and is usually 40 days in practice.

The court's attitude to such notice was clearly set out by Ackner J, who stated: 'Any complaint that to be asked now to provide the information places an unduly oppressive burden upon him (the recipient) would be met with the obvious answer; you have been an author of your own misfortune'. This case has been followed in *Warnock (practising as Stokes Kennedy Crowley & Co) v The Revenue Commissioners*.

The Revenue Commissioners are entitled to a wide range of information, including particulars as to:

a) Transactions with respect to which the person is or was acting on behalf of others
b) Transactions which, in the opinion of the Revenue Commissioners or such officer as the commissioners may appoint, it is proper that they should investigate for the purposes of sections 806, 807 and 808, notwithstanding that in the opinion of the person to whom the notice is given no liability to tax arises under these sections
c) Whether the person to whom the notice is given has taken or is taking any (and, if so, what) part in any (and, if so, what) transaction of a description specified in the notice.

Notices which are currently being served request far more information than a solicitor is required under the act to furnish without the client's prior consent. Section 808(4) limits the extent of the liability of a solicitor to furnish information under this notice and in particular:

a) A solicitor is not regarded as having taken part in a transaction by reason only that the solicitor has given professional advice to a client in connection with the transaction
b) A solicitor cannot, unless with the client's consent, be compelled to do more than state –
   i) that he was acting on behalf of a client
   ii) the name and address of the client
   iii) where the solicitor has been involved in connection with the transfer of the assets in any way to an individual ordinarily resident outside the state or a body corporate resident or incorporated outside the state which, if resident in the state, would be a closed company, the names and addresses of the transferor and the transferee or the persons concerned in the associated operation as the case may be
   iv) where the solicitor has done anything in connection with the formation or management of a foreign body corporate which would be a closed company under Irish law, to specify the name and address of that body corporate
   v) where the solicitor has done anything in connection with the creation or execution of any trust or settlement whereby income becomes payable to a person resident or domiciled outside the state, the names and addresses of the settlor and of that person.

The notices generally relate to certain specified territories and not all 'foreign' transactions are reportable. The notices as furnished require far more information than a solicitor is entitled to give without his client's prior consent, and if information is furnished which results in a breach of confidentiality with the client, the client would have a cause of action against the solicitor for breach of contract.

The court has held that even though the notices are too broad and the Revenue Commissioners seek particulars to which they are not entitled, this does not have the effect of rendering the notice invalid unless the information is so entwined that it would be difficult if not impossible to separate.

Any solicitor who is in receipt of a section 808 notice should refer to the statute to ensure compliance only with the strict wording of section 808(3).

Probate, Administration and Taxation Committee

ELECTRONIC TRANSFER OF FUNDS

Practitioners will probably be aware that a number of lending institutions offer transmission of a borrower's loan funds by way of electronic transfer directly into the borrower's solicitor's client account. It has come to the attention of the Conveyancing Committee that some lending institutions sending and/or receiving such electronic transfers automatically deduct their charges from the loan amount being transferred. If solicitors are not aware of the fact that a deduction has been made or if they do not know the exact amount of such deduction, they are at risk of breaching the *Solicitors' accounts regulations* if they draw the full amount of a client's loan from their client account in order to close a purchase transaction.

The committee raised its concerns about this practice with the Irish Bankers' Federation and was advised that the federation does not issue guidelines to its members on whether or how fees or charges for such electronic transfers should be collected. The federation suggested that solicitors should take the matter up with their own individual banks to ascertain the procedures used and the fees charged.

The committee therefore recommends that every solicitor using electronic transfers of loan funds (or indeed any funds) should establish with his/her bank **and** with the borrower's lending institution (if different):

- What the bank's procedures are for collecting fees/charges for electronic transfers
- How much the bank charges for sending money electronically
- How much the bank charges for receiving money electronically
- Who pays the fee/charge – the sender or the receiver?

In this regard, a solicitor should insist that any fees or charges to be debited by his/her own bank should be deducted from the solicitor's office account in the same way as any other bank charges arising on the operation of the solicitor's client account. The committee is aware that a lending institution that offers only an electronic transfer of funds and does not issue loan cheques or bank drafts does not make a charge for sending the loan funds electronically, although it has pointed out that the receiving bank may levy a charge on its own customer.

Conveyancing Committee

WITHERING PERMISSIONS: *PLANNING AND DEVELOPMENT (AMENDMENT) ACT, 2002*

Planning permissions which would have withered (ceased 'to have effect') under section 96(15) of the *Planning and Development Act, 2000* (a 'withering permission') will now have the normal life of a planning permission (usually five years) by reason of the 2002 *Planning Act*. However, there is a price to be paid.

A withering permission is one granted for residential development on foot of an application for permission lodged after 25 August 1999 and before the planning authority incorporated its housing strategy into its development plan. Under the 2000 act, the permission withered on 31 December 2002 or two years from the date of the permission, whichever is the later.

Dwellings built on foot of a permission which would have withered but for the 2002 act will be subject to a levy of 1% of the sale price if equal to or in excess of €270,000 or 0.5% of the sale price if less than that amount.

There are provisions in the 2002 act to prevent this levy being passed on to a purchaser.

The levy will not apply to any planning permission for four or less dwellings, or for housing on land of 0.1 hectares or less. Nor will it apply to dwellings the external walls of which are completed within two years from the date of the permission, or by 31 December 2002, whichever is the later (the 'exemptions').

Practitioners should note that when acting in the purchase of a dwelling erected on foot of a permission which would have withered but for the 2002 act, and which does not come within the exemptions, they will require a receipt from the planning authority confirming payment of the levy in respect of that dwelling prior to, or on completion of, the purchase.

Conveyancing Committee

PRACTISING CERTIFICATES

A practising certificate must be applied for before 1 February in each practice year in order to be dated 1 January of that year and thereby operate as a qualification to practise from the commencement of the practice year.

It is misconduct for a solicitor to practise without a practising certificate. Any solicitor found to be practising without a practising certificate will be referred to the Disciplinary Tribunal.

Assistant solicitors should note that it is the statutory obligation of every solicitor to ensure that he or she has a practising certificate in force from the commencement of the practice year. Assistant solicitors cannot absolve themselves from this responsibility by relying on their employers to procure their practising certificates.

Practitioners should also note that practising for any period of time without a practising certificate could jeopardise their professional indemnity insurance situation. Further-more, a break in continuity of practising certificates may disqualify a solicitor from applying for judicial appointment.

PJ Connolly, Registrar of Solicitors

ACTING FOR A NON-RESIDENT VENDOR: TAX CLEARANCE ISSUES

The solicitor for the non-resident vendor of land in the state has two possible exposures: income tax/corporation tax and capital gains tax.

These exposures do not arise from prior transactions, as would be the case for capital acquisitions tax, but arise, inherently, from the transaction in hand, whether it be a conveyance, assignment or transfer of land or shares in a company deriving the greater part of its value from land in the state. There are circumstances where the Revenue can be exposed, so the legislation makes the solicitor the 'scapegoat' if any tax escapes the net. There are other examples of this in the tax code.

Income tax/corporation tax

The *Taxes Consolidation Act, 1997*, part 22, is headed *Transactions in land*, with a further sub-heading *Provisions relating to dealing in or developing land and disposals of development land*.

Although a disposal of land may be capital in nature giving rise to a gain, there are circumstances where the tax legislation regards a dealing in land or developing land as giving rise to an income tax/corporation tax charge. Section 640 of the 1997 act, in particular, sets out the circumstances in which disposing of land might be regarded as a dealing in or development of land subject to income tax/corporation tax. This particular note is not detailed enough to carry a discussion of those provisions but to warn the solicitors relating to this matter particularly the reference in requisition 17 of the Law Society's requisitions on title to 'a direction' from the Revenue Commissioners.

This section also applies to any shareholding in a company, or any partnership interest or any interest in settled property, deriving its value, or the greater part of its value, directly or indirectly from land, and any option, consent or embargo affecting the disposition of land.

The provision which affects solicitors in the course of sale is contained in section 644(2). If the Revenue Commissioners think that a non-resident vendor (in the circumstances which Revenue consider is dealing in or developing land) is entitled to any consideration, they may **direct** that section 238 is to apply – in other words, the person by or through whom any such payment is made is to treat it as an annual payment subject to the deduction of standard rate income tax in force at the time of payment. This is the 'direction' referred to in requisition 17.

It is the accepted position that if the direction referred to above does not issue by the date the sale is closing, the solicitor has no requirement under the particular provisions. If the vendor is liable to tax for dealing in or developing land and has agreed, no direction will issue. The direction may issue where the anti-avoidance legislation applies. However, neither the purchaser nor his solicitor can be sure and so must be wary that a direction may issue.

However, under section 645 of the *Taxes Consolidation Act, 1997*, the Revenue Commissioners have the power to obtain information but, in the case of a solicitor, this information is restricted (without the consent of the client) to the fact that the solicitor is acting on behalf of a client and the furnishing of the name and address of the client.

Mention should be made here (but much more reference will be made later) to section 1034 of the *Taxes Consolidation Act, 1996*, which provides: 'A non-resident person shall be assessable and chargeable to income tax in respect of any profits or gains arising, whether directly or indirectly, through or from any factorship, agency, receivership, branch or management and shall be assessable and chargeable in the name of the factor, agent, receiver, branch or manager'.

This means that the agent will be assessable in his or her personal capacity.

The question must now be asked whether the Revenue, having failed to issue a direction in time, could assess the solicitor, as agent, under section 1035. There does not appear to be any particular protection for the solicitor if the money is paid into a bank account in the name of the client.

Agency

Section 1034 of the *Taxes Consolidation Act, 1997* deals with agency, and it is possible that a solicitor acting for a non-resident could be regarded as an 'agent' within this context. This would leave a solicitor exposed in two areas: income tax and capital gains tax.

Income tax. All rents payable to non-residents, whether that non-resident is corporate or individual, is subject to income tax in Ireland, viz the deduction of income tax at standard rate from the payment. If that rent is being paid directly to the landlord by the tenant, the tenant is obliged to deduct standard rate tax. If it is being paid to an agent in Ireland who accounts for it to the non-resident landlord, that agent is obliged to deduct standard rate tax.

Capital gains tax. For many years an argument developed as to whether a solicitor acting for a non-resident was an 'agent' within the meaning of this section. Counsel's opinions were obtained by both the Revenue and the Law Society in this regard, with different results. The 1997 act, section 1043, extends the provisions of section 1034 to capital gains tax.

The UK equivalent of section 1035 was contained in section 23 of the *Taxes Act, 1988* (since repealed). It was identical in terms with the Irish legislation, and in the case of *Willson v Hooker* ([1995] STC 1142) the phrase 'agent' was considered in the context of a lawyer acting on the disposal of a property for a non-resident.

Mr Willson, a resident of the UK for tax purposes, arranged for the acquisition of a company called Ashvale Investments Limited, a non-resident company. Mr Willson instructed his surveyor to bid on the land on behalf of the company. He also negotiated with another company for the sale of the land at a higher price.

He instructed solicitors regarding the purchase and the immediate re-sale of the land by Ashvale Investments Limited. He used Ashvale Investments Limited headed notepaper. He was subsequently assessed to corporation tax on the gain made on the sale of the land on the basis that he was an agent of the non-resident company.

He contended that he was not a regular agent of the company on the basis that he did not satisfy the normal term of 'agency' on the grounds that he acted only once on behalf of Ashvale Investments Limited. This contention was rejected by the court. It was held that a 'regular agency' is 'an agency that is not a casual or occasional agency'. Mr Willson's agency was more than a casual or occasional agency as he was the person through whom all the transactions of Ashvale Investments Limited in the UK was carried out during the relevant period. It would appear from this case, therefore, that the focus of section 1035 is on the nature of agency rather than the number of transactions carried out.

This is definitely a point against solicitors, although it is only persuasive.

The UK equivalent of section 1035 was repealed in their *Finance Act 1995*, with totally dif-

ferent wording being incorporated.

It is also interesting to note from section 1035 that the profit or gain must derive directly or indirectly 'through or from any … agency'. If, therefore, solicitors are acting for a non-resident on the disposal of, say, an investment property in Ireland, there are three situations:

1) The non-resident landlord has never paid tax in Ireland on the rents arising out of this property
2) The sale is for over €500,000
3) The sale is for €400,000.

1) If the solicitor has not been acting for the non-resident client in the collecting of rents, it is doubtful if the Revenue Commissioners could assess the solicitor to income tax on the basis of agency. As the solicitor was not acting, it could not be said that the rents arose, directly or indirectly, 'through or from any … agency' of the solicitor. He had no involvement whatsoever. On the other hand, if he was collecting rents (even partially or even for part of the time), he would have to seriously consider his position as to whether he is or is not an agent. This might involve only the collection of perhaps an initial month's rent or even a security rent.

2) If the sale is over the limit of €500,000 envisaged in section 980 of the *Taxes Consolidation Act, 1997*, a form CG50 will be submitted to the Revenue Commissioners with full details and they will not issue the certificate CG50A without prior payment of the capital gains tax, in the case of a non-resident vendor. This is to be welcomed, as it is a protection for the solicitor and we should not try to alter it. In the absence of this certificate, the purchaser must deduct 15% of the proceeds and account for it to the Revenue.

3) On the other hand, if the sale is under €500,000, there is no need for a form CG50A and the solicitor is left to his own devices. The solicitor, therefore, should protect himself, and he can do this by obtaining the consent of the vendor client to withhold sufficient of the proceeds (say 20%) to ensure that he is covered for any capital gains tax that may arise. The client may find this difficult and may insist on payment in full. This is where the problems arise.

Even at this level, a significant capital gains tax liability can arise. It will be less (at present rate) than €100,000, but it could be still quite significant (**see example below**).

There should be no difficulty in ascertaining the tax if the acquisition was an arm's-length purchase for full consideration and the disposal was an arm's length sale for consideration. In such circumstances, the price or value of the property is fixed at both dates.

The difficulty arises where the purchase or acquisition was not at arm's length, being a voluntary disposition or an inheritance. A sale between connected persons would fall into this category even if it was for full consideration. Adjudication involves delay and a client will be unwilling to let his solicitor retain 20% of the proceeds for too long.

An agreement was reached with the Revenue Commissioners many years ago in relation to this type of case. It was agreed that if the inspector of taxes did not propose to audit the case, particularly the acquisition cost, he would issue a letter in confirmation. This is the letter of 'no audit' referred to in correspondence with the Revenue Commissioners and they seem to either be totally unaware of the agreement or casual in their approach to it. We have been involved in situations where solicitors were waiting up to two years to get a letter from the Revenue Commissioners before they could release the balance of the funds to clients. This is not satisfactory, and the Revenue continues to disappoint in this area.

There have been cases where the client has threatened to sue the solicitor and we are aware of some cases where they did sue.

There is no doubt that the monies held are client monies. The difficulty is therefore caused by two things:

1) The Revenue's inability to recognise that the proceeds of sale (particularly money which has to be used to pay tax) are still client monies, and due to the client if demanded, and
2) The slowness of the Revenue Commissioners in reaching finality on valuation matters or giving letters of 'no audit' in appropriate cases.

In none of these cases does the lodgement of money to a bank account in the client's name protect the solicitor. It would be otherwise if that lodgement was to his estate agent's account, in which case the estate agent has the liability. It is doubtful if the estate agent will agree in these circumstances.

Probate, Administration and Taxation Committee

EXAMPLE

		€
Sale of 20 acres of land @ €20,000 per acre		400,000
Less costs		8,000
Acquisition 1974 @ €1,000 per acre		392,000
Base cost	€20,000	
Stamp duty	€ 800	
Costs	€ 400	
	€21,200 x 7.18	
		152,216
Gain		239,784
Annual exemption		1,270
Taxable gain		238,514 x 20%
		= €47,702.80

LEGISLATION UPDATE: 16 NOVEMBER 2002 – 20 JANUARY 2003

ACTS PASSED

Appropriation Act, 2002
Number: 28/2002
Contents note: Appropriates to the proper supply services and purposes sums granted by the *Central Fund (Permanent Provisions) Act, 1965* and makes certain provision in relation to the financial resolutions passed by Dáil Éireann on 4/12/2002
Date enacted: 13/12/2002
Commencement date: 13/12/2002

British-Irish Agreement (Amendment) Act, 2002
Number: 26/2002
Contents note: Amends the *British-Irish Agreement Act, 1999* to give effect to the international agreement between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland to enable the decisions of the North/South Ministerial Council (NSMC) in relation to the six all-island implementation bodies to be taken by the Irish and British governments together during the temporary suspension of the Northern Ireland Assembly
Date enacted: 29/11/2002
Commencement date: 3/12/2002 (per SI 552/2002)

Domestic Violence (Amendment) Act, 2002
Number: 30/2002
Contents note: Amends the *Domestic Violence Act, 1996* by the substitution of a new section 4(3) relating to *ex parte* interim barring orders, following the decision in *Keating v Crowley* (Supreme Court, 9/10/2002), which found that s4(3) of the *Domestic Violence Act, 1996* was unconstitutional. Also amends s5(4) of the 1996 act so that it corresponds with the wording of the new s4(3)
Date enacted: 19/12/2002
Commencement date: 19/12/2002

European Communities (Amendment) Act, 2002
Number: 27/2002
Contents note: Amends the *European Communities Act, 1972* in order to provide that certain parts of the *Treaty of Nice* shall form part of the domestic law of the state once Ireland has ratified the treaty
Date enacted: 5/12/2002
Commencement date: Commencement order to be made (per s3(3) of the act)

National Development Finance Agency Act, 2002
Number: 29/2002
Contents note: Establishes a National Development Finance Agency (NDFA) to advise state authorities, including government departments, on evaluating financial risks and costs and on cost effective finance for major infrastructure projects; to assess optimal funding for public investment projects set out in the national development plan (NDP) and other infrastructure priorities; and to raise finance for NDP projects. NDFA functions are discharged through the National Treasury Management Agency (NTMA). Provides for the necessary amendments to the *National Treasury Management Agency Act, 1990*
Date enacted: 19/12/2002
Commencement date: 19/12/2002; 1/1/2003 for the establishment day for the National Development Finance Agency (per SI 617/2002)

Planning and Development (Amendment) Act, 2002
Number: 32/2002
Contents note: Amends s96, part V (housing supply) of the *Planning and Development Act, 2000* in relation to the requirements for the provision of social and affordable housing; makes other miscellaneous amendments to the 2000 act and certain amendments to the *Housing (Miscellaneous Provisions) Acts, 1992 and 2002* and to the *Housing Finance Agency Act, 1981*
Date enacted: 24/12/2002
Commencement date: 24/12/2002

Social Welfare Act, 2002
Number: 31/2002
Contents: Amends and extends the *Social Welfare Acts* to provide for increases in the rates of social insurance and social assistance payments, and improvements in the family income supplement scheme; provides for the changes in PRSI announced in the budget, including an increase in the annual earnings ceiling above which contributions are not payable by employed contributors; and contains additional measures for optional contributors (class P PRSI)
Date enacted: 19/12/2002
Commencement date: Various – see act

SELECTED STATUTORY INSTRUMENTS

British-Irish Agreement (Amendment) Act, 2002 *(Commencement) Order 2002*
Number: SI 552/2002
Contents note: Appoints 3/12/2002 as the commencement date for the act

Building Regulations (Amendment) (No 2) Regulations 2002
Number: SI 581/2002
Contents note: Amend part 5 (ventilation) of the second schedule to the *Building Regulations 1997* to provide for the removal of water vapour from kitchens, bathrooms and other areas where water vapour is generated
Commencement date: 1/12/2003, subject to exceptions – see regulations

Communications Regulation Act, 2002 *(Establishment Day) Order 2002*
Number: SI 510/2002
Contents note: Appoints 1/1/2002 as the establishment day for the purposes of the act. The establishment of the Commission for Communications Regulation has the effect of dissolving the Office of the Director of Telecommunications Regulation and transferring its functions to the new commission under the act

Companies (Fees) Order 2002
Number: SI 557/2002
Contents note: Amends the *Companies (Fees) Order 2001* (SI 477/2001) as amended to provide for the application of the late filing penalty, having regard to the annual return filing deadline imposed on companies pursuant to s127 of the *Companies Act, 1963* (substituted by s60 of the *Company Law Enforcement Act, 2001*)
Commencement date: 5/12/2002

Company Law Enforcement Act, 2001 *(Section 58) Regulations 2002*
Number: SI 544/2002
Contents note: Prescribe particular professional bodies, including the Law Society of Ireland, for the purposes of s58 of the *Company Law Enforcement Act, 2001* (reporting by prescribed bodies of misconduct by liquidators or receivers to the director of corporate enforcement)
Commencement date: 1/12/2002

Competition Act, 2002 *(Notification Fee) Regulations 2002*
Number: SI 623/2002
Contents note: Prescribe a fee of €8,000 to accompany notifications of mergers or acquisitions in accordance with s18 of the *Competition Act, 2002*
Commencement date: 1/1/2003

Competition Act, 2002 *(Section 18(5)) Order 2002*

Number: SI 622/2002
Contents note: Applies the provisions of part 3 of the *Competition Act, 2002* to all mergers or acquisitions in which one or more of the undertakings involved carries on a media business. The terms 'media business' and 'media merger' are defined in s23(10) of the act
Commencement date: 1/1/2003

Copyright and Related Rights (Certification of Licensing Scheme for Reprographic Copying by Educational Establishments) (The Irish Copyright Licensing Agency Limited) Order 2002
Number: SI 514/2002
Contents note: Certifies the licensing scheme operated by the Irish Copyright Licensing Agency Ltd for copying by educational establishments in accordance with ss57 and 173 of the *Copyright and Related Rights Act, 2000*
Commencement date: 13/1/2003

Criminal Justice (Legal Aid) (Amendment) Regulations 2002
Number: SI 575/2002
Contents note: Provide for an increase of 4% with effect from 1/10/2002 in the fees payable under the criminal legal aid scheme to solicitors for attendance in the District Court and for appeals to the Circuit Court, and for an increase of 4% with effect from 1/10/2002 to solicitors and counsel in respect of essential visits to prisons and other custodial centres (other than garda stations) and for certain bail applications

European Communities (Amendment of* Cruelty to Animals Act, 1976*) Regulations 2002
Number: SI 566/2002
Contents note: Give effect to council directive 86/609/EEC regarding the protection of animals used for experimental and other scientific purposes. Revoke the *European Communities (Amendment of* Cruelty to Animals Act, 1876*) Regulations 1994*
Commencement date: 5/12/2002

Food Safety Authority of Ireland Act, 1998 *(Amendment of First and Second Schedules) Order 2002*
Number: SI 580/2002
Contents note: Amends the first schedule to the *Food Safety Authority of Ireland Act, 1998* (previously amended by SI 184/2000) to update the list of food legislation in force – acts, statutory instruments and EC regulations. Also makes an amendment to the second schedule to the act. For convenience, the full list of legislation contained in the first schedule is set out in the explanatory note to SI 580/2002

Freedom of Information Act, 1997 *(Prescribed Bodies) (No 2) Regulations 2002*
Number: SI 530/2002
Contents note: Prescribe each of the bodies listed in the schedule to the regulations as a public body for the purposes of the *Freedom of Information Act, 1997* by their inclusion in paragraph 1(5) of the first schedule to the act
Commencement date: 1/11/2002

Health (In-Patient Charges) (Amendment) (No 2) Regulations 2002
Number: SI 553/2002
Contents note: Amend the *Health (In-Patient Charges) Regulations 1987 and 2002* by raising the daily charge for in-patient services to €40 and the maximum amount payable in any period of 12 consecutive months to €400. Exemptions, including medical card holders and hardship provision, continue to apply
Commencement date: 1/1/2003

Irish Nationality and Citizenship Regulations 2002
Number: SI 567/2002
Contents note: Prescribe the procedure to be followed and the forms to be used by persons who make declarations for the purposes of the *Irish Nationality and Citizenship Acts, 1956 to 2001*, or who apply for certificates of naturalisation. Also prescribe the form of certificates of naturalisation which the minister may grant and the form of notice in *Iris Oifigiúil* of the grant of a certificate of naturalisation
Commencement date: 30/11/2002

Local Government Act, 2001 *(Part 15) Regulations 2002*
Number: SI 582/2002
Contents note: Prescribe the classes of local authority employees to whom the provision of part 15 of the *Local Government Act, 2001*, regarding an ethical framework, apply. Prescribe the annual declaration form, giving particulars of declarable interests as required by s171 of the act, to be furnished by relevant employees and members of local authorities
Commencement date: 1/1/2003

Local Government (Financial Procedures and Audit) Regulations 2002
Number: SI 508/2002
Contents note: Set out the financial and audit practices and procedures to be followed and associated forms to be issued by local authorities in the management of their day-to-day financial and audit activities. Revoke the *Public Bodies Orders 1946 to 1998*
Commencement date: 14/11/2002

National Development Finance Agency Act, 2002 *(Establishment Day) Order 2002*
Number: SI 617/2002
Contents note: Appoints 1/1/2003 as the establishment day for the National Development Finance Agency for the purposes of the *National Development Finance Agency Act, 2002*

Refugee Act, 1996 *(Appeals) Regulations 2002*
Number: SI 571/2002
Contents note: Revoke and replace the Refugee Act, 1996 *(Appeals) Regulations 2000* (SI 342/2000). Supplement the procedures set out in s16 of the *Refugee Act, 1996* in relation to the determination by the Refugee Appeals Tribunal of appeals against recommendations of the refugee applications commissioner on applications for recognition as a refugee
Commencement date: 13/12/2002

Road Traffic Act, 1994 *(Section 25) (Commencement) Order 2002*
Number: SI 597/2002
Contents note: Appoints 1/1/2003 as the commencement date for s25 of the act (requirement to carry driving licence while driving vehicle)

Road Traffic Act, 2002 *(Commencement) (No 2) Order 2002*
Number: SI 598/2002
Contents note: Appoints 1/1/2003 as the commencement date for ss12(2) and 18 of the act; appoints 1/2/2003 as the commencement date for s15 of the act

Trustee (Authorised Investments) Order 1998 (Amendment) Order 2002
Number: SI 595/2002
Contents note: Substitutes a new second schedule to the *Trustee (Authorised Investments) Order 1998* (SI 28/1998) which specifies conditions to apply to the investment of trust funds affected by the *Trustee (Authorised Investments) Act, 1958.* The main effect is to remove the restriction on the proportion of trust funds which may be invested in a single collective investment scheme or insurance contract and to replace this with a requirement to have regard to certain considerations such as concentration of investment risk
Commencement date: 2/1/2003 G

Prepared by the Law Society Library

Personal injury judgment

Tort – personal injury – fall in bus while proceeding to upper deck with a child – contributory negligence – dispute over medical reports – video evidence of an investigator – issue of exaggeration by plaintiff of medical condition and symptoms – High Court hearing – appeal to the Supreme Court – claim that loss of earnings letter was the work of solicitors and that the plaintiff was not responsible – view of Supreme Court on responsibilities of plaintiffs and their solicitors – consideration of effect of exaggerated claim – review of legal authorities in context of exaggerated claim – the concept of unjust recovery

CASE

***Siwsan Shelley-Morris v Bus Átha Cliath/Dublin Bus*, High Court judgment of O'Higgins J; Supreme Court, Denham, McGuinness and Hardiman JJ with judgments delivered by Denham and Hardiman JJ (McGuinness J agreeing with both judgments) of 11 December 2002.**

THE FACTS

On Saturday 22 September 1995, Mrs Siwsan Shelley-Morris (who at the time of the accident was 45 years old), with her husband and two-year-old daughter, was a passenger in a bus owned by Dublin Bus. The bus was privately hired to bring people to a wedding in Monkstown and after that to a reception at a hotel in Killiney. Previously they had been brought to the church from the Grand Hotel in Malahide in the same bus.

It was alleged by Mrs Shelley-Morris that on the journey from the church in Monkstown to the reception in Killiney, the driving of the bus was somewhat more 'jerky'. The plaintiff was in the lower deck, somewhere beyond half way up the bus towards the back, with her two-year-old daughter sitting beside her. The child got bored, the bus having stopped at a red light. Mrs Shelley-Morris proceeded to bring the child upstairs to the top deck. She held the child on her right hip and started to go up the stairs. She was approximately one step from the top when the bus allegedly jerked forward and then carried on accelerating. She was thrown backwards. Her dress was torn and up around her waist. Her knee became very painful and swollen; she could not stand up; and the heel of her shoe came off in the incident. The bus driver strongly denied that there had been any variation in his standard or manner of driving between one leg of the journey and the other or that the bus jerked forward at any stage. He said the bus was in motion in the normal fashion immediately prior to his noticing the commotion caused by Mrs Shelley-Morris's fall, and the bus had not recently stopped.

Mrs Shelley-Morris instituted High Court proceedings on 7 January 1997. In her statement of claim, delivered the following month, she claimed by way of special damages loss of earnings which were described as 'unascertained and continuing'. At the time of the accident, she was employed as a community worker by a public authority in London.

On 8 November 1999, the solicitors for Mrs Shelley-Morris provided further particulars for the claim, stating that she had developed post-traumatic degenerative arthritis which was progressive in nature and would require a knee replacement at sometime in the future. The letter ended: 'She has had to retire from her work on health grounds and has suffered a loss of income to date and will do so into the future in respect of which actuarial evidence will be led'.

On 26 June 2001, Mrs Shelley-Morris's solicitors gave particulars of special damages, claiming £114,281.37 in respect of the loss of earnings to date and £298,037 loss of earnings into the future. These sums totalling £412,318.37 were for loss of earnings alone. She claimed in a subsequent letter from her solicitors on 4 July 2001 that she was 'incapable by reason of ill-health of discharging her duties with the Hammersmith and Fulham Social Services'. She had retired from that body on 22 September 1996. Subsequently, she moved to Wales, where she had been unable to find similar employment. She also made a claim in respect of loss of pension.

JUDGMENT OF THE HIGH COURT

The case came before O'Higgins J in the High Court and the trial took place between 24 and 26 October 2001. Evidence was given by, among others, a witness, Trudy Conlon, the plaintiff's sister-in-law. O'Higgins J stated that she was 'an extremely impressive witness, careful, accurate' and in his view to be believed. He accepted her account of the accident. The judge stated that Mrs Conlon substantially corroborated the account of Mrs Shelley-Morris, both as to the bus having been stopped and moving off abruptly causing a jerk. The judge stated that he believed her and she carried Mrs Shelley-Morris's case on the factual issue.

Contributory negligence was pleaded on behalf of Bus Átha Cliath. O'Higgins J stated that while he felt that Mrs Shelley-Morris herself must take a share of the responsibility for the accident, it was correct that there was no embargo on people going up to the top of the bus. However, to do so with a small child on the hip in circumstances where one had already noticed the jerky nature of the bus when moving off seemed, to O'Higgins J, to amount to a considerable degree of contributory negligence. He penalised Mrs Shelley-Morris in contributory negligence to 25%.

The medical details

Following the accident, Mrs Shelley-Morris was taken to

Loughlinstown Hospital where she received an injection, x-rays and a bandage was applied. She returned to the wedding reception. She went back to London the following day and stated she was in considerable pain. She was subsequently seen in a fracture clinic and it was recorded that she had sustained a depressed fracture of the right tibial platter. She was admitted to hospital, where she subsequently underwent an operation on her right knee, arthroscopy and elevation of the lateral tibial platter with bone grafting and external fixation. Fixation was provided by a laterally placed T-shaped buttress plate with screws attached. The judge stated that as a result of the operation, and the subsequent operation to remove the metal from the knee, she was left with 'an ugly and unpleasant scar'.

In a subsequent medical report dated 20 November 1997, a surgeon stated that Mrs Shelley-Morris's complaint was of a constant intermittent ache around the right knee which became painful at times, the joint swelling periodically. She complained of pain if standing in excess of 15 minutes and walking in excess of 100 yards was impossible without a rest. She carried a walking stick continuously outdoors. Subsequent x-rays showed a united fracture. The medical reports described a significant injury with an excellent result but for arthritis.

Mrs Shelley-Morris disputed the finding that the medical result was 'excellent'. She disputed that she was walking without a stick. In relation to the issue of 'no significant pain', she stated it depended on what one meant by 'significant'.

The video evidence

On 24 September 2001, a month before the trial in the High Court, Mrs Shelley-Morris had been observed by an investigator retained by Dublin Bus over a considerable period of time and a video tape of her movements over much of that day was made. The video tape was played in the High Court. It shows Mrs Shelley-Morris generally in the company of other persons, especially her father-in-law and sister-in-law, walking on the public street, crossing the road to a restaurant, getting in and out of a car, walking up and down a sloping drive while carrying items, holding a child in one arm at hip level and playing with two boxer dogs.

The video commenced when Mrs Shelley-Morris was returning from the premises of a consultant employed by Dublin Bus. She was driven to the meeting by her father-in-law and brought her stick along. For most of the time during the video tape, Mrs Shelley-Morris is not using the stick at all. The video tape showed that in walking on the street and reeling in some form of wire or line and in crossing the road to her father-in-law after doing so, she appeared natural and unhindered despite the fact that she was not using a stick. She did not show undue difficulty getting in or out of a car.

O'Higgins J stated that he had to accept that in relation to Mrs Shelley-Morris's evidence overall he found that she was exaggerating her symptoms from time to time. In particular, what was evident to the court from the video tape was at variance at least to the general picture of her disability which she had offered to the court. O'Higgins J concluded that the case was more difficult to evaluate because of the fact that the court had found that she deliberately exaggerated some of her symptoms to the court. The High Court found that Dublin Bus was mostly to blame for the accident.

THE HIGH COURT AWARD

Having found that Dublin Bus was negligent and there was contributory negligence on the part of Mrs Shelley-Morris, O'Higgins J apportioned the degree of fault at 75% to Dublin Bus and 25% to Mrs Shelley-Morris.

Damages were assessed as follows:

- **Special damages**
  Loss of pension and gratuity: £37,500
  Loss of earnings for the future: £25,000.
- **General damages**
  Pain and suffering to date of trial: £70,000
  Pain and suffering into the future: £40,000.

  Total award: £172,500.00

Taking into consideration the apportionment for contributory negligence, the High Court awarded Mrs Shelley-Morris the sum of £129,375. Dublin Bus appealed to the Supreme Court.

JUDGMENT OF THE SUPREME COURT

The matter came before Denham, McGuinness and Hardiman JJ, with Denham and Hardiman JJ delivering judgments on 11 December 2002 (with McGuinness J concurring with both judgments). Denham and Hardiman JJ referred to the grounds of appeal. It was argued that the High Court had erred in its findings that Dublin Bus was the prime cause of the accident, the High Court had erred in finding 25% contributory negligence only by Mrs Shelley-Morris, the High Court was in error in relation to the assessment of appropriate damages to be paid as a result of the personal injuries in the accident by virtue of the deliberate exaggeration by the plaintiff of those injuries, and that the High Court erred in its assessment of the appropriate damages in relation to loss of pension and earnings when there was insufficient evidence to support such an assessment.

The issue of exaggeration of the claim

The Supreme Court judgments of Denham and Hardiman JJ deal with the issue of the exaggeration by Mrs Shelly-Morris of her medical condition and symptoms. Hardiman J stated that Mrs Shelley-Morris told 'a number of deliberate falsehoods' in relation to her symptoms and capacities. He stated that the manifest falsehoods in the overall impression of her performance in the video tape gave rise to a considerable difficulty. The Supreme Court considered that Mrs Shelley-Morris was capable of working. Pretending to be unable for any significant work, she was guilty of 'serious falsehood'.

It had been argued in court that in the context of the claim for loss of earnings for the entire of her working life Mrs Shelley-Morris had incurred a specific 'loss' in her own mind. Further, it was submitted that the contents of the letter setting out the loss of earnings, even literally construed, should not be attributed to Mrs Shelley-Morris as a claim advanced by her. This was because the letter was the work of other persons. It was stated that these other persons were her solicitors, who presumably arrived at the actual sums specified with the input of her former employers and other advisers. But it was said in court that the plaintiff was not responsible for the particulars delivered. It was stated that even if the letter quoted was to

be regarded as advancing a claim for the amount specified, the claim had been resiled from at trial. It was said that claims are often made in pleadings which are not supported in evidence.

The Supreme Court stated it could see no merit whatever in any of these contentions. Hardiman J stated that the reference in the claim for the sum of £412,318.37 described as 'special damages' and divided into loss of earnings to the date of trial and future loss of earnings to date of retirement had been quantified to the last penny. Further, the plaintiff was an intelligent woman, quite able to understand to what she was and was not entitled. Third, Hardiman J specifically referred to the case of *Vesey v Bus Éireann/Irish Bus* (Supreme Court [2001] IR 192), where the same submissions on behalf of a plaintiff were strongly deprecated.

Hardiman J stated that it was inappropriate to contend that the particulars of the plaintiff's claim are not to be attributed to the plaintiff himself or herself. It was very much to be hoped, he stated, that no such submissions would be made in the future. He stated that the claiming of a very large sum of money from a defendant was a serious matter and most plaintiffs would know this quite well. In any event, it was the responsibility of a solicitor to ensure that the plaintiff is fully aware of the significance and, indeed 'solemnity', of advancing a claim for hundreds of thousands of pounds, or a lesser sum, before the claim is presented to the defendant 'not to speak of the court'.

Hardiman J stated that it had been submitted that the plaintiff's 'deliberate exaggeration' related solely to her description of the effect of her injuries. It was submitted that if a lie was told in the course of the prosecution of a claim for damages for personal injuries, that fact affects only the narrow aspect of the case to which the lie specifically relates, and that this was different in degree from a wholly-invented injury. Thus, while it was conceded that the video tape would make one regard some of Mrs Shelley-Morris's earlier descriptions as suspect, or exaggerated, it should not be regarded as wholly undermining her credibility or undermining it in relation to unconnected aspects of the case.

Approach to an exaggerated claim

Hardiman J stated that the onus of proof lies on the plaintiff who is, of course, 'obliged to discharge it in a truthful and straightforward manner'. Where this has not been done, the court is not obliged or entitled to speculate in the absence of credible evidence. To do so would be unfair to the defendant. Moreover, a plaintiff who engages in falsehoods may expose himself or herself to adverse orders and costs. Hardiman J specifically referred to *Vesey*, where it was stated that there was plainly a point where dishonesty in a prosecution of a claim could amount to an abuse of the judicial process as well as an attempt to impose on the other party.

Referring to a decision of Lord Denning in *Goldsmith v Sperrings* ([1977] 2 AER 566) and the English Court of Appeal in *Arrow Nominees v Blackledge* ([2002] BCLC 167), Hardiman J said it must not be considered that a falsehood in respect of one aspect of a claim would at worst lead to that particular part of a claim being reduced or disallowed. The courts had a power and duty to protect their own processes from being made the vehicle of 'unjustified recovery'. In a proper case, this can be done by staying or striking out the plaintiff's proceedings.

Quite properly, according to Hardiman J in the circumstances of the present case, Dublin Bus had not sought this drastic relief. That was not to say that this relief would be inappropriate in a similar case in the future. Hardiman J stated that a plaintiff who was found to have engaged in 'deliberate falsehood' must face the fact that a number of corollaries arise from such finding:

- The plaintiff's credibility in general, and not simply on a particular issue, is undermined to a greater or lesser degree
- In a case, or an aspect of the case, heavily dependent upon the plaintiff's own account, the combined effects of the falsehoods and the consequent diminution in credibility meant that the plaintiff may have failed to discharge the onus on him or her either generally or in relation to a particular aspect of the case
- If this occurs, it is not appropriate for a court to engage in speculation or benevolent guesswork in an attempt to rescue the claim.

Denham J emphasised that the plaintiff, Mrs Shelley-Morris, was in danger of losing her entire claim. Denham J emphasised that deliberate exaggeration by a plaintiff may be such as to be an abuse of process of the court. In such a case, it may be appropriate to put this to a witness and for counsel to address the legal issues.

In relation to liability and the issue of contributory negligence, both Denham and Hardiman JJ stated that they would divide the responsibility for the accident in equal measure between Mrs Shelley-Morris and Dublin Bus. G

This judgment was summarised by solicitor Dr Eamonn Hall.

THE SUPREME COURT AWARD

The Supreme Court set aside the awards of the High Court in respect of loss of pension and gratuity and loss of earnings for the future. The following sums were awarded in respect of pain and suffering:

- Pain and suffering to date of trial £70,000
- Pain and suffering in the future £20,000.

Having determined the contributory negligence of Mrs Shelley-Morris at 50%, the sum awarded by the Supreme Court amounted to £45,000, reduced from £129,375 which had been awarded by the High Court.

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ARBITRATION

Step in the proceedings

Two requirements for conduct to constitute step in proceedings – whether second-named defendant had taken step in the proceedings by making particular averments in affidavit – Arbitration Act, 1954, *s5(1) – order 56, rule 2 RSC*

The second-named defendant applied for an order pursuant to section 5 of the *Arbitration Act, 1980*, staying the proceedings so that the matter could be referred to arbitration. The plaintiffs opposed the application on the grounds that the second-named defendant had taken a step in the proceedings and, as a result, was no longer entitled to the order sought. The alleged step was a request made by the second named defendant to the court in the affidavit grounding the application for a stay. In the affidavit, the second-named defendant indicated that he was not a party to the contract. At paragraph 7, he stated that he was willing to consent to court determining the issue as to whether or not he was a party to the contract if the court considered this necessary. However, he emphasised that in so consenting he was not waiving his right to a stay or taking any step in the proceedings. At the hearing, counsel for the second-named defendant indicated that the second-named defendant was no longer seeking to assert that he was not a party to the contract. It was submitted on behalf of the plaintiffs that the second-named defendant, having sought to invoke the assistance of the court, must be regarded as having taken a step in the proceedings and was now no longer entitled to a stay.

Geoghegan J granted a stay, ruling that two requirements must be satisfied for conduct to constitute a step in the proceedings:

- The conduct of the applicant must be such as to demonstrate an election to abandon his right to a stay in favour of allowing the action to proceed, and
- The act in question must have the effect of invoking the jurisdiction of the court.

In making the averments in paragraph 7, the second-named defendant could not be said to have elected to abandon his right to a stay. In such circumstances, it was unnecessary to consider whether the statements made therein had the effect of invoking the jurisdiction of the court.

***Gleeson v Grimes*, High Court, 01/11/2002** [FL6473]

CRIMINAL

Case stated, District Court

Summary offences – delay – right to expeditious trial – reason for delay of 22 months – dismissal by district judge – whether district judge erred in law – whether respondent prejudiced in conduct of defence by delay in proceedings – Road Traffic Act, 1961, *sections 2(B), 49 and 53*

The defendant/respondent was charged with offences under sections 49 and 53 of the *Road Traffic Act, 1961*, alleged to have been committed in January 2000 in summonses issued in June 2000 and returnable for September 2000. The trial was adjourned on a number of occasions until April 2001 at the request of the defendant because of the unavailability of a witness he wished to call. On that date, the matter was adjourned, ultimately to October 2001, to allow the re-issuing of the summons for dangerous driving which had been inadvertently struck out. On that date, the district judge, following *DPP v Arthur* ([2000] 2 ILRM 363), dismissed the charges against the defendant/respondent on the basis that the defendant's constitutional rights to a fair trial with reasonable expedition would be violated were the prosecutions allowed to proceed. The appellant appealed that decision on the grounds that the district judge erred in law in that no actual prejudice had been shown by the defendant.

Ó Caoimh J answered the question stated in the negative and remitted the case back to the District Court. He held that the district judge had erred in law in dismissing the charges as each case had to be taken on its facts and two identical periods of delay may have differing results. The fact that the period at issue in the case of *DPP v Arthur* was similar to that the defendant complained of did not give rise to a conclusion that the complaints against the respondent should be dismissed, as the circumstances of the two cases were different and no prejudice was shown to have arisen by reason of the final period of delay.

***DPP v Byrne*, High Court, Mr Justice Ó Caoimh, 26/6/2002** [FL6488]

Certiorari, judicial review

Circumstances in which judge may, following conviction of a sex offender, direct prohibition of name of the offender – whether judge lacked jurisdiction – whether orders supported by adequate reasons – Criminal Law (Rape) Act, 1981 *(as amended)*, *sections 7, 8* – Bunreacht na hÉireann, *article 34.1*

On 29 November 2000, OC was sentenced to three years' imprisonment for sexual assaults. The sentence was suspended subject to certain conditions. The trial judge (respondent) had made an order prohibiting any reporting of the case and he continued this order in force on 29 November. On 30 November 2000, following submissions made on behalf of certain newspapers and RTÉ, the respondent varied the order so as to prohibit the publication of the name and address of either OC or the complainant and of OC's occupation. On 1 December, the applicant applied to the respondent to have OC's name published. The respondent refused, principally on the ground that it would not be in the complainant's best interests. The applicant was granted leave to apply for judicial review by Kinlen J to have the orders of the respondent quashed. In April 2001, the respondent made an order providing the applicant with a copy of the medical report relating to the complainant. In May 2001, the DPP obtained leave from Kelly J to bring judicial review proceedings to have this order quashed. The DPP also sought an order quashing the respondent's order of 30 November 2000 prohibiting the publication of the OC's name. The applications were listed for hearing together. The only statement of opposition to the application to quash the order of 30 November was filed by OC. The applicant submitted (supported by counsel for the DPP) that the respondent did

not have jurisdiction to make the order under the *Criminal Law (Rape) Acts*, that at the time of making the orders the respondent was *functus officio* and that the reasons for the order were inadequate. OC submitted that the terminology of the act clearly envisaged that the trial judge could make such order as he considered necessary when the trial was over.

In quashing the orders of the respondent made on 30 November 2000 and 1 December 2000, Kearns J held that, while the respondent had jurisdiction to make some order, it did not impute that he had jurisdiction to make the particular order which he made. The jurisdiction conferred by the act was one which was exercisable only with regard to the complainant. The orders made by the respondent did not in any way go to the accused's right to a fair trial. While the respondent acted from the best possible motives, his stated reasons for making the order were incapable of sustaining the order which he did in fact make.

***Independent Star Limited v Judge O'Connor*, High Court, Mr Justice Kearns, 01/11/2002** [FL6547]

Extradition, *habeas corpus*

Constitutional law – extradition – detention – habeas corpus – *jurisdiction of District Court – practice and procedure – murder – offence of criminal damage – whether applicant lawfully detained – whether arrest warrant defective* – Criminal Justice (Public Order) Act, 1994 – Criminal Justice Act, 1999 – Bunreacht na hÉireann 1937, *article 40*

The applicant had been extradited from England on foot of an arrest warrant issued by the District Court and was remanded into custody. Initially, the applicant faced a charge of criminal damage and subsequently was also charged with offences of murder and larceny. The applicant sought an inquiry into his detention on the grounds that the arrest warrant originally issued by the District Court was a stale or invalid warrant and also contended that the original request for extradition on the criminal damage was a colourable device in order to investigate the unlawful killing charge.

Geoghegan J dismissed the application. The District Court judge had jurisdiction to issue the warrant in question and any defects in the recitals to the warrant were not of such a fundamental nature as to justify a finding of illegality of the applicant's detention. At the time of the request for extradition, the Garda Síochána genuinely intended to pursue the criminal damage offence. The fact that the gardaí may have also intended prosecuting another offence did not affect the validity of a request for extradition.

***Stephens v Governor of Prison*, High Court, Mr Justice Geoghegan, 20/9/2002** [FL6411]

Judicial review, right to fair trial

Constitutional law – right to fair trial – delay – prohibition – fair procedures – Alzheimer's disease – res judicata – *whether ill-health grounds for prohibiting trial – whether order of prohibition restraining trial should issue – whether real risk of unfair trial*

The applicant sought an order of prohibition to restrain his trial on the grounds of ill-health. The applicant claimed that he was suffering from the onset of Alzheimer's disease which would prejudice his ability to defend himself. The applicant had previously been granted an order of prohibition by the High Court preventing his trial from proceeding. This order had been overturned by the Supreme Court, which ordered that the trial should proceed. The present application was opposed by the DPP, who contended that the issue of whether the applicant should face trial had already been decided and was *res judicata*. In addition, it was contended that whether the applicant was fit to stand trial was a matter for the trial judge to adjudicate upon under section 2 of the *Criminal Lunatics Act 1800*.

Peart J granted the order of prohibition sought. The ground now adduced by the applicant for the prohibition of his trial was an entirely new ground of ill-health and therefore could be the subject of a new application. The applicant was suffering from Alzheimer's disease, which would prevent the applicant from properly instructing his legal team. There was a real and substantial risk that if the applicant was to face trial he could not have a fair trial. This consideration outweighed the complaints and society's right to have persons accused of offences brought to trial. The respondent would be restrained from further prosecution of the offences in question.

***O'C v Director of Public Prosecutions*, High Court, Mr Justice Peart, 08/10/2002** [FL6426]

DAMAGES

Personal injuries, road traffic

Negligence – road traffic – personal injuries – claim for future loss of earnings – causation

As a result of a road traffic accident in 1998 where liability was not in issue, the plaintiff suffered injuries to his face and jaw which continued to cause him moderate (as distinct from minor or severe) discomfort, leading to stress, especially around exam time. He had to take a year out of college as a result of failing his second year exams and claimed for a full year's loss of potential earnings.

In assessing general damages in the sum of €45,000, Peart J held that he was not satisfied that the evidence sufficiently demonstrated that, on the balance of probabilities, the plaintiff lost a year's earning capacity as a result of the accident but that some allowance would be made for it in the assessment of general damages but not to the extent of a full year's anticipated earnings, estimated by the plaintiff to be £25,000. To the sum for general damages was awarded €8,000 for future pain and suffering, which the court was satisfied was likely to continue for some time. €14,000 was awarded for special damages, taking into account the possibility that the plaintiff may opt for further surgery on his jaw.

***McGauran v Smith and McDermott*, High Court, Mr Justice Peart, 06/10/2002** [FL6368]

LAND LAW

Appeal

Promissory estoppel – whether defendant acted to his detriment – proof of detriment – adverse possession – whether defendant entitled to declaration that he is entitled to beneficial ownership of property

The plaintiff had allowed his son, the defendant, to use part of his yard for around 20 years to store vehicles but he had revoked this licence subsequently and sought to have the defendant prevented from entering on or using the land. The defendant counterclaimed, seeking a declaration that he was entitled to full beneficial ownership of the property on the grounds that he was brought back from England on an express representation and warranty that he would have sole and exclusive right to the use of the premises and that he acted to his detriment on foot of those representations. The Circuit Court ordered that the defendant remove all vehicles from the plaintiff's premises.

Kinlen J held that the defendant had acquired by adverse possession a portion of the property in dispute but that the defendant had not made out his claim for title to the property by virtue of promissory estoppel that, to establish promissory estoppel a material detriment in reliance on a promise of entitlement to

land must be proved. However, detriment cannot be assumed and must be proved as a matter of probability. The alleged detriment had not been proven as the supporting evidence did not corroborate the defendant's claim in that respect.

***Christopher McGuinness v Francis McGuinness*, High Court, Mr Justice Kinlen, 19/3/2002** [FL6453]

LEGAL PROFESSION

Disciplinary procedures, judicial review

Solicitors – Disciplinary Tribunal – declaration – certiorari – *whether sections 7 and 8(a) of the* Solicitors (Amendment) Act, 1960 *(as amended) unconstitutional – whether applicant denied fair procedures at inquiry – whether applicant entitled to legal aid* – Solicitors (Amendment) Act, 1960, *ss6, 7, 8, 16, 38* – Solicitors (Amendment) Act, 1994 – Bunreacht na hÉireann, *articles 34.1, 40.3.2*

The respondent was a statutory body which dealt with alleged misconduct of solicitors. The Law Society referred a complaint to the tribunal with respect to the alleged misconduct of the applicant. The division of the tribunal considered that a *prima facie* case was disclosed and directed an inquiry to be held. The applicant sought discovery of documents from the tribunal, delaying the inquiry, and the tribunal directed that the inquiry would commence on 4 February 1999. On 4 February 1999, prior to the commencement of the inquiry, the applicant through his solicitor made a number of applications. The hearing was adjourned to 2 March 1999. On that date, the applicant's solicitor made an application to come off record, which was refused. The inquiry continued and the applicant's solicitor participated. After an adjournment, the applicant appeared on his own and informed the tribunal that he had dismissed his solicitor. The inquiry adjourned to enable the applicant to obtain alternative representation. The applicant did not obtain alternative representation and the hearing was held. The tribunal found the applicant guilty in respect of 58 of the 70 complaints made. The tribunal referred the matter to the High Court with a recommendation that the applicant's name be struck off the roll of solicitors. The applicant was granted leave to apply for judicial review for a declaration that sections 7 and 8(a) of the act were unconstitutional and an order of *certiorari* quashing the tribunal's recommendations on grounds that the act made inadequate provision for legal representation, did not grant a right of appeal and that the tribunal acted unreasonably and unfairly.

Carroll J refused the relief sought, ruling that the applicant's claim that sections 7 and 8(a) of the act were unconstitutional were unsubstantiated. The act provided for an appeal to the High Court against the findings of misconduct by the tribunal. The applicant had full opportunity to meet the case against him and the recommendation was not irrational. No duty was imposed on the state to provide legal aid in a case such as the present one, given the fact that the applicant was a qualified solicitor and was represented by a solicitor before dismissing him.

***Malocco v The Disciplinary Tribunal*, High Court, Ms Justice Carroll, 16/10/2002** [FL6533]

REVENUE

Assessment, practice and procedure

Appeal procedure – right to fair procedures – right to appeal assessment of liabilities – necessity to pay tax due before appeal – ability to pay tax due to existence of asset-freezing order – whether open to taxpayer to apply for release of assets so frozen – whether constitutional rights of access to appeals procedure breached – Proceeds of Crime Act, 1996, *sections 2 and 6* – Taxes Consolidation Act, 1997, *sections 922 and 957* – Bunreacht na hÉireann 1937, *articles 4, 34(1), 37(1), 40(1), (2) and (3)*

The plaintiff obtained summary judgment in the High Court against the defendant for income tax due on foot of assessments made in August 1997. The defendant had sought to appeal that assessment, enclosing his own assessment of liability, and was given a hearing date for June 1998 for that appeal. He failed to appear for the hearing on that date and summary proceedings were then issued by the Criminal Assets Bureau. He had previously been notified that a valid appeal must be accompanied by the admitted amount of tax due submitted within 30 days of the notice of assessment. Previously, two of his accounts had been made subject to an asset-freezing order pursuant to section 2(1) of the *Proceeds of Crime Act, 1996*. The defendant submitted that as a result of his monies being so frozen he was unable to comply with the requirement in section 957 of the *Taxes Consolidation Act, 1997* that he pay his admitted tax liabilities prior to an appeal and, accordingly, his constitutional rights were breached in that he was prevented from pursuing an appeal against those assessments. Section 2(3) of the act of 1996 entitles a person who has been the subject of an order pursuant to section 2(1) to apply to the court to discharge the order on the grounds that the property concerned is not property which is the proceeds of crime. Section 6 provides that the High Court may permit an order under section 2 to be varied 'if it considers it essential to do so' to enable the person concerned 'to discharge reasonable living and other necessary expenses'. It was contended by the plaintiff that as a result of the effect of sections 2 and 6 of the act of 1996 the combined effect of the impugned provisions was not to deprive the defendant of access to his monies and assets in the manner alleged. The defendant also alleged that the High Court had erred in law in not according him *locus standi* to make submissions on the impugned sections of the acts of 1996 and 1997.

Murray J dismissed the appeal, holding that the defendant had sufficient opportunity to pursue the remedies available to him under sections 2(3) and/or 6 of the act of 1996. The phrase 'necessary expenses' in section 6 included monies due and payable to the state pursuant to a statutory obligation. Accordingly, the combined effect of the impugned provisions was not to deprive the defendant of access to his monies and assets in the manner alleged. In the High Court, the defendant had made substantial submissions as to why the relevant sections of the impugned acts should be interpreted as having the effect of denying him access to his monies and assets, the subject of the freezing order. Accordingly, the defendant had been accorded *locus standi* to the extent necessary to argue the issue.

***Criminal Assets Bureau v John Kelly*, Supreme Court, 11/10/2002** [FL6618]

TORT

Abuse of process, personal injuries

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 that it was clear that the plaintiff had suffered a significant injury. However she 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, 11/12/2002** [FL6611]

Liability, personal injuries

Accident at work – contributory negligence claim – liability – Safety in Industry Act, 1980, *section 12*

The plaintiff was injured in an accident at work. On the evidence, the court was satisfied that the defendant was in breach of the *Factories Act, 1955*, as substituted by the *Safety in Industry Act, 1980*. The defendant pleaded that there was contributory negligence on the part of the plaintiff. The net point was whether the plaintiff had removed any of the inspection plates from the unit of machinery he was working on. The plaintiff denied any contributory negligence. Following *Kennedy v East Cork Foods Ltd* ([1973] IR 244), Finnegan P accepted the principles enunciated in relation to breach of statutory duty and satisfied himself that the plaintiff was not guilty of contributory negligence.

***O'Neill v ESB*, High Court, Mr Justice Finnegan, 31/7/2002** [FL6572]

Personal injuries, appeal, evidence

Onus of proof – balance of probabilities – failure to discharge onus – conflict of evidence – whether respondent's evidence supported claim on balance of probabilities – negligence – personal injuries – whether caused by appellant's security staff in restraining respondent – whether force used excessive in circumstances – claim dismissed

The respondent brought a claim for damages for personal injuries in the Circuit Court, which, he alleged, were sustained in an incident outside the appellant's premises, when two security men, during the course of their employment with the appellant, restrained the respondent. The respondent alleged that the force used was excessive and that one of the men bit his finger. The Circuit Court gave judgment in favour of the respondent. The appellant appealed that decision. There was a conflict of evidence during the hearing of the appeal as to whether the respondent's finger was bitten by one of the appellant's agents as alleged and as to other circumstances surrounding the incident in question. In setting aside the order of the Circuit Court, Peart J held that without some corroboration of the biting allegation made by the plaintiff, on the balance of probabilities the plaintiff had not discharged the onus of proof that his finger had been bitten by one of the bouncers and, accordingly, the force used by the agents of the appellant in restraining the respondent was reasonable in the circumstances.

***Thomas Callery v Sinnan Inns Ltd*, High Court, Mr Justice Peart, 28/11/2002** [FL6583] G

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Eurlegal

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

CFI overturns *Airtours* merger decision

The European Court of First Instance has overturned the decision by the European Commission to prohibit the merger between UK tour operators Airtours plc and First Choice plc.[1] The commission had concluded that, following the merger, the three remaining large tour operators in the UK would hold a collectively dominant position on the UK market for short haul foreign package holidays. In finding that the commission had not proven its case, the CFI criticised the commission's factual and legal analysis and held that the commission's decision was 'vitiated by a series of errors' (para 294).

This is the first time the CFI has annulled a merger prohibition and only the second time a commission merger decision has been overturned.[2] The judgment is also significant because in this case the CFI undertook a detailed review of the evidence and findings of fact, whereas the practice of the courts to date was limited to considering errors of law or procedure.

The CFI's judgment provides useful guidelines on the elements required to establish the existence of collective dominance and is of particular interest to businesses that operate in concentrated markets. On a broader level, the judgment is of interest as it clarifies that a thorough legal and economic analysis and a high standard of proof are required to prohibit a merger.

Background to the case

In April 1999, Airtours plc, a UK tour operator and supplier of package holidays, announced its intention to acquire one of its competitors, First Choice plc. The proposed merger was notified to the European Commission under the *European Community merger regulation (ECMR)*, and in September 1999 the commission announced its decision to prohibit the merger (Case IV/ M1524, OJ [2000] L93/1).

The EC *merger regulation* obliges the commission to prohibit mergers that create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or a substantial part of it (regulation 4064/89, article 2[3]).

A dominant position may be held by one firm or it may be shared by two or more firms in a situation referred to as 'joint' or 'collective dominance'.[3] Collective dominance may arise on an oligopolistic market (a market dominated by a few major players) where the large players (the dominant oligopoly) lose their incentive to compete against each other. The CFI defined collective dominance as a situation where: 'in view of the actual characteristics of the relevant market and of the alteration in its structure that the transaction would entail, the latter would make each member of the dominant oligopoly, as it becomes aware of common interests, consider it possible, economically rational, and hence preferable, to adopt on a lasting basis a common policy on the market with the aim of selling at above competitive prices, without having to enter into an agreement or resort to a concerted practice within the meaning of article 81 EC and without any actual or potential competitors, let alone customers or consumers, being able to react effectively' (CFI judgment, para 61).

Elements of collective dominance

The court outlined three necessary conditions for collective dominance to exist, namely, that there be a sufficient degree of market transparency, that tacit co-ordination be sustainable over time, and that the reaction of competitors and consumers would not jeopardise the results of the common policy (CFI judgment, para 620).

Market transparency. The CFI held that there must be a sufficient degree of market transparency so that each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy. The degree of transparency is also important for the purposes of permitting each member of the dominant oligopoly subsequently to detect alterations made by the others as regards capacity, to distinguish deviations from the common policy from mere adjustments consequent upon volatility of demand and, finally, to ascertain whether it is necessary to react to any such deviations by punishing them (for example, by engaging in competitive behaviour in return).

The CFI rejected the commission's assertion that the reduction in the number of operators in the market would result in increased market transparency. Conversely, it held that in the market in question there are practical difficulties which make it hard for operators to find out what capacity other operators have planned for. Thus, it would be difficult for the major players to collectively reduce capacity in order to increase prices.

It is significant, however, that the CFI did not reject the idea that, in theory, collective action by a dominant oligopoly may be limited to capacity planning, as collective dominance has previously been limited to price collusion. Indeed, several economic studies over the past decade have indicated that a collusive outcome is possible where parties collude at the capacity planning stage but later adopt market prices.[4]

As regards market conditions, the commission had argued that the volatility of demand, which characterised the market, was conducive to collusive behaviour. However, the CFI noted that economic theory suggests the opposite – that volatility of demand renders the creation of a collective dominant position more difficult – and that the commission had failed to establish that economic theory did not apply or that volatility in demand was conducive to the creation of collective dominance.

The CFI held that the stability of historic market shares is also conducive to the development of tacit collusion, but in this instance the commission had wrongly excluded growth through acquisitions to conclude that market shares had remained static.

Tacit co-ordination must be sustainable over time. There must be an incentive (such as the threat of retaliatory action by other members of the dominant oligopoly) not to depart from the common policy on the market. However, the CFI held that in order to demonstrate collective dominance, the commission does not need to prove the existence of a specific retaliation mechanism involving a degree of severity. Rather, the commission must establish that each member of a dominant oligopoly is aware that highly competitive action on its part would provoke identical action from the other members, so that it would derive no benefit from its initiative.

The CFI found that the retaliatory measures cited by the commission could not be implemented quickly and effectively enough to act as adequate deterrents and therefore the deviating actor would benefit from the advantages of having acted first.

Reaction of competitors and consumers. The CFI held that in order for collective dominance to be sustainable, the foreseeable reaction of current and future competitors, as well as consumers, must not jeopardise the results expected from the common policy. However, the court was of the view that in this case smaller competitors were in a position to take advantage of capacity reductions by the large tour operators, in particular as the market was characterised by low barriers to entry, a factor which militates against collective dominance.

The CFI also held that a collective dominant position cannot be maintained in the long term if barriers to market entry are insignificant. The court found that this was in fact the case and that smaller operators had sufficient access to the market to compete against the larger operators.

As regards the reaction of consumers, the CFI held that consumers had countervailing buyer power as they could choose to book their holidays on the basis of the lowest price available.

Interdependence of the major tour operators

The requirement that there be economic links between the members of the dominant oligopoly, held in previous cases to be a requirement for the existence of collective dominance,[5] was also addressed by the CFI.

The court stated that the existence of economic links alone is not sufficient to demonstrate collective dominance and held that it was for the commission to prove that the commercial links between the large tour operators resulted in an increase in the level of interdependence between them (CFI judgment, para 289). Indeed, the CFI noted that the supply arrangements between the large operators might allow them to capitalise on capacity and business opportunities in an industry with very high fixed costs and low profit margins and therefore allow them to act independently of each other.

Similarly, as regards the high degree of vertical integration achieved by the large tour operators, the CFI held that in the absence of evidence to the contrary there must be a presumption, given how the relevant market operated, that vertical integration made the larger tour operators more independent of each other (judgment, para 284).

Criticism of the commission

Throughout its judgment, the CFI was highly critical of the commission's arguments and interpretation of the evidence available to it. The CFI noted that the commission ignored economic theory without explaining why it should not apply, misconstrued the meaning of documents and evidence available to it, and was even unable to produce details of an econometric study on which it said it had relied.

The judgment indicates the standard of empirical and theoretical reasoning that should be applied in merger cases. The commission must establish a convincing level of proof to prohibit any merger and, in this case, the CFI concluded that the commission had not proved its case to the requisite legal standard.

The CFI noted that in this case the commission's task was to demonstrate the creation (rather than the strengthening) of a collective dominant position (judgment, para 77). In this regard, the level of competition existing at the time when a transaction is notified is a decisive factor in establishing whether collective dominance had been created, and the CFI held that mergers that will not result in a significant change in the level of competition obtaining previously should be approved. It was held that the commission had failed to prove that transaction would change the structure of the market so that this leading operators would no longer act as they had in the past.

As the ECMR concerns mergers that create or strengthen a dominant position, the commission may not prohibit mergers that do not result in a dominant position but are detrimental to consumer welfare (for example, those that may lead to price increases). However, economic theory suggests that the increased market power resulting from a merger will always be detrimental to consumer welfare and a merger should only be allowed if the merged firms become more efficient as a result of the transaction and these efficiency gains are passed on to consumers.

While in this case the commission could not prove collective dominance, nevertheless the Airtours/First Choice merger would have reduced the number of major players in an already concentrated market from four to three without offering any significant efficiency gains. Arguably, therefore, the requirement to prove dominance has led to the incorrect outcome in this case, from an economic point of view.

The judgment has led to calls for a move away from the 'dominance test' and for changes to the ECMR allowing the commission to take account of efficiency gains. Other suggestions for change include the establishment of a specialised economists unit in the commission, the introduction of a structure within the commission to review proposed merger decisions independently of the team conducting the examination, and closer scrutiny by the CFI of the commission's merger decisions.[6] The *Airtours* judgment comes at a time when the commission is conducting a comprehensive review of the ECMR[7] and debate on such changes is certain to intensify in the wake of this judgment. G

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Footnotes

1 Case T-342/99, *Airtours plc v Commission of the European Communities*, judgment of 6 June 2002.

2 The European Court of Justice overturned a commission decision to approve a merger subject to conditions in joined cases C-68/94 and C-30/95, *France v Commission (Kali and Salz)* ([1998] ECR I-1375).

3 A dominant position is a position of economic strength that enables the holder to act independently of market forces, such as reactions of competitors or consumers. See case 322/81, *Michelin v Commission* ([1983] ECR 3461).

4 See, for example, Stagier and Wolak, 'Collusive pricing with capacity constraints in the presence of demand uncertainty', *Rand Journal of Economics*, 23(2), pp203-219.

5 Kali and Salz, note 2 above; case T-102/96, *Gencor v Commission* ([1999] ECR II-879).

6 In addition to the fast-track procedure for expediting procedures before the CFI, introduced on 1 February 2001, OJ [2000] L322/4.

7 Green paper on the review of council regulation (EEC) no 4064/89, COM (2001) 745/6 final.

Enforcement of EC competition law: radical changes for practitioners

In December 2002, the council adopted council regulation 1/03 on the implementation of the rules on competition laid down in articles 81 and 82 of the treaty (OJ L1 of 4 January 2003). Regulation 1/03 is to apply from 1 May 2004. It will repeal, in particular, (with one exception) council regulation no 17/62 of 6 February 1962, first regulation, implementing articles 81 and 82 of the treaty (OJ 12 of 21 February 1962). The EC Commission will, in the near future, adopt an implementing regulation and it also proposes to publish a number of notices to assist in interpreting regulation 1/03. The first of these notices will give guidance on complaints to the commission and how these complaints will be dealt with, where and how to complain and when it would be appropriate to complain to the commission. There will also be a notice on the circumstances under which undertakings can seek the advice of the commission. It is expected that these circumstances will be very narrowly defined and that intervention by the commission will be discretionary rather than mandatory. There will also be a notice on the concept of 'effect on trade' and a notice giving guidance on the interpretation of article 81(3). Finally, the 1993 notice on co-operation between national courts and the commission in applying articles 81 and 82 of the treaty (OJ C39 of 13 February 1993) and the 1997 notice on co-operation between the commission and national authorities (OJ C313 of 25 October 1997) will also be amended and replaced to give effect to the changes outlined in regulation 1/03. The commission expects to publish these notices in July of this year and will begin a public consultation debate at that time. It expects to publish the final versions later this year or in early 2004.

There are two significant and radical changes in the operation and implementation of the competition law code as laid down in regulation 1/03, the first being that national courts and competition authorities will have the power to apply article 81(3) of the *EC treaty* and the second being that the notification system established under regulation 17 will be abolished. Article 9, one of the key provisions of regulation 17, granted to the commission the sole power to declare that article 81(1) was inapplicable to restrictive practices by reason of article 81(3). This power has now been extended under regulation 1/03 to the national courts of member states and to national regulatory authorities (NRAs). Regulation 17/62 also established a compulsory notification system whereby undertakings which wished to benefit from article 81(3) were required (subject to certain exceptions) to notify their restrictive practices to the commission and exemptions could be backdated to the date of the notification. Regulation 1/03 abolishes this system of notification. These changes, which are radical reforms to the system as currently operated, were first proposed in the white paper on the modernisation of the rules implementing articles 81 and 82 of the *EC treaty*[1].

Application of article 81(3) by NRAs and national courts

Article 5 of regulation 1/03 provides that the NRAs are to have the power to apply articles 81 (including article 81(3)) and 82 of the *EC treaty*, while article 6 provides that national courts of the member states are to have similar powers. A particular problem in the past, and which will continue to pose problems until regulation 1/03 applies, is that national courts are permitted to apply article 81(1) but cannot grant an individual exemption under article 81(3). As pointed out by the commission in the white paper, the position in national courts is particularly curious in that undertakings can, in practice, bring court proceedings to a halt by lodging a notification with the commission. The national courts are also in a difficult position, given their obligations under article 10 of the treaty, not to reach a conclusion that would be inconsistent with that of the commission. The position of national courts varies according to whether an agreement is one that must be notified in order to benefit from individual exemption or whether it is one that can be exempted whether it has been notified or not.

The commission had frequently expressed its wish for more centralised application by both national authorities and national courts. In particular, in its 1983 competition report, it stressed the role which national legal channels could play in establishing infringements of the Community competition rules. It also urged decentralisation in its notice on co-operation between national courts and the commission and its notice on co-operation between the EC Commission and the national authorities. It is expected that the new notices on co-operation between the commission and the NRAs and the commission and national courts will deal in great detail with the issue of co-operation under the new system. However, regulation 1/03 itself also deals with these vital co-operation issues.

Chapter IV of regulation 1/03 deals with a number of interface issues between the various bodies with competition law competences. This question of the dynamic between each of these bodies is not an easy one, given in particular the shared competences of the bodies involved and the parallel application of EC and national competition laws in certain circumstances under article 3 of regulation 1/03. In a previous version of regulation 1/03 and, in particular, of article 3 thereof, it was proposed that where there was an 'effect on trade between member states', only EC competition law would apply to the exclusion of national competition law codes. With the parallel application of EC and national laws, the interface issues between the various bodies is intensified. In addition, given the multiplicity of bodies with the power to apply articles 81 and 82, serious issues arise in terms of the body that is best placed to investigate the anti-competitive effects of any given arrangement. At article 13, regulation 1/03 attempts to resolve how cases will be allocated as between the EC Commission and the NRAs.

Article 13 of regulation 1/03 provides that where NRAs of two or more member states have received a complaint or are acting on their own initiative under article 81 or article 82 against the same agreement, decision of an association or practice, the fact that one authority is dealing with the case will be sufficient grounds for the others to suspend the proceedings before them or to reject the complaint. The commission can also reject a complaint on the grounds that a competition authority of a member state is dealing with the case. Article 13 goes on to provide that where a competition authority of a member state or the commission has received a complaint which has already been dealt with by another competition authority, it may reject it.

The question also arises of the dynamics between the national courts and the commission. Article 15 of regulation 1/03 outlines the new provisions in relation to the co-operation between the commission and national courts. It provides that in proceedings for the application of articles 81 or 82 that the courts of the member states may ask the commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules. The article goes on to outline the circumstances in which NRAs and/or the commission can submit oral or written observations to national courts.

The commission noted in the white paper that there was a need for flexible and rapid mechanisms for the exchange of information between NRAs, national courts and the EC Commission. This is essential for the effective operation of the system under regulation 1/03. Articles 11 and 12 outline a framework for this exchange of information. In particular, article 11(3) provides that the competition authorities of the member states are to inform the commission in writing before, (or without delay after), commencing the first formal investigative measure in any particular case. This information may also be made available to NRAs of other member states. In addition, the NRAs are obliged to inform the commission before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption. This information may also be brought to the attention of the NRAs of other member states. Article 12 outlines the provisions on the exchange of information provided by undertakings as between the commission and as between the NRAs. Article 12(1) provides that for the purpose of applying articles 81 and 82, the commission and the NRAs are to have the power to provide one another with and use in evidence, any matter of law or of fact including confidential information. This is going to raise difficulties in terms of confidentiality, given the multiplicity of recipients of information that is given in confidence.

The new directly-applicable exception system should produce benefits in terms of the refocusing of the work of the commission and in terms of radically reducing its workload in particular areas. However, it will be difficult to achieve consistency and legal certainty for clients in such a system and a lot will depend on the manner in which the system is operated and, in addition, the manner in which all of the relevant bodies co-operate. Once the system is introduced, clients will have to be made aware of the difficulties with the new system, and the possible increase in costs in terms of complying with it.

Abolition of the notification system

Under article 2 of regulation 17/62, it is possible for undertakings to apply to the commission for a negative clearance whereby the commission is able to certify that, on the basis of the facts in its possession, there are no grounds under article 81(1) or article 86 for action on its part in respect of an agreement, decision or practice. Under article 4(1) of regulation 17, it is provided that agreements, decisions and concerted practices of the kind described in article 81(1), which came into force after the entry into force of regulation 17 and in respect of which the parties seek the application of article 81(3), have to be notified to the commission. Until they had been notified, no decision on the application of article 81(3) can be taken. Article 4(2) of regulation 17 outlines the exceptions to this rule.

Regulation 1/03 does not provide for a notification/authorisation system. The position in the new *Competition Act, 2002* in Ireland is consistent with this position. The *Competition Act, 2002* introduced a new licensing scheme. Under this new system, the Irish Competition Authority no longer has the power to grant an individual certificate to an individual agreement and, therefore, it no longer has the power to declare that a specific agreement does not infringe section 4(1) of the *Competition Act, 2002*. In addition, it no longer has the power to adopt an individual licence for an individual agreement. It is likely that the decision to abolish the notification system at a national level was taken as a pre-emptive step so as to bring Irish law into line with proposed EC competition law.

In the white paper, the commission noted that the authorisation/notification system resulted in undertakings systematically notifying their restrictive practices to the commission which, with its limited administrative resources, was very soon faced with the impossibility of dealing by formal decision with the thousands of cases which had been submitted to it. At paragraph 25 of the white paper, the commission noted that as early as 1967 it was faced with a mass of over 37,000 cases that had accumulated since the entry into force of regulation 17 four years earlier. The commission goes on to note in the white paper that it was, therefore, necessary to make certain adjustments to the system in order to limit individual notifications, speed up the processing of applications for authorisation and encourage complainants to turn to their own national authorities or courts. It did this in a number of ways. In its first formal decision, decision 64/344 *Grossfillex-Fillistorf* (OJ L 64 of 10 June 1964 at page 1426), the commission introduced the concept of 'appreciable effect on competition', which allowed minor cases to be excluded from the scope of article 81(1). In 1970, it published a notice for guidance on the topic and this notice was updated on a number of occasions, most recently in 1997 (OJ C 372 of 9 December 1997 on page 13). The commission also introduced a number of other notices starting in 1962 in order to clarify the conditions under which restrictive practices would not normally have as their object or effect the restriction of competition and, therefore, would not be caught by article 81(1). A notice was produced on exclusive dealing contracts with commercial agents, on agreements, decisions and concerted practices in the field of cooperation between enterprises, on the assessment of certain sub-contracting agreements in relation to article 81(1) and on the assessment of co-operative joint ventures in 1993. The commission also introduced a number of block exemptions. The council, under article 83 of the treaty, adopted a number of enabling regulations that empowered the commission to declare the prohibition in article 81(1) inapplicable to certain categories of agreements.[2] Finally, the commission also introduced the concept of the comfort letter: these letters informed the undertaking that the commission considered that, on the basis of the information in its possession, no further action on the case should be taken and that it intended to close its file. The introduction of the comfort letter helped to speed up the process considerably as it eliminated the various procedural and publication requirements of formal decisions.

In paragraphs 76 to 81 of the white paper, the commission outlines the reasoning behind the abolition of the notification system. In the first place, it considers that the requirement that undertakings wishing to invoke article 81(3) are obliged to notify their restrictive practices acts as a curb on their commercial strategy and represents a considerable cost. In a system

where there was no need to notify and where there was a directly applicable exemption system, the commission considers that the position of undertakings would be strengthened were they to seek the enforcement of their restrictive practices in courts, as they would be able to plead that article 81(3) covered their restrictive practices. The commission also noted that the notification system proved useful as long as the interpretation of article 81(3) was uncertain. Finally, the commission also considers that the abolition of the notification system will improve legal certainty. It is noteworthy that, in terms of legal certainty, the EC Commission has provided somewhat of a safety net for undertakings. In recital 14 of regulation 1/03, it outlines the fact that in exceptional cases (such as those involving 'the public interest of the Community'), the commission can adopt decisions of a declaratory nature finding that the prohibition in article 81 or article 82 of the treaty does not apply. These declarations will be issued with a view to clarifying the law and ensuring its consistent application throughout the Community, with a particular focus on new types of agreements or practices which have not been settled in the existing case law and administrative practice.

The commission hopes that the abolition of the notification system will lead to the concentration by it of its resources on investigating cases arising out of complaints or taken up on its own initiative. Its powers of investigation have also been increased in the new system under regulation 1/03 so as to take into account this new focus. For practitioners, the abolition of the notification system means that we will have increased responsibilities in terms of assessing the compatibility of agreements and practices with the competition law code. It will mean that solicitors in Ireland, with the assistance of economists, will need to make the final call on any particular arrangement.

The changes that have been introduced under the new system will radically alter the manner in which practitioners in the area deal with competition legislation. It is important in these circumstances that legal certainty and clarity be provided in terms of regulation 1/03. It will be interesting, in this regard, to see the new notices which the commission intends to publish mid-year as there are quite a number of areas in regulation 1/03 which require clarification. Because of the increased responsibilities for practitioners, the need for certainty and clarity is particularly acute. NRAs, courts, judges and lawyers throughout the EU will also need to come to grips with the competition law code in a different manner, and competition authorities themselves will need to put in place structures that will be able to deal with the new rules. The manner in which the rules and the exchange processes are operated will be key to the smooth operation of the new system. G

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

Footnotes

1 Commission Programme no 99/027, COM (1999) 1001 final of 28th April, 1999

2 See, for example, commission regulation 2790/1999 of 22 December 1999 on the application of article 81(3) of the treaty to categories of vertical agreements and concerted practices – OJ no L336 of 29 December 1999.

Recent developments in European law

COMMERCIAL LAW

The council has agreed a directive for the distance marketing to consumers of financial services. It establishes common rules for selling contracts for credit cards, investment funds, pension plans and other financial services to consumers by telephone, facsimile or through the Internet. The directive prohibits abusive marketing practices seeking to oblige consumers to buy a service, which they have not sought ('inertia selling'). The directive also contains rules to restrict unsolicited telephone calls ('cold calling') or unsolicited e-mails ('spamming'). It provides for an obligation to provide comprehensive information before a contract is concluded. Consumers will have a right to withdraw from a contract except where there is a risk of price fluctuations in the financial market.

EMPLOYMENT

Transfer of undertakings

Case C-164/00 *Katia Beckmann v Dynamco Whicheloe Macfarlane Ltd*, 4 June 2002. Ms Beckmann was an employee of Dynamco Whicheloe Macfarlane (DWM). She had been an employee of the National Health Service and the operation of which she was part had been taken over by DWM. When she was made redundant, she claimed an early retirement pension and other benefits. This was a package that NHS employees had been entitled to. DWM did not pay her any of these benefits. The English High Court referred the matter to the ECJ, asking whether the benefits in question should have been paid due to the *Transfer of undertakings directive* or whether they came within an exception in article 3(3) of that directive for old-age, invalidity or survivors' benefit. The ECJ held that the exception only covered benefits which were paid to an employee when he reached the end of his normal working life as laid down by the structure of the pension scheme in question. It did not cover benefits paid on redundancy even if classified as old-age benefits and calculated by reference to the rules for calculating normal pension benefits. The English court had also sought guidance on whether such benefits were binding on the transferee if they derived from secondary legislation. The ECJ held that all obligations arising from a contract of employment, an employment relationship or a collective agreement were transferred, regardless of whether these obligations are derived from secondary legislation or are implemented by such legislation.

LITIGATION

Brussels Convention

Re Cover Europe Ltd, English High Court (Chancery Division), 26 February 2002. Cover Europe Ltd carried on business as an insurance company in Italy. It entered members' voluntary liquidation in England in February 1999, when a liquidator was appointed. Kvaerner was one of the company's creditors. It brought proceedings in England arguing that the liquidator should admit the debts owing to it in the liquidation. An Italian branch of the company had guaranteed a sum of money to secure the performance by an Italian company (Athanor) of its payment obligation. This company defaulted and Kvaerner argued that Cover Europe was liable under the terms of the guarantee. Athanor disputed the claim and argued that Cover Europe should not have to pay. Separate proceedings were started in Italy seeking a declaration that the guarantee be declared null and void and of no legal effect. The English proceedings were issued and served on 13 August 2001. The Italian proceedings were issued on 27 August 2001, served on Athanor on 8 September and on Cover Europe on 25 September.

The court held that the dispute came within the terms of the *Brussels convention* and that the article 1 bankruptcy exception was not applicable. Article 1 is confined to 'proceedings relating to the winding-up of insolvent companies'. Cover Europe was in voluntary liquidation and was solvent, even the sum at issue was paid. This was consistent with the decision in *UBS AG v Omni Holding AG (in liquidation)* ([1999] 2 All ER (Comm) 686). In that case, Rimer J had held in interpreting the identical provision in the *Lugano Convention* that for the exception to apply, the claim must be derived directly from the winding-up. He expressed the view that a claim by a liquidator to recover debts would not be within the article 1 exception. On the same basis, a claim by a creditor challenging a liquidator's decision about payment of claims is not one that derives directly from the winding-up. It is one that was capable of arising quite apart from such winding up or the insolvency.

The next question was the possible application of articles 21 and 22 of the convention. Where two courts are seised of the same matter, the court second seised is to decline jurisdiction. The court examined whether the two cases concerned the same cause of action and involved the same parties. The English proceedings involved Kvaerner and the liquidator, whereas the Italian proceedings involved the company, Athanor and Kvaerner. The Italian proceedings sought a declaration as to the invalidity of the guarantee provided to Kvaerner, whereas the English proceedings concerned the proof of debt submitted by Kvaerner in the voluntary liquidation. The court referred to the test used in case C-406/92 *The Tatry* ([1999] QB 515) for determining 'the same cause of action'. In that case, the court had held that the 'cause of action' comprises the facts and the rule of law relied on as the basis of the action. It held that two actions have the same object when the first seeks a declaration that the defendant is not liable for damage as claimed by the defendants, and the second seeks to have the plaintiff in the first action held liable for causing loss and ordered to pay damages. The court followed that decision, holding that there was no material distinction between the relief sought in the Italian and English proceedings. They both related to the admission of the debt based on the guarantee. The court then turned to the question of whether the case involved the same parties. The English proceedings were between Kvaerner and the liquidator, whereas the Italian proceedings involved the company, the principal debtor, Athanor and Kvaerner. For convention purposes, the court considered that in court actions the liquidator acting in the name of the company and the litigator acting as liquidator should be considered as the same party. Therefore, the two sets of proceedings did fall within the remit of article 21. The remaining question was whether the English or the Italian courts were first seised of the matter. The English courts were first seised due to the earlier service of the originating application on the liquidator.

Case C-256/00 *Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co KG (WABAG), Planungs-und Forschungsgesellschaft Dipl Ing W Kretzschmar GmbH & CO KG (Plafog)*, 19 February 2002. WABAG (part of the Deutsche Babcock group) and Besix signed an agreement in Brussels in French. In this agreement, they undertook to submit a joint tender for a water supply project in the Cameroon and if their tender was accepted to perform the contract jointly. Under the agreement they were not to commit themselves to other partners. However, Plafog, another member of the Deutsche Babcock group,

had put in a tender in association with a Finnish undertaking. When all the tenders had been assessed, it was decided to split the contract and to entrust different lots to different undertakings. One lot was awarded to the group, which included Plafog, while the WAGAG/Besix group did not win any part of the contract. Besix took the view that the exclusivity and non-competition clauses in the agreement had been breached and brought an action in damages against WABAG and Plafog in the Belgian courts. The Belgian court held that it had jurisdiction under article 5(1) of the *Brussels convention*. Looking to Belgian rules of private international law, the applicable law was that of the state with which the contract had the closest connection. The obligation in question was the exclusivity undertaking that should have been performed in Belgium as a corollary to the preparation of the joint tender. At first instance, the action was dismissed as unfounded on the merits of the case. Besix appealed the case to the Belgian Appeals Court. WBAG and Plafog argued that only the German courts had jurisdiction to hear the case. The Court of Appeal referred a number of questions to the ECJ. It asked whether the exclusivity undertaking was to be honoured in Belgium as the negotiations took place in Germany with a Finnish undertaking. The exclusivity obligation was applicable in any place whatever in the world, and the place where it was breached did not matter. Thus, there were a large number of possible places of performance and the court asked whether a defendant could be sued in one of them. The ECJ held that the relevant obligation for the purposes of article 5(1) was the exclusivity undertaking. The parties did not designate the place of performance of this obligation or any applicable law or any jurisdiction in which disputes were to be heard. The ECJ said that it was essential to avoid a situation where a number of courts had jurisdiction in relation to the one contract to avoid the risk of irreconcilable judgments. A single place of performance for the obligation in question had to be identified. In principle, this would be the place having the closest connection between the dispute and the court having jurisdiction. Application of the ECJ's cases, which looked to the law governing the obligation in question, to identify the place of performance did not enable that result to be achieved. In a case like this, there was a risk that a claimant would be able to choose the place of performance which he considered to be most favourable to his interests. Thus, that interpretation did not make it possible to identify the court most qualified territorially to determine the case. It was also likely to reduce the predictability of the competent court so that it was incompatible with the principle of legal certainty. It was not possible to give an autonomous definition of the place of performance in a situation such as this without calling into question earlier decisions of the ECJ. The place of performance of the obligation in question could not be identified on the basis of factual considerations – the specific circumstances demonstrating a particularly close connection between the case and a contracting state. In these circumstances, article 5(1) would appear to be inapplicable. An obligation not to do something was applicable without any geographical limit and had to be honoured throughout the world and was not capable of being identified with a specific place or linked to a court which was particularly suited to hear and determine the dispute relating to that obligation. Thus, jurisdiction fell to be determined by article 2, which provided a certain and reliable criterion. That was more in keeping with the scheme of the convention and the rationale of article 5(1). Article 5(1) is a derogation from the general jurisdictional rule in article 2 that a defendant should be sued in the court of the state in which he is domiciled.

Derogations must not give rise to an interpretation going beyond the cases expressly envisaged by the convention. Otherwise, the general principle laid down in article 2 would be undermined and a claimant might be able to affect the choice of a court unforeseeable for a defendant domiciled in a contracting state. G

School's out
Law Society president Geraldine Clarke and director general Ken Murphy with graduates at the parchment ceremony in December

Sligo smiles
Pictured at the November meeting of the Sligo Bar Association were (*seated, left to right*): Niamh McDermott; Law Society president Geraldine Clarke; director general Ken Murphy; Michelle O'Boyle, president of Sligo and County Solicitors' Association; and Fiona McGuire, together with members of the bar association

CIA dinner
Law Society president Geraldine Clarke pictured with James Bridgeman, chairman of the Irish branch of the Chartered Institute of Arbitrators, at the annual dinner of the Irish branch in the Royal St George Yacht Club, Dun Laoghaire

Roscommon calling
Roscommon Bar Association AGM, November 2002
(*Front, left to right*) Paul Wynne, Law Society director general Ken Murphy and and president Geraldine Clarke, president of the bar association Terence O'Keefe, secretary Brian O'Connor and Harry Wynne
(*Second row, left to right*) Declan O'Callaghan, Michael O'Dowd, Rebecca Finnerty, Mary Daly, Brid Millar, Dermot M McDermott, Marie Conry and John V Kelly
(*Back row, left to right*) John Duggan, Padraig Kelly, Con Harlow, Sean Mahon, Johathan Wynne, Niamh Mahon, John Sweeney and Kieran Madigan

Handful of treasure
Judith Lawless, a partner in McCann FitzGerald's banking and financial services department, pictured at her recent appointment as president of the Irish Association of Corporate Treasurers with outgoing president Derek Browne of Arnotts. Lawless is the first lawyer in private practice to hold this position

Justice Media Awards ceremony

Pictured with Law Society director general Ken Murphy and immediate past president Elma Lynch at the *Justice Media Awards* ceremony in Blackhall Place in December 2002: Margaret Rossiter, columist with the *Nationalist* newspaper in Clonmel, who won the overall award and also the non-daily newspaper category; Angela Daly and Sinéad McCarthy from RTÉ's *Prime Time*, winners of the television category; Barry O'Halloran of *Business and Finance* magazine, winner of the magazine category; Vincent Power of the *Evening Echo* in Cork, winner of the daily newspapers category; and Paul Cullen, who took the award in the books category, for *With a little help from my friends*.

Vincent Power

Angela Daly and Sinéad McCarthy

Margaret Rossiter

Barry O'Halloran

Paul Cullen

Cats that got the cream
President Geraldine Clarke and director general Ken Murphy recently visited the Kilkenny Solicitors' Association. Pictured are (*back row, left to right*) Kieran Boland, Seamas Brennan, David Dunne, Eugene O'Sullivan and John Lanigan; (*front row, left to right*) Caroline Roche, honourary secretary Karl Johnston, Geraldine Clarke, association president Martin Crotty, Ken Murphy, Mary Molloy and Sarah Breslin

Looking back on the track
Pictured at the launch of the Law Reform Commission's latest consultation paper on the judicial review procedure are (*left to right*): commissioner Patricia Rickard-Clarke; attorney general Rory Brady; and Dr Hilary Delaney

Mars a-Tax

Students pictured at the *Diploma in property tax* conferring ceremony in October. Also in the photo are: (*front row, left to right*) Alan Moore of Tax World, sponsors of the DPT prize; director general Ken Murphy; Geraldine Kearney, highest mark and winner of the DPT prize; John O'Connor, chairman of the society's Taxation Committee; Council member Philip Joyce; Sylvia McNeece, the society's legal development manager (*back row, second from left*); and Geoffrey Shannon, deputy director of education (*back row, far right*)

A good night for a fright

Mayo Solicitors' Bar Association held its annual dinner dance on Friday 13 December. Pictured at the event were (*seated, left to right*): Joe Donnelly, president of the Law Society of Northern Ireland; Jackie Durcan, president of Mayo Solicitors' Bar Association; Law Society president Geraldine Clarke; James McCourt, president of the Dublin Solicitors' Bar Association; (*standing*) Peter Campbell, chairman of the Belfast Solicitors' Association; Jarlath McInerney, Galway Solicitors' Bar Association; Jackie Prendergast, Galway; Mr Justice Michael Peart; and Bernard Brennan, retired District Court judge

Wonder Woman

Pictured with Law Society president Geraldine Clarke and director general Ken Murphy is Lisa Smyth, who was awarded the Overend scholarship for 2001 (best overall performance in both sittings of the final exam – first part)

Stealing the show

Pictured at the recent continuing legal education seminar on *The Criminal Justice (Theft and Fraud Offences) Act, 2001* were (*left to right*): Paul Anthony McDermott BL; Barry Donoghue, deputy director of public prosecutions; Barbara Joyce, Law Society; Mr Justice Paul Carney; and Robert Eagar, Garrett Sheehan & Company

Oh my darling Clementina

One of the best loved and most familiar faces around Blackhall Place, Tina Flanagan, at a special reception to mark her retirement. Pictured are (*left to right*): Cillian MacDomhnaill, Áine Ryan, Tina Flanagan, Ken Murphy and Liam Delaney

French property
Pictured at a recent seminar on buying property in France, organised by Dublin solicitors LK Shields, were (*from left to right*): Susan Hardie, Head of French Property, Triplet & Associés, Philip Jenkinson, Partner, Triplet & Associés, and Emmet Scully and Nicola Palmer, partners at LK Shields

Book of the damned
Marking the publication of *Abuse of process: unjust and improper conduct of civil litigation* (FirstLaw, 2002) at the offices of McCann FitzGerald in November were (*left to right*): Ronan Molony, chairman of McCann Fitzgerald; the author Desmond Shiels; and Chief Justice Ronan Keane, who wrote the foreword to the book.
The book is the first to be written in Ireland or the UK on this rapidly developing area of law

What do you propose?
At a recent meeting of the Tipperary Bar Association in Thurles were (*seated, from left*) outgoing president Brendan Hyland, Law Society president Geraldine Clarke, director general Ken Murphy, and incoming president Peter Reilly

COURT AND COURT OFFICERS ACT 1995 – 2002
JUDICIAL APPOINTMENTS ADVISORY BOARD

APPOINTMENT OF ORDINARY JUDGES OF THE:
SUPREME COURT
HIGH COURT
CIRCUIT COURT
DISTRICT COURT

Notice is hereby given that applications are invited from practising barristers and solicitors who are eligible for appointment to the Office of Ordinary Judge of the Supreme Court, the High Court, the Circuit Court and the District Court.

Those eligible for appointment and who wish to be considered for appointment should apply in writing to the Secretary, Judicial Appointments Advisory Board, Phoenix House, 15/24 Phoenix Street North, Smithfield, Dublin 7, for a copy of the relevant application form.

It should be noted that this advertisement for appointment to Judicial Office applies to vacancies that may arise in the Office of Ordinary Judge of the Supreme Court, the High Court, the Circuit Court and the District Court during the period to the 31st December 2003. Applications received will be considered by the Board during this period unless and until the applicant signifies in writing to the Board that the application should be withdrawn.

Applicants may, at the discretion of the Board, be required to attend for interview. Canvassing is prohibited.

BRENDAN RYAN B.L., SECRETARY
JUDICIAL APPOINTMENTS ADVISORY BOARD

LOST LAND CERTIFICATES

Registration of Title Act, 1964

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

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

(Published 7 February 2003)

Regd owners: David Denieffe and Denise Noonan; folio: 19062F; lands: 7 The Cove, Poachers Gate and barony of Carlow; **Co Carlow**

Regd owner: Patrick I Delaney (deceased) and Kathleen Delaney; folio: 83F; lands: Carlow, barony of Carlow; **Co Carlow**

Regd owner: Maura McDermott, Killadrean, Loughduff, Co Cavan; folio: 20307; lands: Mullaghoran; area: 12.5 acres; **Co Cavan**

Regd owners: Patrick and Mary Teresa Haugh; folio: 24939; lands: townland of Kilcloher and Carrowmore South and barony of Moyarta and Ibrickan; area: 2 acres, 4 roods; **Co Clare**

Regd owner: Felix Barrett; folio: 22612; lands: a plot of ground being part of the townland of Ballygirriha situate in the barony of Muskerry East; **Co Cork**

Regd owners: John Barton and Hannah Barton; folio: 5004; lands: a plot of ground being part of the lands of Croom (Midleton) and barony of Barrymore; **Co Cork**

Regd owner: William Michael Carter; folio: 11821F; lands: a plot of ground being part of the townland of Ballycureen and barony of Cork; **Co Cork**

Regd owner: Industrial Development Authority; folio: 24825F; lands: A plot of ground being part of the townland of Foxhole situate in the barony of Imokily; **Co Cork**

Regd owner: Kathleen Lenihan; folio: 57882; lands: a plot of ground being part of the townland of Dromrahan and barony of Fermoy; **Co Cork**

Regd owner: Daniel J O'Donovan; folio: 512; lands: a plot of ground being part of the townland of Knockskagh and barony of Carbery East; **Co Cork**

Regd owner: Joan Sheehan; folio: 16254F; lands: a plot of ground being part of the townland of Glashaboy East and barony of Barrymore; **Co Cork**

Regd owners: Alex Bailey and Jean Bailey; folio: 53743F; lands: a plot of ground being part of the townland of Ballard and barony of Bear; **Co Cork**

Regd owner: Joseph O'Driscoll; folio: 27331; lands: a plot of ground being part of the townland of Eyeries and barony of Bear; **Co Cork**

Regd owner: Joseph O'Driscoll; folio: 28118; lands: a plot of ground being part of the townland of Eyeries and barony of Bear in the county of Cork; **Co Cork**

Regd owner: James Cunningham, Springfield, Muff; folio: 8674; lands: Drumskellan, Muff, Co Donegal; area: 47a, 1r, 35p; **Co Donegal**

Regd owner: Margaret Simpson, Tulnaree, Carndonagh, Co Donegal; folio: 6645F; lands: Churchland Quarters; area: 0.781 acres; **Co Donegal**

Regd owners: Columbia Diver and Patrick Gildea, Drimaha, Ardara, Co Donegal; folio: 17559; lands: Sandfield, Sandfield and Magheramore; area: 11.5312 acres, 53.6875 acres and 5.5625 acres; **Co Donegal**

Regd owner: William C Mallace, Bin, Rathmullin, Co Donegal; folio: 6120F; lands: Bin; area: 0.325 acres; **Co Donegal**

Regd owner: Huntstown Community Centre Limited; folio: DN91467F; lands: property situate in the townland of Huntstown and barony of Castleknock; **Co Dublin**

Regd owner: Alan Bradley; folio: 86114F; lands: property situated in the townland of Carrickmines Little in the barony of Rathdown; **Co Dublin**

Regd owners: Mark Crosbie and Margaret Furlong; folio: DN68774F; lands: property known as 39 Belton Park Gardens and situate on the north side of the said gardens in the parish of Artaine and district of Clonturk; **Co Dublin**

Regd owner: Michael Devoy; folio: DN17674F; lands: property known as 2 Drumfinn Park situate in the parish of Palmerstown and district of Ballyfermot; **Co Dublin**

Regd owner: Karen Doogan; folio: DN69840L; lands: property known as 86 Saint Attracta Road situate in the parish of Grangegorman and district of North Central; **Co Dublin**

Regd owners: Thomas and Ellen O'Connor; folio: DN56715L; lands: property situate in the townland of Oldbawn and barony of Uppercross; **Co Dublin**

Regd owners: Thomas and Ayda Lundon; folio: DN 70805F; lands: property situate in the townland of Murphystown and barony of Rathdown; **Co Dublin**

Regd owners: James and Catherine Ritchie; folio: DN62590L; lands: property situate in the townland of Oldbawn and barony of Uppercross; **Co Dublin**

Regd owners: Joseph and Jennifer Murphy; folio: DN9544F; lands: property situate in the townland of Priorswood and barony of Coolock; **Co Dublin**

Regd owner: Brendan Kelly; folio: DN19126L; lands: a plot of ground known as 185 Alderwood Grove situate in the townland of Tallaght and barony of Uppercross; **Co Dublin**

Regd owner: Michael Hoey; folio: DN5429; lands: property situate in the townland of Burrow and barony of Uppercross; **Co Dublin**

Regd owner: Maureen Levey; folio: DN51485L; lands: property situate in the townland of Haroldsgrange and barony of Rathdown; **Co Dublin**

Regd owner: Monica Phelan; folio: DN3399; lands: property no 1 situate in the townland of Bettyville and barony of Balrothery East and property no 2 situate in the townland of Parnelstown and barony of Balrothery East; **Co Dublin**

Regd owner: Coldchon Limited; folio: 50909; lands: townland of Carrowmoneash; area: 2a, 2r, 14-1/2p; **Co Galway**

Regd owners: Tony Giblin and Joanne Butler, c/o Giblins Hotel, Eyre Square, Galway; folio: 27433F; lands: townland of Ballynacloghy and barony of Dunkellin; area: 0.3702 hectares; **Co Galway**

Regd owner: Kathleen Livingstone; folio: GY55685; lands: townland of Cloonnacartan and barony of Ballynahinch; area: 0.5336 hectares; **Co Galway**

Regd owner: William Scarry; folio: 33433; lands: Killeely More and Kilcolgan and barony of Dunkellin; area: 11.2135 hectares; **Co Galway**

Regd owner: Michael Conneff; folio: 4879F; lands: townlands of Kilmurry and Betaghstown and barony of Clane; **Co Kildare**

Regd owner: Green Isle Foods (Portumna) Ltd; folio: 20579F; lands: townland of Monread North and barony of Naas North; **Co Kildare**

Regd owner: James Kelly; folio: 780; lands: townland of Sheriffhill and barony of Kilkea and Moone; **Co Kildare**

Regd owner: Christopher King; folio: 910; lands: townland of Ballyadams and barony of Narragh and Reban East; **Co Kildare**

Regd owners: Daniel and Eileen Power; folio: 1182L; lands: townland of Leixlip and barony of North Salt; **Co Kildare**

Regd owner: Noel Furlong; folio: 16330F; lands: townland of Ballysax Great and barony of Offaly East; **Co Kildare**

Regd owner: Desmond Gee; folios: 10789 and 10822; lands: Ballymaddock and barony of Cullenagh; **Co Laois**

Regd owner: Anthony Mulhall; folio: 3879F; lands: Crubeen and barony of Cullenagh; **Co Laois**

Regd owner: Mary Ahern; folio: 27497; lands: townland of Carheeny and barony of Kenry; **Co Limerick**

Regd owners: Thomas and Maureen Frawley; folio: 17009; lands: townland of Newcastle and barony of Clanwilliam; **Co Limerick**

Regd owners: Mary Elizabeth (Ann) Sharpe and Richard Anthony Walsh; folio: Mayo 10011F; lands: townland of Rathmeel and barony of Tireragh; area: 0.488 acres; **Co Mayo**

Regd owners: Paul and Susan Donoghue; folio: 16904F; lands: Castlefarm; **Co Meath**

Regd owner: Irish Shell Ltd, Irish Shell House, 13-16 Fleet Street, Dublin; folios: 17011,14529; lands: Rossan; area: 0.4125, 0.3375; **Co Meath**

Regd owner: Dominic B Caine, Wilkinstown House, Navan, Co Meath; folio: 17887F; lands: Wilkinstown; area: 5.130 acres; **Co Meath**

Regd owner: Pierce Nevin, Kellystown, Slane, Co Meath; folio: 1942; lands: Kellystown, Monknewtown; area: 69.962 acres, 1 acre; **Co Meath**

Regd owner: Patrick Coyle, Naghill, Co Monaghan; folio: 13816; lands: Naghill; area: 15.281 acres; **Co Monaghan**

Regd owner: Isobel Catherine Dixon, c/o Barry Hickey & Henderson, Solicitors, The Diamond, Clones, Co Monaghan; folio: 2518; lands: Carn; **Co Monaghan**

Regd owner: Brian Oliver Plunkett Carroll, Cavancreevy, Castleshane, Co Monaghan; folio: 9730; lands: Cavancreevy; area: 13.275 acres; **Co Monaghan**

Regd owner: James Kielty (deceased) and Margaret Kielty; folio: 20290; lands: townland of Ballymote and barony of Corran; area: 0.2530 hectares; **Co Sligo**

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

Regd owner: O'Dwyer and Sons; folio: 8539F; lands: townland of Fawnagowan and barony of Clanwilliam; **Co Tipperary**.

Regd owner: John G (orse Sean) Barron; folio: 1750; lands: townland of Ballynamona and barony of Decies-within-Drum; **Co Waterford**

Regd owner: James Hurley; folio: 11922; lands: a plot of ground being part of the townland of Toortane and barony of Cashmore and Cashbride; **Co Waterford**

Regd owner: Edmond Crotty; folio: 855; lands: a plot of ground being part of the townland of Ballyscanlan and barony of Middlethird; **Co Waterford**

Regd owner: William Cleary, 1 Blackhall Street, Mullingar, Co Westmeath; folio: 19730; lands: Mullingar; area: 0.1375 acres; **Co Westmeath**

Regd owner: Mary Bridget Leech, Milltownfass, Mullingar, Co Westmeath; folio: 5087; lands: Griffinstown; area: 131.737 acres; **Co Westmeath**

Regd owners: Patrick J Logan, Carricknaghten, Athlone, Co Roscommon; Patrick Logan, Carricknaghten, Athlone, Co Westmeath; Patrick Logan ors Patrick J Logan, Golden Island, Athlone, Co Westmeath; folio: 19947; lands: Golden Island, Creggan Lower; area: 7.575 acres, 7.50 acres and 5.368 acres; **Co Westmeath**

Regd owner: Mary Potterton, Craddenstown House, Raharney, Co Westmeath; folio: 1479; land: Craddanstown; area: 4.2589 hectares; **Co Westmeath**

Regd owner: Nuala Barron; folio: 9979F; lands: Enniscorthy and barony of Scarawalsh; **Co Wexford**

Regd owner: Liam McCoy; folio: 3373F; lands: townland of Ballybrew and barony of Rathdown; **Co Wicklow**

WILLS

Baker, Joseph Edward (deceased), late of 20 Bracken Gardens, North Circular Road, Limerick. 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.securemail.ie*

Byrne, Christopher (deceased), late of 158 Quarry Road, Cabra, Dublin 7, who died on 21 June 2001. Would any person having knowledge of the whereabouts of a will made by the above named deceased, please contact Christopher Byrne, 83 Claremont Crescent, Glasnevin, Dublin 9, tel: 01 8301979, mobile: 087 6615536

Carolan, James (deceased), late of Balrath, Navan, County Meath, who died on 10 June 2002 at Rathfeigh Nursing Home, Co Meath. Would any person having any knowledge of a will made by the above named deceased, please contact Oliver Shanley & Company, Solicitors, 11 Bridge Street, Navan, Co Meath, tel: 046 9023333 or fax: 046 9029937

Cotter, John, (deceased), late of Laurelville, Ballinlough Road, Cork, who died on 23 October 2002. Would any person having any knowledge of a will made by the above named deceased, please contact Harry McCullagh & Co, Solicitors, The Mill House, St Patrick's Terrace, Douglas, Cork

Dunne, John (deceased), late of Ballypreacus, Bunclody, Co Wexford. Would any person having knowledge of a will made by the above named deceased who died on 21 October 2002, please contact Peter G Crean & Co, Solicitors, Estate House, Castle Hill, Enniscorthy, Co Wexford, tel: 054 34500, fax: 054 34257, e-mail: *petercrean@securemail.ie*

Healy, Jeremiah Gerard (Gerry) (deceased), late of 147 Roselawn Road, Castleknock, Dublin 15. Would any person having any knowledge of a will made by the above named deceased who died on 8 November 2002 at James Connolly Memorial Hospital, please contact Frank Ward & Co, Solicitors, Equity House, Upper Ormond Quay, Dublin 7, tel: 01 8732199 or 01 8733484

Mannion, Frank (otherwise Laurence or Larry) (deceased), late of 54 Idrone Park, Templeogue, Dublin 6, who died 28 February 2000. Would any person having knowledge as to the whereabouts of a will of the above named deceased, please contact Brendan Irwin & Co, Solicitors, 6 Garden Vale, Athlone, Co Westmeath, tel: 0902 74243, fax: 0902 72516 or e-mail: *brendanirwin@eircom.net*, reference: G/153

O'Beirne, Derek (deceased), late of 179 Lower Rathmines Road, Dublin 6, who died 1 August 2002. Would any person having knowledge of a will made by the above named deceased, please contact Cullen & Cullen, Solicitors, 86/88 Tyrconnell Road, Inchicore, Dublin 8, tel: 01 4536114, fax: 01 4535498, e-mail: *cullmar@securemail.ie*

O'Brien, Patrick, late of Sandyhills, Dunlavin, Co Wicklow, who died on 19 September 1999, **O' Brien, John**, late of Sandyhills, Dunlavin, Co Wicklow, who died on 5 November 1999, **O'Brien, James**, late of Sandyhills, Dunlavin, Co Wicklow, who died on 4 December 2002. Would any person having knowledge of wills made by the above named deceased, please contact Reidy Stafford, Solicitors, Newbridge, Co Kildare, tel: 045 432188, fax: 045 433019

Phelan, Richard (deceased), late of 60 Dunluce Road, Clontarf, Dublin 3, who died on 22 January 2002, aged 79 years, a retired labourer. Would any person having knowledge of a will made by the above named deceased, contact O'Leary Maher, Solicitors, 183 Howth Road, Killester, Dublin 3, tel: 01 8331900, fax: 01 8334991

Redmond, Mary (Mollie) (deceased), late of 2 Castle Park, Wicklow, who died on 17 August 2000. Would any person having knowledge of the whereabouts of a will of the above

named person, please contact Declan M Whittle, Haughton McCarroll, Solicitors, 2 Christchurch Street, Wicklow, tel: 0404 68344; fax: 0404 68131, e-mail: *haughtonmccarroll@eircom.net*

Roche, Nora (deceased), late of 24 King Street, Mitchelstown, Co Cork. Would any person having knowledge of a will made by the above named deceased who died on 19 October 2002 at the General Hospital, Mallow, Co Cork, please contact Anna Hogan of Murphy English & Co, Solicitors, Sunville, Cork Road, Carrigaline, Co Cork, tel: 021 4372425, fax: 021 4373978

EMPLOYMENT

Assistant solicitor required for busy Dublin 15 conveyancing practice, one to three years' experience necessary. Contact: 01 8201701

Assistant solicitor required with or without experience for a busy Galway city practice. Please apply with CV to **box no 10**

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

Assistant solicitor – our client, a busy practice in the North West which is expanding and modernising, requires an assistant solicitor to concentrate on conveyancing, civil litigation and probate. The successful applicant will have good IT skills and inter-personal skills and will join a young team. A salary commensurate with ability will be offered, together with a profit-sharing scheme. Please reply in writing to ref: AP-LP, Gilroy Gannon, Chartered Accountants, Stephen St, Sligo

Experienced male solicitor (conveyancing, probate, civil litigation) seeks association with firm in North Wicklow/Rathdown/Dun Laoghaire. Unusual titles a speciality. Reply to **box no 11**

Experienced solicitor required for conveyancing and civil litigation work with young rapidly-expanding and dynamic practice. Excellent salary and prospects for right candidate. Apply in writing to principal, Catherine Allison & Co, Solicitors, Roden House, Roden Place, Dundalk, Co Louth, tel: 042 320854

Locum solicitor required, March 2003 to June 2003, with experience of general practice. Contact Boyle & Bracken, Solicitors, The Woods, Clane, Co Kildare, tel: 045 868045

Locum solicitor with experience in all aspects of conveyancing required. Full/part-time option. Reply to O'Callaghan, Solicitors, reference: PJC, 51 Mulgrave Street, Dun Laoghaire, DX 6018 Dun Laoghaire or e-mail: *occs@indigo.ie*

Locum solicitor available with wide experience of general practice, particularly conveyancing, probate, and litigation. Reply to **box no 12**

McMahon O'Brien Downes, Solicitors, Limerick and Dublin require an experienced litigation solicitor. Excellent terms and conditions. Please send applications to the personnel manager, McMahon O'Brien Downes, Solicitors, Mount Kennett House, Henry Street, Limerick

Solicitor required for busy general practice in Mullingar, Co Westmeath. PQE needed in conveyancing, probate, litigation and family law. Applications with CV to JA Shaw & Co, Solicitors, Mullingar, Co Westmeath or e-mail: *shaws@jashaw.ie*

Solicitor with extensive experience in general practice with emphasis on conveyancing, probate and litigation seeks position. Tipperary/Limerick/Kilkenny areas preferred. **Box no 13**

Assistant solicitor required for busy expanding practice in Ennis, Co Clare. Experience in litigation, conveyancing and probate required. Salary commensurate with experience. Reply with CV to Kerin Hickman & O'Donnell, Solicitors, 2 Bindon Street, Ennis, Co Clare, tel: 065 6828712/6828466

Solicitor – one to three years' PQE. General role with focus on conveyancing and probate. Medium-sized firm in North Munster. Good computer skills an advantage. Send CV to **box no 14**

Locum solicitor: two to three years' minimum PQE. Conveyancing and some probate. Required early March for three to six months. Send CV in confidence to FP Gleeson & Co, Liberty Square, Thurles, ref: WFG or e-mail Billy.**Gleeson@tipperary-law.com**

Solicitor, six years' PQE, seeks full/part-time position in Galway city/county practice. Experience in conveyancing, probate, litigation and family law. **Box no 15**

Solicitor wanted for busy practice in North Tipperary. Conveyancing experience preferential. All applications to **box no 16**

MISCELLANEOUS

Retiring or selling a legal practice? Solicitor seeking to buy established practice in Dublin area. One to two year transition preferred. Enquiries to Charles M Carri FCA, John P Greely & Company, Mill House, Millbrook, Naas, Co Kildare. E-mail charlescarri@jpgreely.com or tel: 045 879822, fax: 045 879773

Near Four Courts. The alternative to hotels. Newly-decorated, quiet two bedroom flat offered for short-term lets (one night +) at competitive rates. Professionally managed. Contact 087 9318111 or 087 9089940.

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

Northern Ireland agents for all contentious and non-contentious matters. Consultation in Dublin if required. Fee sharing envisaged. Offices in Belfast, Newry and Carrickfergus. Contact Norville Connolly, D&E

Fisher, Solicitors, 8 Trevor Hill, Newry, tel: 080 1693 61616, fax: 080 1693 67712

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

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

EYE INJURIES AND OPHTHALMOLOGICAL NEGLIGENCE

Mr Louis Clearkin ChM, FRCS, FRCOphth, DO, MAI, MEWI
Consultant Ophthalmic Surgeon

Experienced expert witness in ophthalmological personal injury, medical negligence and civil litigation

Renuntiabo, 8 Rose Mount, Oxton, Wirral, Merseyside, L43 5SW

secretary: +44 (0) 151 6047047
fax: +44 (0) 151 6047152

e-mail: L.Clearkin@Liv.ac.uk

TITLE DEEDS

Robert A Fanning (deceased), late of 20 Parnell Road, Dublin 12. Would any person having knowledge of the whereabouts of the title documents of property held in the name of the above-named deceased known as 20 Parnell Road (previously known as 6 Parnell Place), Harold's Cross, situate in the parish of St Catherine, barony of Upper Cross, formerly in the county and now in the county borough of Dublin, please contact Maurice E Veale & Co, Solicitors, 6 Lower Baggot Street, Dublin 2, tel: 01 6764067

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 Joseph Davy
Take notice that any person having an interest in the freehold estate of the following properties: 148 Lower Leeson Street, Dublin 2, formerly known as 111 Lower Leeson Street, Dublin 2 and previously known as 9 Lower Leeson Street, Dublin 2, held under lease dated 14 December 1840 and made between Henry Read of the one part and Robert Chambers of the other part for a term of 200 years from 14 December 1840 with a yearly rent of £20 sterling.

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

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

Date: 28 November 2002
Signed: Eugene Davy (solicitors for the applicant), 16-18 Harcourt Road, Dublin 2

In the matter of the *Landlord and Tenant (Ground Rents) Acts, 1967–1989*: Patrick and Carmel Flynn (applicant) and estate of Dr Patrick Morrissey (respondent)
Whereas the applicant has acquired and is now entitled to the lands comprised in the agreement to lease dated 1 January 1898 between Maria Morrissey of the one part and John Downey of the other part as yearly tenants. The said yearly tenancy is a tenancy to which part two of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978* apply. The lands demised by the said agreements to lease are therein described as 'all that and those the dwellinghouse, shop and premises situate at Main Street, in the city of Cashel, parish of St John the Baptist, barony of Middlethird and county of Tipperary', being the property now known as 75 Main Street, Cashel, Co Tipperary.

And whereas the applicants are persons entitled under the *Landlord and Tenants Acts, 1967 to 1989* to acquire the fee simple interest in the said hereditaments and premises and is desirous of so doing. And whereas the person or persons required by the acts to convey or join in conveying the fee simple in said premises are unknown and unascertained.

Take notice the we, as solicitors for the applicant, hereby apply to the county registrar for County Tipperary to have the matter determined by her arbitration and for an award:

a) Determining that the applicant is entitled to acquire the fee simple in the said hereditaments and premises under the said acts

b) Determining the purchase price to be paid in respect of the acquisition
c) Appointing such person as she may think fit to execute a conveyance of the fee simple in the said premises for and on behalf of the unknown and unascertained respondent
d) Ordering that the purchase price be paid into the court before the execution of such conveyance
e) As to the costs of this application and arbitration
f) Granting such further or other relief as may be necessary in the circumstances of the case.

Take notice the application herein will be made to the county registrar sitting at the Courthouse, Clonmel, Co Tipperary on 17 February 2003 or the first opportunity thereafter.
Signed: John P Whelan & Co (solicitors for the applicant), 68 Queen Street, Clonmel, 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) Act, 1978* and in the matter of premises near Parade Quay, Waterford (behind 109 Parade Quay): an application by An Post
Take notice that any person having any interest in the freehold estate of the following premises: all that and those the yard and premises situate near Parade Quay in the parish of Trinity within and city of Waterford and more particularly delineated and described on a map endorsed on an indenture of conveyance and assignment made 12 October 1937 between Francis Graham of the one part and Austin Orlando Hill of the other part and therein coloured brown originally held in yearly tenancy at a rent of £5 per annum and therein described as 'all that and those the premises adjoining the premises herein before described situate in the parish of Trinity within and city of Waterford and more particularly delineated and described in the map thereof endorsed on these presents and therein coloured brown'.

Take notice that the applicant, An Post, intends to submit an application to the county registrar for the county of Waterford for the acquisition of the freehold interest in the aforesaid properties and any party asserting that they hold a superior interest in the aforesaid premises (or any of them) are called upon to furnish evidence of title to the aforementioned premises to the below named within six weeks from the date of this notice.

In default of any such notice being received, An Post intends to proceed with the application before the county registrar at the end of six weeks from the date of this notice and will apply to the county registrar for the county of Waterford 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: 8 January 2003
Signed: Anne-Marie Donnelly (solicitor entitled to act on behalf of the applicant), Daly Derham & Co, Solicitors, 32 Washington Street, Cork

In the matter of the *Landlord and Tenants Acts, 1967–1994* and of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978*: an application by John Cooney and Company Limited
Take notice that John Cooney and Company Limited intends to submit as application to the county registrar for the county and city of Dublin for the acquisition of the freehold interest in the following property: all that and those that plot or piece of ground at the south east side of their premises at no 197 Harold's Cross Road, such ground being formerly part of the garden of no 10 Leinster Place, Rathmines in the city of Dublin.

And take notice that any person having any 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, John Cooney and Company Limited intends to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the county and city of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in each of the aforesaid premises are unknown or unascertained
Date: 7 February 2003
Rosemary Ryan & Co (solicitors for the applicant), 13/15 Rathfarnham Road, Terenure, Dublin 6W

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 Peter Humphreys, Reverend Henry Montgomery and Mr J Stanley Harper
All that and those the property known as Kilmainham Congregational Church, Inchicore Road, Dublin 8, part of the property held under indenture of lease made 21 May 1917 between Richard Pelham Johnson of the one part and the Reverend Philip Davis, George Yates and John B Mason of the other part for a term of 999 years from 25 March 1916 subject to a yearly rent of £15 sterling and the covenants and conditions therein contained as more particularly delineated edged red on the map attached thereto.

Take notice that Peter Humphreys, Reverend Henry Montgomery and Mr J Standley intend to submit an application to the county registrar for the city of Dublin for the acquisition of the freehold interest in the aforesaid premises and any party asserting that they hold 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, Peter Humphreys, Reverend Henry Montgomery and Mr J Stanley 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 city of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in each of the aforesaid premises are unknown or unascertained
Date: 23 January 2003
Margetson & Greene (solicitors for the applicant), 35 Lower Baggot Street, Dublin 2