LawSociety Gazette

Regulars

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Cover Story

12 Professional pitfalls

Aggrieved or disappointed clients are likely to at least consider suing their solicitors for professional negligence. Patrick Groarke sheds a little light on what the law expects of lawyers

18 Family fortunes

A wealth of experience was shared with practitioners at the recent *Family law in Ireland conference*. Keith Walsh outlines the key points highlighted by speakers as well as some practical tips for solicitors

24 Net gains

The Law Society website has been a valuable resource for members and the general public for a number of years, but now it has been relaunched with a host of extra features, as Claire O'Sullivan explains

27 Tough talking

Mediation aims to resolve disputes and avoid the day in court – but while clients may save money and salvage relationships, solicitors must consider how traditional litigation practice will be affected, writes Michael Williams

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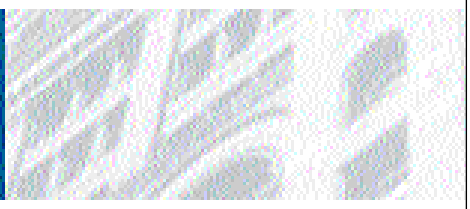

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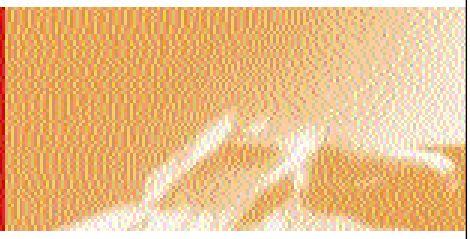

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Meeting the challenge

Sometimes being president of the Law Society is a little like waiting for a bus. You wait for ages, and then three come along at once. This month a number of such 'buses' have arrived, not all of them carrying good news. But let me start with the positive.

Continuing professional development became a requirement at the start of this month. I believe that this is an extremely positive step for the profession and one which has the support of the vast majority of solicitors. I don't think anybody could seriously argue that 20 hours of CPD over a period of two years represents a particularly onerous burden on the profession, but CPD will almost certainly make you a better solicitor and pay handsome dividends in terms of the standard of care that your clients receive. I have no doubt whatsoever that you will find this initiative both personally and professionally fulfilling. I would like to take this opportunity to thank Mr Justice Michael Peart and Donald Binchy and the members of CPD Task Force for all their hard work and commitment in bringing this programme to fruition. Their contribution is very much appreciated.

Information at the touch of a button

Another development that will be warmly welcomed by the profession is the upgrading and relaunch of the Law Society's website. Whether you are a technophile or a Luddite, there is no denying that computers and on-line sources of information now dominate our working lives. Recognising this fact, the society launched its first website back in 1999. In the intervening years, internet use within the profession has grown enormously. The advent of such sites as BAILII, FirstLaw, Westlaw and Lexis-Nexis is testament to the fact the many practitioners now turn to their PCs rather than to the traditional hard copy law texts to access vital information immediately. Indeed, it was the increasing amount of traffic on our website that made us rethink the way it had been structured. The Law Society is acutely conscious of the need to keep members continuously updated on developments both in the legal environment and in relation to the society's own initiatives. Recent events, such as the establishment of the Personal Injuries Assessment Board, graphically illustrate how quickly and radically the legal landscape can change for practitioners. The new website will prove to be a valuable, and indeed essential, resource for colleagues during these challenging times.

Later in the magazine (page 24), Claire O'Sullivan, the society's member services executive and webmaster, explains the new features incorporated in the website and how it will help to make your professional lives easier. I would also like to congratulate Claire on a job well done.

'Computers and on-line sources of information now dominate our working lives'

Money-laundering regulations

Now for the bad news. The society was astonished to be told that the minister for justice had signed regulations giving effect to the second EU directive on money laundering on 10 June. The society had been given to understand that the Department of Justice intended to engage in a meaningful consultation process with us on the manner of implementation of the directive, but no such consultation took place.

Compliance with these regulations will seriously challenge the principle of solicitor client confidentiality, and this is a matter of grave concern to the Law Society. The society also has grave reservations about several aspects of the *Criminal Justice Act, 1994*, which will now apply to solicitors from 15 September 2003.

We are examining closely all aspects of the regulations and the legislation and will seek clarification in relation to a number of matters. Advices to the profession will follow in due course and as early as possible in advance of the operative date of 15 September 2003.

We live in challenging times, but I have no doubt but that the profession that will rise to meet them.

Geraldine Clarke,
President

SAFETY WATCHDOG TARGETS SMALL BUSINESS

The Health and Safety Authority (HSA) targeted small businesses last year on the grounds that they are more likely than large organisations to have workplace injuries and least likely to have a safety statement, its chief executive Tom Beegan said in the agency's 2002 annual report.

He said that six out of ten of the 12,900 inspections that the HSA carried out in 2002 were in workplaces with 15 employees or fewer. About 13% of these inspections resulted in enforcement action, while 75% produced verbal or written advice.

RETIREMENT TRUST SCHEME

Unit prices: 1 June 2003
Managed fund: 381.703c
All-equity fund: 87.77c
Cash fund: 250.74c
Long bond fund: 107.246c

WOMEN LAWYERS' SEMINAR

The Irish Women Lawyers' Association will host a seminar by Shivaun Quinlivan, lecturer in law at the National University of Ireland, Galway, on disability law in at 6pm on 9 July at the Distillery Building, 145/151 Church Street, Dublin 7. The event will be free to Irish Women Lawyers' Association members.

Hi-tech streamlining for court payments

Payments to the 22,000 beneficiaries of the country's court funds are to be sped up in the latest phase of a scheme to modernise the courts' payment system when the High Court accountant's office goes on-line from 14 July. According to the Courts Service's director of finance Sean Quigley, the move will mean that wards of court and other individuals entitled to payment will be paid by electronic transfer of funds.

He told the *Gazette* this month that other benefits of the new system would include faster turnaround time for payments, annual statements of account to each beneficiary, better quality of information, and greater transparency and accountability. The service manages €800 million worth of court funds.

It also plans to roll out the electronic processing of family law maintenance payments across the country over the rest of the year. This is currently operating in Cork and Limerick District Court offices. The new system will ultimately provide a central database for the management of all court funds, said Quigley.

Future plans include computerising fines and bail payments. Lawyers will also ultimately have the option of paying court fees over the internet. The Courts Service recently announced that it awarded a €3 million contract to Fujitsu Services to manage its information technology infrastructure.

Wylie to lead business tenancy seminar

JCW Wylie, author of the standard work on Irish landlord and tenant law, will lead a Law Reform Commission (LRC) seminar on business tenancies on 21 July. The commission has invited all those interested to attend the seminar, which will be held at its offices in IPC House in Ballsbridge, Dublin. The meeting is designed to open discussions on the LRC's *Consultation paper on business tenancies*, which it published last March.

The paper is aimed at consolidating and reforming the current law, which is contained in the *Landlord and Tenant (Amendment) Acts, 1980, 1984, 1989* and *1994*. It deals with issues such as the scope for 'contracting out' of the legislative scheme, entitlement to statutory rights, restrictions on statutory rights and compensation provisions. The commission says its recommendations are 'provisional only'.

All those interested in attending should contact Trevor Redmond on tel: 01 637 7603 or e-mail tredmond@lawreform.ie to reserve a place.

ONE TO WATCH: NEW LEGISLATION

European Convention on Human Rights Act, 2003

The bill passed all stages in the Oireachtas on 24 June and is due to come into effect at latest around the new year. It follows a long process started in 1952 with Ireland's signing of the convention; then there was the *Belfast agreement*, which contemplated incorporation of the convention into Irish law; and the final publication of a bill in March 2001. The act incorporates the convention in an interpretative manner.The courts are required to interpret Irish law in a manner compatible with the convention insofar as this is possible (section 2). The alternative forms of incorporation were by way of constitutional amendment and by direct incorporation, which would have allowed better remedies than are available under this form of incorporation.

Organs of state to respect the convention

Organs of state (as defined) are required to perform their functions in a manner compatible with the convention, subject to any legislation or rule of law, and if a person suffers injury, loss or damage because there is a failure in this respect, he or she may claim compensation in the Circuit or High Court as the court considers appropriate (section 3). However, if legislation or a rule of law is incompatible with the convention, the only remedy open to the High Court will be to make a declaration of incompatibility, leaving any change of the law at the discretion of the government (section 5). Until this happens, however, the existing law remains valid. Therefore, the usual remedies available to the courts in comparable constitutional cases (striking down of legislation, damages, injunctions, orders for release, quashing of convictions) will not be available to applicants who prove that the incompatibility of a rule of law has caused them suffering, loss or damage. Without direct incorporation by way of constitutional amendment or statute, this is a logical consequence of the supremacy of the constitution and the power reserved to the Oireachtas to make laws, and the duty of the courts to apply them.

Effective remedies

Article 13 is given effect in Irish law by this legislation and provides that: *'Everyone whose rights and freedoms as set forth in this convention are violated*

Society launches CPD scheme

It started in Leitrim, *writes Ken Murphy*. The idea that every solicitor should be required to undertake a minimum number of 20 hours education every two years first arose at a meeting in the Bush hotel in Carrick-on-Shannon four years ago.

Both myself and the then Law Society president Pat O'Connor were initially surprised when the members of the Leitrim Bar Association unanimously demanded that the society introduce regulations to this effect. The Leitrim Bar Association reasoned that they knew the law and its practice were constantly changing; they needed courses and seminars to keep them up-to-date, but their good intentions would always be superseded by immediate client demands unless the education was made mandatory.

Over subsequent years, at bar association meetings all over the country, ordinary members indicated their overwhelming support for what the society has now put in place with effect from 1 July.

The Law Society marked the beginning of a new era for Irish solicitors recently with the launch in Blackhall Place of its continuing professional development (CPD) scheme. From this month, the society's regulations require all practising solicitors to spend 20 hours in training over the two-and-a-half years to 31 December 2005, and 20 hours every two years from then on.

Mr Justice Michael Peart, former chairman of the CPD task force, and Law Society senior vice-president Gerard Griffin at the launch of the new CPD scheme

A minimum of 15 hours of the required 20 will have to spent in group study, while at least 25% of the total should be spent on management and professional skills.

Law Society senior vice-president Gerard Griffin launched the scheme. He told the gathering that CPD had intrinsic value and was an essential pre-requisite for modern practice.

'There is widespread acknowledgement among the profession that professional practice is never achieved for once and for all, and cannot preclude the need for further learning', he said, adding that the scheme's overriding emphasis was on encouragement, not compulsion.

'The scheme is sufficiently flexible to ensure the focus remains on the training requirements of individuals and their practices', said Griffin. 'The long lead-in period and the introduction of a two-year reporting cycle were very deliberately chosen as the Law Society does not wish the obligation to be unduly onerous for solicitors'.

Reminder on data protection laws

A recent *Sunday Business Post* report suggested that solicitors could face prosecution if they fail to register any sensitive personal information that they hold on computer about clients and any other individuals with the data protection commissioner. The Law Society wants to remind members that Paul Lavery, an expert on the law on this area, outlined the official position on their obligations in the December 2002 issue of the *Gazette* (page 26). The article deals with members' obligations under the *Data Protection Act, 1988*, the *Data Protection Regulations 2001* and the new regime that the *Data Protection (Amendment) Act, 2003* introduced on 1 July.

shall have an effective remedy before a national authority'. It is difficult to see how the courts are to provide effective remedies in cases of incompatibility.

This unsatisfactory position may be alleviated not by the courts, but at the discretion of the government. Section 5(4) provides for a system of discretionary *ex gratia* payments in respect of injury, loss or damage suffered by an applicant as a result of an incompatibility, at the same very modest level as awards of the European Court of Human Rights (ECHR) in Strasbourg. The intention here is to give applicants the option of seeking equivalent compensation without having to take a case to Strasbourg, thus avoiding further delay and pressure on the caseload of the ECHR. While it is not mentioned in the act, there is no reason why the government, in appropriate cases should not arrange for the liberation of a prisoner on temporary release, or recommend to the president the use of the presidential pardon. None of these, however, amounts to an 'effective remedy' within the jurisprudence of the Strasbourg court, and Ireland may yet be held to be in violation of its obligations under the convention for not providing 'effective remedies' in this act.

A lead-in period of up to six months is provided to enable preparation, including adjustments to the rules of court and training for 'organs of state' and others such as the legal profession. The case law of the ECHR will now provide precedents for Irish courts (section 4) and certain articles of the convention are considered to go further than the constitution and will therefore be of interest to litigants seeking to vindicate convention rights. It is thought that the large overlap between the constitution and the convention will mean that convention cases will be a small minority. However, articles 6 (right to a fair trial), 8 (right to respect for private and family life) and 10 (freedom of expression) have the potential to further change Irish law as they have already done, for example, in the *Airey* free civil legal aid case, the *Keegan* adoption case and the *Norris* homosexuality case.

The Law Society will be running seminars on the convention and different areas of practice in the autumn. G

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

BEGINNER'S GUIDE TO PIAB

What is PIAB?
The Personal Injuries Assessment Board. It currently exists on an interim basis and is chaired by Dorothea Dowling, the chief claims manager of CIE.

Why is it in the news?
It has been in the news constantly for over two years as a key part of the government's response to anger from the business lobby and the public about the massive escalation in the cost of insurance. It is currently in the news because tánaiste Mary Harney published the heads of bill for PIAB last month.

When is it due to be up and running?
According to the tánaiste, who is planning to publish a bill and pass it into law in the autumn, it will be up and running with effect from 1 January 2004.

What cases will it deal with?
It will apply initially to employers' liability cases only. Ultimately it is intended to also apply to public liability, road traffic accidents and all other cases in which claims are brought for damages for personal injuries.

Will it deal with issues of liability?
It is intended to deal only with cases in which liability is not an issue.

How will it work?
Much of the detail is still unknown, but it seems that anyone bringing a claim for damages for personal injuries in which liability is not an issue will be obliged by statute first of all to have the appropriate level of damages assessed by PIAB before they can bring an action to the court. However, if the PIAB assessment is ultimately rejected by either the claimant or defendant, the case can then proceed through the courts system in the usual way.

What effect will it have on the solicitors' profession?
It is too early to say.

Will PIAB be fair to both sides and make economic sense?
On the information so far available, in the view of the Law Society, the answer to both of these questions is no.

New DSBA share purchase agreement

A revised share purchase agreement (SPA) for solicitors was launched by the Dublin Solicitors' Bar Association on 26 June in the Conrad Hilton Hotel. The SPA is a 'specimen' document to facilitate bar association members in share purchase transactions, such as the buying and selling of companies. The original agreement document was launched in 1996, but was recently revised to take account of the changes in tax legislation in the intervening seven years.

According to DSBA president James McCourt, the share purchase agreement 'affords a template or a specimen for colleagues who don't necessarily specialise in areas of acquisition, mergers or onward sale of companies. Sale of companies is a sale like any other, but is more specialised in some areas and not everyone has the expertise. The SPA gives such colleagues a starting point, and when they are dealing with other solicitors who are involved in this on a daily basis there is a greater meeting of minds'.

At the launch of the DSBA share purchase agreement were DSBA president James McCourt (centre) with Brendan Heneghan and Paul Keane

International Criminal Court training

Members are being offered the opportunity to take part in a training course for defence lawyers before the International Criminal Court (ICC) under a European Commission-backed scheme. The commission has given the Council of Bars and Law Societies of the European Union (CCBE) and the Academy of European Law (ERA) a grant to provide training for up to 100 lawyers. The course will be aimed at providing them with the knowledge needed to appear before the court.

Of the 100 available places, 85 will be reserved for lawyers from Eastern Europe. The other 15 are open to those from EU member states. The CCBE and ERA say this will break down as 'roughly one from each state'.

Training will consist of four five-day sessions starting on 4-10 December 2003 and ending on 10-16 February 2005. The areas covered will include the ICC's structure and jurisdiction and proceedings before the court.

There will also be a moot court exercise and a visit to the International Criminal Tribunal for ex-Yugoslavia that will include discussions with judges and prosecutors.

Training will be in both English and French.

Law Society members interested in taking part should contact Colette Carey of the Criminal Law Committee at the Law Society, Blackhall Place, Dublin 7, tel: 01 672 4800, e-mail: *c.carey@lawsociety.ie*. Completed application forms should be returned by 15 July.

Condon sworn in as DJ

Solicitor and Law Society Council member Angela Condon became the latest member to be promoted to the bench when she was sworn in as a district judge recently. Condon was one of the two principals of Kerry firm, JB Healy Crowley & Co, which has offices in Cahirciveen and Killorglin.

Letters

It's the way you tell them

From: Quentin Crivon, O'Hagan Ward and Co, Dublin 2

At the recent LawTech technology exhibition in the Law Society, a representative of one of the larger Dublin law firms (not a solicitor) who had installed a computer speech-recognition system gave a talk – a rather negative appraisal of its suitability in a solicitor's office. I would like to give a positive view of speech recognition (SR) and its application.

I have used SR since 1998. With constant software upgrades since then, the system is now of such a very high standard that it is possible to use SR in place of a secretary. I don't think it is necessary to emphasise the substantial economic savings that can be effected.

The system I use is suitable for a stand-alone computer, including a notebook (formerly called 'laptop'), or a network system through a server. I know that several colleagues tried SR when it first came out and found it unsuccessful. However, the advancements in SR software over the last five years have been so phenomenal that, depending on your ability to enunciate clearly, you can achieve speeds of over 160 words a minute with 98-99% accuracy.

However, I have noted two problems that have arisen within the profession:

- Many colleagues are intimidated by computers and almost afraid to turn them on, and
- Many who purchased the SR programs find the instruction book intimidating, put it away with the intention of learning it sometime – and then forget about it.

There are companies and individuals who carry out home or office training which provides enough knowledge to enable anyone to use a computer without any fear of losing data. Training is also provided by word-processing programs such as Microsoft Word, Lotus SmartSuite, Word Perfect and others. (A knowledge of word-processing is essential to make proper use of SR.)

With training at home or in the office, it is possible to train most people in two hours – in English, not 'computerese' – to be able to dictate to the computer at 100 words a minute with 95% accuracy. A few more hours of practice will bring speed and accuracy to a highly acceptable level, and constant, continuing improvement will follow with time.

There is no age barrier to prevent anyone learning how to use a computer and speech recognition. I came to this new technology as I was approaching being a senior member of the profession.

The use of SR by a solicitor (or anyone) is enhanced by what are called 'macros'. These are

verbal or manual short cuts that can be programmed to do whatever you want. For example, you could say 'Family law civil bill', and your pre-programmed family law civil bill precedent will come up on your screen. All you have to do is dictate the details directly into it.

Many people believe it is a very expensive system. Not so. The most advanced SR software can be purchased off the shelf for less than €200. It comes with a basic microphone headset. More advanced microphones, including those that are like advanced desktop dictating microphones with all the bells and whistles attached, can be bought separately for €200 plus VAT (price as of March 2003).

The biggest expense is the computer. What you have at the moment might be sufficient. Or it might need some slight upgrading by installing additional memory. But if not, with prices falling, you can get a desktop computer with the minimum required specifications for under €800 (plus VAT). For €1,200 (plus VAT), you can get a highly advanced desktop computer with a flat-panel monitor (recommended for space and ease of use).

Notebooks, of course, are more expensive, but you can get a very good-quality one, with a 15-inch screen for less than €2,000 (plus VAT). Installing a network system would require a more sophisticated and expensive server system, usually installed by experts, who, needless to say, charge for their service.

Therefore, starting from scratch, a total of €1,600 (again, plus VAT) will buy you a highly-sophisticated desktop system with SR, capable of being upgraded if necessary to take new developments in technology as they come. Consider the short and long term savings.

Time for the paperless office?

From: Declan O'Reilly, Dublin 9

Reading with some interest the audited financial statements that I received today, I note that some €238,216 was spent on lecture materials for education and €53,909 on CLE materials.

As an apprentice, the bane of my life was travelling to the Law Society to pick up the multiple boxes of notes which, in an attempt to store the deluge of paper and precedents, eventually ended up in various places at home and work. Today, this has been replaced with volumes of CLE material. Perhaps it is time for the Law Society to consider saving paper, money and storage space by distributing materials by CD.

Statutes are available on-line and most documents are computer-generated, so this would be a straightforward process. Older documents can simply be scanned. Similarly, all CLE precedents should be distributed on disk to avoid having to copy-type documents followed by hours of proofing for mistakes. Given that CDs are available for approximately €1 or less, huge savings would be made. While I agree that we don't yet live in a paperless society, perhaps we should strive for an office with less paper.

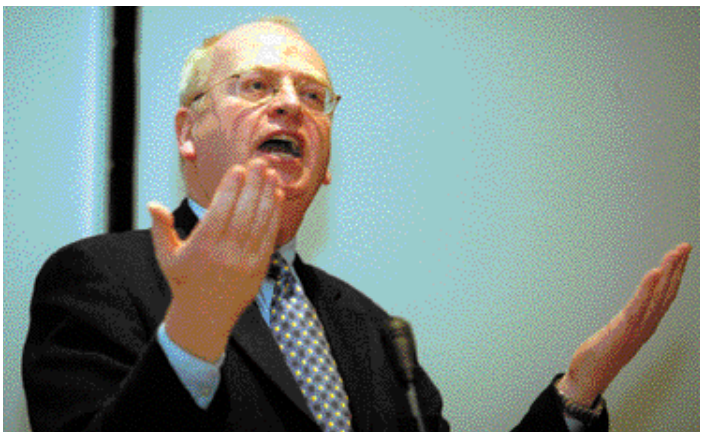
Minister McDowell gets it all w

The justice minister's recent comments about economic and social rights are in stark contrast to the desires of many citizens, says Caroline Nolan

The resistance to economic, social and cultural rights as justiciable rights is not founded in law or fact. It seems to flow from ideological prejudices more in keeping with the cold war era than serious discussion as to what are the values and needs that we, as citizens, expect and demand of our modern society.

Justice minister Michael McDowell's prolific commentary against the justiciability of economic, social and cultural rights (*Irish Times*, 15 April and 24 May 2003; see also *Gazette*, November 2000, page 5) stands in stark contrast to the views expressed in the north of Ireland. There, over 80% of people from both communities responding to a Northern Ireland Human Rights Commission survey supported the inclusion of rights in respect of health, housing and employment. Yet even with such support, the future of these rights in the proposed *Bill of rights for Northern Ireland* remains uncertain due to political opposition from some parties.

What is it about economic and social rights that makes them so appealing to the people on the ground and so threatening to politicians? There are two key arguments against the justiciability of economic and social rights. The basis of the first argument is that the nature of economic, social and cultural rights is different from civil and political rights, making them incapable of forming 'real' rights. But can rights be categorised as easily as this argument suggests? Take, for example, the right to education.



Justice minister Michael McDowell: ideological prejudice?

The United Nations' committee on economic, social and cultural rights has classed it variously as *'an economic right, a social right and a cultural right. It is all of these. It is also, in many ways, a civil and a political right, since it is central to the full and effective realisation of those rights as well. In this respect, the right to education epitomises the indivisibility and interdependence of all human rights'*.

Further, the challenge that economic and social rights are vague and of a character that is different from civil and political rights does not hold water when you think of the specific nature of several economic rights, such as rights under health and safety at work, holiday entitlements and so on. It is true that some economic and social rights are less developed in some respects, but this is more indicative of the evolutionary nature of all rights, rather than a flaw in the nature of the rights.

The second major argument is directed at the policy and resource implications of economic, social and cultural rights. This argument suggests that economic and social decision-making is a matter of public concern properly within the remit of the legislature, and that judges are neither publicly accountable nor have the declared skills and expertise to adjudicate on such complex matters, which should properly be debated in an open forum.

This argument is a little more complex as it conflates two issues. At first sight, it seems to suggest that if an economic or social right exists – for example, a right to healthcare – the legislature then 'gives over' control, with the implication being that judicial determinations will set the agenda in relation to the allocation of resources. This is misleading. A practical example from South African case law (*Soobramoney v Minister of*

Balance of power shifts in new

Despite reports in the Irish media, the first draft of a new European Union treaty is a significant victory for larger states over the interests of smaller ones, writes Conor Quigley QC

Much progress has been made in the European convention in its efforts to produce a new European Union treaty which will last for the next 50 years. The draft which was presented by former French president Valéry Giscard d'Estaing to the European Council in Greece last week is a formidable achievement, given the different proposals which were made on so many issues by members of the convention. However, despite the self-congratulatory message presented in parts of the Irish media which appears to have accepted that Ireland's so-called interests were vindicated, the outcome represents more of a victory for the large member states, with the institutional balance being altered significantly.

The European Council, which consists of the heads of government together with the European Commission president, is set to have its own president, who will be responsible for driving forward its work. The proposal that the president must be a former member of the European

rong about rights

Health, KwaZulu-Natal, 1998 (1) SA 765 CC, 1997 (12) BCLR 16996 CC), where healthcare rights are guaranteed, highlights the possible different roles that the judiciary and the legislature can adopt in such instances.

In that case, the applicant sought renal dialysis treatment to save his life. The court concluded that the treatment of chronic illnesses did not fall within the remit of emergency medical treatment and then sought to determine the case under the right of access to healthcare services. However, in this regard, it clearly acknowledged the role of the legislature to set budgetary priorities: '*A court would be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibilities it is to deal with such matters*'.

Furthermore, there is little evidence from other jurisdictions of the courts wishing to 'take over' the role of policy-makers and their general approach in policy-related areas is to adjudicate on the right in question but to leave the method and process of implementation in the hands of the legislature.

Eminent lawyers and academics have set out these arguments more eloquently, but it is my belief that the debate over economic and cultural rights must be taken to a new level, beyond these legalistic and mainly historical arguments.

The move towards privatisation and public-private partnerships in the delivery of economic and social services means that the state is becoming less of a governing body and more of a regulator. What are the implications of this for management, accountability and control of policy? Is the new social currency 'the market value' and how can values such as social justice and equality be measured and form part of these new negotiation processes? Undoubtedly, social and economic issues are becoming more complex, so how can effective participation be realised? Is there evidence to show that constitutional protection will be sufficient to safeguard minimum rights?

For instance, education rights enjoy constitutional protection yet the high-profile cases in the area of children with learning disabilities indicate the difficulties of translating these rights into real change on the ground. Predictably, in the complexity of the new relationships many unresolved matters will fall to be determined by the courts, in the guise of interpretation of clauses in service level agreements. But is the current court structure and adversarial system adequate to deal with these matters? In reality, the courts will be called upon to adjudicate on new policy processes.

It is not unreasonable to want to know who will be the ultimate arbiter on the level of healthcare to which I am entitled, what criteria will underpin the minimum standard of my child's education, who is setting the threshold levels of social security benefit? Instead of debating how we will manage and deal with these complex issues, we are burying our heads in the sand and hiding behind tired old arguments.

Is it not time for lawyers to begin to take a keen interest in these new and challenging developments? G

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European treaty

Council has disappeared, so that leaves open the possibility of appointing a senior statesman who has not been a prime minister. Only the appointment of a powerful figure will result in this post having any worth, so it is unlikely that a weak individual will ever be proposed, as has happened in the past with the European Commission. On the contrary, this could be an exciting development if the individual concerned is prepared to take on the arrogant nature of some of the current crop of national leaders in an effort to forge a European position on the international stage. There is no reason why the president should not come from a small country.

The Council of Ministers is in for a bit of a shake up as well. First, the merry-go-round of national presidencies is finished. The Irish will therefore be among the last to host a presidency in the first half of next year. In future, all council meetings are likely to be held in Brussels, under different presidents, depending on the meeting. Foreign affairs

VOX POP

The government has proposed libel law reform. Do you think the media has too much power in this country?

'Yes. They seem to be able to inflict damage to people's reputations. Compensation in terms of damages is not sufficient; a retraction is simply not good enough. There should be restraints on them to stop them carrying out the libel in the first instance'.
Paul Foley, McKeever Rowan

'My view would be that the media does not have too much power, but the area does need to be more properly regulated'.
Stephen Walker, Orpen Franks

'I think the media has been restrained by the law: they can't print a story; they've had to pull articles. They need to change the law. I agree with the amendments that are being made'.
Barry Fox, Doyle Fox and Associates

'The media does have too much power; they should bear the mantle of responsibility for ensuring that anything they publish is correct and accurate. I think that the new proposals to amend the law, particularly by the introduction of the defence of justifiable publication, merely makes it much more difficult for anyone to bring a claim over any defamatory statement or publication in the newspapers'.
Paul Marren, Martin E Marren & Co

meetings will be chaired by the new European foreign minister (who will also be a vice-president of the European Commission). Other council meetings, such as agriculture or finance, will be chaired by a particular country, depending on the subject matter, for a period of at least a year. Thus, there could be a Czech presidency of the industrial affairs council and a Dutch chair of the transport ministers' council. This eminently sensible proposal is designed to provide a sense of continuity and to avoid small countries (of which there will shortly be 19) from being overwhelmed by the duties previously involved in chairing all the council meetings for a six-month period.

Proposals for limiting membership of the commission have caused most problems within the convention, with the larger states wanting a small, efficient commission of 15 members, while the small member states wished to continue to have a representative at all times. The resulting compromise solution is a fair attempt to resolve a difficult situation. An earlier idea had been to appoint 15 commissioners, with the rest being associate commissioners. However, the draft treaty now envisages that, once the commission president and foreign minister are chosen, the 13 commissioners will be selected on a basis of equal rotation between the member states. These 13 commissioners are to be chosen by the president from candidates presented by the relevant member states. Each member state must provide a list of three names, including at least one man and one woman. The president will then select the members of the commission on the basis of competence, European commitment and guaranteed independence.

Right of refusal

The European Parliament has its position strengthened as well. Its membership is not to exceed 736, with a minimum of four representatives per member state. It is given the power of electing the president of the European Commission, but since only one candidate is to be proposed to it at any one time by the European Council, this is really a right of refusal rather than a power of election. Nevertheless, we might expect to see the parliament flex its muscles from time to time, particularly should the European Council proffer a visibly weak candidate for president.

Although the draft treaty received a warm welcome in public, there are several issues on which no real agreement has been reached as yet. At present, a messy formula exists for calculating the individual member states' weights necessary for qualified majority voting (QMV). It is proposed

'The client is king': can you rec

This is a summary of an address given to the Danish Law Society by director general Ken Murphy as president of ESSEBA, the Association of Secretaries of Bar Associations in Europe

Hollywood Great, Gregory Peck, died last month. In a long and distinguished career as a leading man, he won his only Academy Award in 1962 for playing the lawyer Atticus Finch in the classic movie of Harper Lee's novel *To kill a mocking bird*.

Nowadays, the lawyer in a Hollywood movie is likely to be played by Danny DeVito as sleazy, greedy and amoral. But when tall, handsome Gregory Peck in his white suit turned to face the racism of the entire courtroom directed at his black client – armed only with his legal skill, courage and integrity – we saw something rarely depicted in movies in the last 40 years: the lawyer as hero.

In his ethical commitment to justice for his client and in placing his client's interests above his own, the Gregory Peck lawyer is clearly distinguishable from the flawed and unscrupulous lawyers

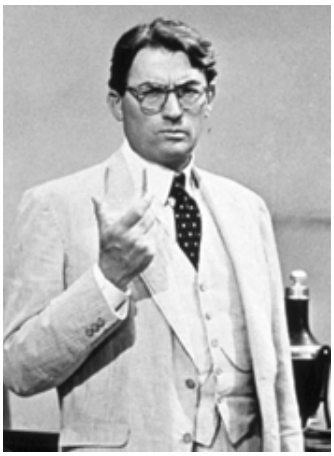


PHOTO BY SNAP/REX FEATURES

Atticus Finch: heroic defender of justice

played by today's Danny DeVito or Richard Gere. These and countless other movie and TV lawyers, whose personalities have entered popular culture, have, regrettably, powerfully and negatively shaped opinion across the globe about the legal profession and its values.

The proposition I have been asked to rebut is that 'the client is king', meaning that it is the demands and values of clients and nothing else which will ultimately determine what lawyers do in the future. This again raises the debate that has raged for many years on whether lawyers are engaged in a profession or a business.

Profession or business?

At one level, of course, this is a false dichotomy. It is necessary for a lawyer's practice to be run successfully as a business in order that it continue to exist. Profit, quite rightly, is not a dirty word in the legal profession. Among the perfectly legitimate reasons to practise law is to make money. However, it is one of the traditional and still vitally important distinguishing features of a profession that its purpose is not solely to make money.

The legal profession many centuries ago emerged through the courts of justice and as part of that system. The promise of justice legitimises the state and the central role of lawyers in delivering justice legitimises the role of lawyers in a liberal democracy. If justice is 'the pursuit of human emancipation from exploitation, inequality and oppression', then it is at the very centre of human moral values. The legal profession's commitment to the service of these values has been, at least up to now, at the core of the profession's identity.

But how is this altruistic commitment to the service of justice, rather than commercial interest, reconcilable with the values of modern society, consumerism and the marketplace? The motto of the American Bar Association is *Defending freedom, pursuing justice*, but how many lawyers there or anywhere else have as their first thought on waking every morning 'how can I pursue justice in the world today'? Is even the most noble ideal of the

that this be replaced with an easy formula whereby acts could be adopted by a simple majority of member states representing 60% of the community population. Some studies show that this alteration could really be a disguised way of giving much greater leverage to the large member states at the expense of small countries.

Over my dead body

Tax harmonisation is another matter that will not go away. In the early stages of the convention, the French and German delegations proposed that direct taxation should be subject to qualified majority voting, rather than unanimity as at present. The Irish and British governments (with some supportive background noises from a few other smaller countries) adopted the over-my-dead-body line of attack. Romano Prodi, the current commission president, professes that he cannot see why there is such a conceptual resistance to tax harmonisation, and indeed, no rational argument has been offered by the Irish government other than the desire to protect its 12.5% corporation tax rate. British resistance is more related to political notions of economic sovereignty, despite the obvious fact that no such sovereignty exists any longer in the modern global economy.

Conor Quigley: 'official Ireland should wise up'

The draft treaty sought another compromise by including the right for the council to decide, unanimously, that direct tax matters concerning administrative co-operation and fraud be decided upon by qualified majority provided that they were necessary for the functioning of the internal market and to avoid distortion of competition. Even this has been rejected by the Irish (though not yet the British!), with minister Dick Roche tabling an amendment deleting the proposed article. The French, however, are on the offensive and have also tabled an amendment calling for QMV in relation to all areas of company taxation which involve distortions of competition, discrimination and double taxation, a highly sensible approach which is wholly justified in the light of European Court case law relating to free movement in the internal market. 'Official Ireland' should wise up on this one. G

Conor Quigley QC is a member of Brick Court Chambers, specialising in European Union law.

oncile ethics with the market?

legal profession, that of acting as a counterweight for citizens to the ever-increasing power of the state, merely another self-serving use of the language of ethics and high principle?

While justice remains a key social goal, another one, undoubtedly, is economic well-being. Society is becoming ever more materialistic in its outlook. Corporate clients in particular can dominate a law firm's values because they have the power to offer high-paying repeat business.

Justice must prevail

One of the areas in which tension has emerged between two sets of values around the globe is between the values of lawyers and the legal system on the one hand, where the emphasis is placed on justice and the rights of individuals, and the values of competition policy on the other, with its emphasis on economic efficiency in the delivery of goods and services to consumers. Up until recently, it seemed that competition was becoming the card which trumped all others and was being accorded a superior social value to what the legal profession had traditionally held dear.

However, in the European Court of Justice judgment of 19 February 2002 in the *NOVA* case – in which the court upheld the Dutch Bar Association's ban on multi-disciplinary partnerships between lawyers and accountants – the supreme authority on the EU's competition rules held that the sound administration of justice and independence of the legal profession were higher values which justified a rule that would otherwise be anti-competitive. The court declared *'members of the bar should be in a situation of independence vis-à-vis the public authorities, other operators and third parties, by whom they must never be influenced'*.

The court gave its judgment some months after the Enron debacle in the United States. This was a disaster for the accountancy profession globally and in particular for the previously renowned firm of Arthur Andersen. How vital it is to maintain a reputation for integrity, and how easily it can be lost, was demonstrated by the disappearance of that firm almost overnight.

The Enron case demonstrates what happens if the client is made king and his demands are placed above all other ethical values. For a supermarket, perhaps, the client can be king. But the client is not king for a lawyer. The court is the king, embodying as it does the lawyer's overriding obligation to the administration of justice.

Conscience is king

Or maybe ultimately the lawyer's ethically-informed conscience is king. In the wake of Enron, WorldCom and other financial scandals, Bill Knight, the senior partner of the major London-based law firm Simmons & Simmons, wrote an article on the need for lawyers to have the moral compass and courage to stop acting and walk away when their 'king' client is demanding that they do something which their conscience tells them is not right. He acknowledged the pressure to improve profits per partner and to please and retain clients. He continued: *'But Enron, WorldCom and the rest were major corporations. Don't let anyone tell you that you are not the guardian of morality. We all are. If not you, who? Politicians? Now I really feel safe'*.

Knight concluded: *'But be clear. I am not talking about actions by your clients which might be misconstrued, or which the press might not like, or which the authorities might not like. You can advise about the risks of those and keep acting. I am talking about transactions that you don't like. Yes, you'*.

Atticus Finch would approve. We all should. G

Ken Murphy is director general of the Law Society.

PROF

Aggrieved or disappointed clients are likely to at least consider suing their solicitors for professional negligence. Patrick Groarke sheds a little light on what the law expects of lawyers

The general legal principles governing solicitors' liability for professional negligence are to be found in the Supreme Court judgment of Henchy J in *Roche v Peilow* ([1986] ILRM at 196-7), where he said:

'The general duty owed by a solicitor to his client is to show him the degree of care to be expected in the circumstances from a reasonably careful and skilful solicitor. Usually the solicitor will be held to have discharged that duty if he follows a practice common among the members of his profession ... Conformity with the widely-accepted practice of his colleagues will normally rebut an allegation of negligence against a professional man, for the degree of care which the law expects of him is no higher than that to be expected from an ordinary reasonable member of the profession or of the speciality in question'.

Walsh J in *O'Donovan v Cork County Council* ([1971] IR 173 at 193) identified an important exception to this rule: where there are inherent defects in a professional practice, however common, professional negligence will be held to have arisen if loss occurs.

There is undoubtedly an overlap in the definition of the duty of care owed by a doctor to his patient and by a solicitor to his client, and it is worthwhile considering how that duty has been defined. In *Daniels v Heskin* ([1954] IR 73), Maguire CJ stated: *'A medical practitioner is liable for injury caused to another person to whom he owes a duty to take care if he fails to possess that amount of skill which is usual in his profession or if he neglects to use the skill which he possesses or the necessary degree of care demanded or professed'.*

In *McMullen v Farrell* ([1993] 1 IR 123), the plaintiff sued three firms of solicitors for negligence in respect of advice which he received as to the meaning and effect of the provisions of the *Landlord and Tenant (Amendment) Act, 1980*. Two of the firms of solicitors failed to advise the plaintiff that a landlord could not unreasonably withhold consent to a change of use of leasehold property. Barron J originally heard the matter in the High Court and he set out the definition of the duty that a solicitor owes to his client:

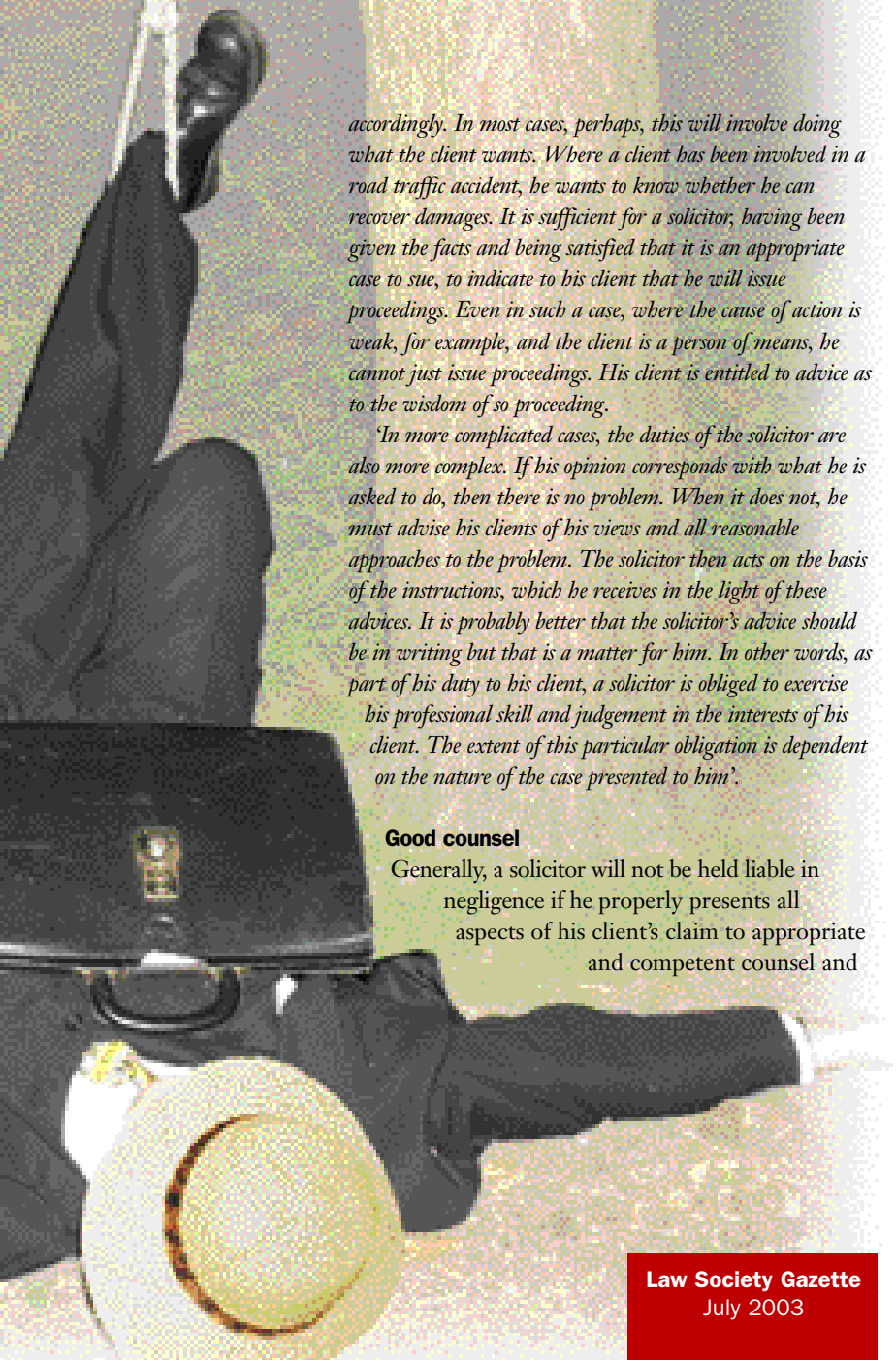
'A solicitor cannot in my view fulfil his obligations to his client merely by carrying out what he is instructed to do. This is to ignore the essential element of any contract involving professional care or advice. The professional person is consulted by the client for the very reason that he has specialist or professional skill and knowledge. He cannot abrogate his duty to use that skill or knowledge. To follow instructions blindly is to turn himself into a machine. In my view, a solicitor when consulted by a client has an obligation to consider not only what the client wishes him to do but also the legal implications of the facts which the client brings to his attention. If necessary, he must follow up these facts to ensure that he appreciates the real problem with which he is being asked to deal.

'When he is sure that he is clear as to the way forward, then he advises his client

MAIN POINTS

- **General duty of care to clients**
- **Dealing with counsel**
- **Professional negligence and the specialist**

ESSIONAL PITFALLS



accordingly. In most cases, perhaps, this will involve doing what the client wants. Where a client has been involved in a road traffic accident, he wants to know whether he can recover damages. It is sufficient for a solicitor, having been given the facts and being satisfied that it is an appropriate case to sue, to indicate to his client that he will issue proceedings. Even in such a case, where the cause of action is weak, for example, and the client is a person of means, he cannot just issue proceedings. His client is entitled to advice as to the wisdom of so proceeding.

'In more complicated cases, the duties of the solicitor are also more complex. If his opinion corresponds with what he is asked to do, then there is no problem. When it does not, he must advise his clients of his views and all reasonable approaches to the problem. The solicitor then acts on the basis of the instructions, which he receives in the light of these advices. It is probably better that the solicitor's advice should be in writing but that is a matter for him. In other words, as part of his duty to his client, a solicitor is obliged to exercise his professional skill and judgement in the interests of his client. The extent of this particular obligation is dependent on the nature of the case presented to him'.

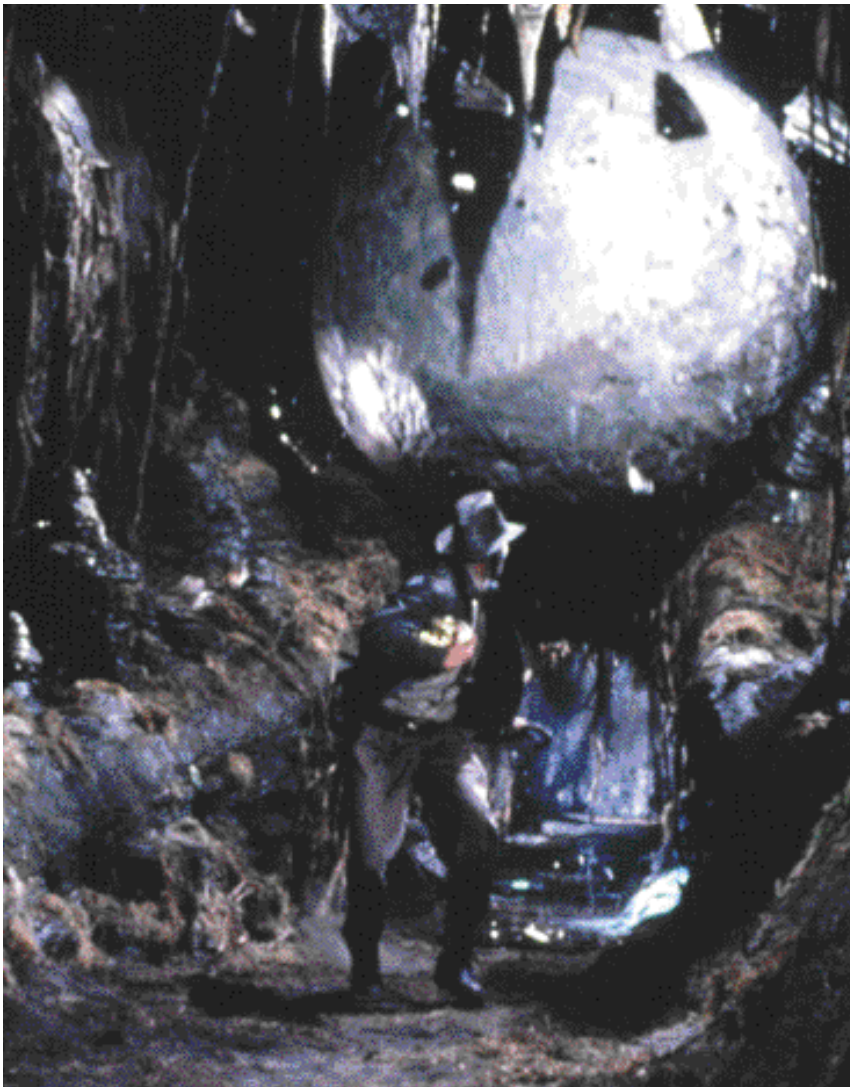
Good counsel

Generally, a solicitor will not be held liable in negligence if he properly presents all aspects of his client's claim to appropriate and competent counsel and he acts on the advice received. Henchy J stated this in *Millard v McMahon* (High Court, unreported, 15 January 1968) in the following terms: 'It is well settled that where a solicitor lays his client's claim before competent counsel and acts on counsel's advice, he is not liable for negligence'.

The general law on this is to be found in *Cordery on solicitors* (sixth edition) at paragraph 553. It points out that, as a general rule, a solicitor acting on the advice of properly-instructed counsel cannot be acting unreasonably, except in very exceptional circumstances.

But later it says: *'It has been recognised, however, that these principles do not operate so as to give a solicitor an immunity in every such case. A solicitor is highly trained and rightly expected to be experienced in his particular legal fields. He is under a duty at all times to exercise that degree of care, to both client and the court, that can be expected of a reasonably prudent solicitor. He is not entitled to rely blindly and with no mind of his own on counsel's views … Thus it is the duty of a solicitor to reject counsel's advice that is "obviously or glaringly wrong". It has been said that a solicitor does not abdicate his professional responsibility when he seeks the advice of counsel. He must apply his mind to the advice received. But the more specialist the nature of the advice, the more reasonable it is likely to be for the solicitor to accept it and act on it'.*

Thus, a solicitor cannot rely blindly on counsel's advice. He will be expected to apply his professional skill, judgment and experience to the matter and he ought to critically analyse any advice received from counsel so as to satisfy himself that it is correct. If the advice received is clearly incorrect, then the solicitor must point this out to his client. The



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Indiana Jones belatedly realised that failing to brief counsel properly could put him in a tight spot

contractual duty of care is one that a solicitor owes to his client. He fails to discharge that duty by blindly relying on counsel's advice.

O'Sullivan J accepted and endorsed these statements of the law in *Fox v O'Carroll and Hogan* (High Court, unreported, 29 April 1999), when he dismissed the plaintiff's claim against the defendant solicitors, holding that it was impossible for him: *'to draw the conclusion that (the solicitor) was negligent or in any way at fault for accepting counsel's advice notwithstanding that he was disappointed and his client bitterly disappointed with such advice. Nor can it be said that the defendant accepted the advice uncritically or blindly and with no mind of his own; on the contrary, he asked counsel to reconsider the matter and when this was done with the same result he requested a verbal consultation. Following this, he asked for a consultation with another counsel so that on no fewer than four occasions he was advised specifically by counsel that the plaintiff had no cause of action'.*

A solicitor must engage 'appropriate and competent counsel'. In effect, this means that the solicitor must reasonably satisfy himself that the counsel he engages on behalf of his client is reasonably competent to deal with the type of case concerned. Finlay CJ summarised these duties in *Fallon v Gannon* ([1988] ILRM 193) as follows: *'The duty of a solicitor with regard to the conduct of a case in court where he has briefed counsel is firstly to brief appropriate and competent counsel and secondly to instruct them properly with regard to the facts of the case which he has obtained from his client, and to make provision for the attendance of appropriate witnesses and other proofs'.*

In *Fallon v Gannon*, the plaintiff unsuccessfully sued his solicitor for negligence in his handling of the sale by the plaintiff of his licensed premises, petrol filling station and other lands situated at Rooskey, Co Roscommon. What gave rise to this claim was a previous claim in which the High Court held that the purchasers of the premises were entitled to rescind their contract with the plaintiff/vendor and were entitled to a refund of their deposit.

Those proceedings were based on the allegation that the purchasers had been induced to enter into the contract with the vendor on foot of an express verbal representation made to their agent, another solicitor, before the auction in relation to the turnover of the business. The High Court held that the representation was false. The vendor's appeal to the Supreme Court was dismissed.

The vendor then proceeded to sue his solicitor. In those proceedings, the plaintiff made a number of allegations against his solicitor, but we will deal with only two of them:

- First, the auction was held in Dublin and the defendant did not attend in person but sent his town agent instead. The plaintiff contended that had his solicitor been present at the auction, he would have intervened to prevent him from making a false representation or alternatively that he would have been subsequently available as a witness to deny the making of any representation by the plaintiff. In holding that the purpose of a solicitor going to an auction in such circumstances was to deal with any question of title raised by a

INCORRECT ADVICE OR FAILING TO ADVISE

A solicitor will be held liable in negligence if he gives incorrect advice on 'a point of common occurrence, where the law is clear' (*Professional negligence*, Jackson and Powell, second edition, 1987, paragraph 4.67).

If the law is complex, the duty of the solicitor will be measured against the established criteria, and if the advice given does not breach those criteria, and is reasonably given, liability may not attach to the solicitor even if the advice proves subsequently to be incorrect. Having said that, the solicitor can only really protect himself when advising on a complex issue of law if he:

1) Fully and comprehensively briefs appropriate and competent counsel on the point, and
2) Communicates a copy of counsel's advice to his client, and
3) Where necessary, and if required by the client, arranges a consultation with the counsel.

If a solicitor unreasonably fails to advise a client on a matter of relevance and/or urgency, thereby causing loss to his client, it is likely that the solicitor will be held liable in negligence for that.

WHAT OF THE SPECIALIST?

Is the solicitor who holds himself out to specialise in a particular area of law and is presumably paid on that basis to be assessed by reference to different criteria? Apparently not in this jurisdiction, for we have already seen that in *Roche v Peilow* the solicitor will be judged by reference to the degree of care expected from a solicitor with the particular speciality.

That issue was addressed in the UK by McGarry J in *Duchess of Argyle v Beuselinck* ([1972] 2 Lloyds Reports 172) and was answered thus:

'No doubt the inexperienced solicitor is liable if he fails to attain the standard of a reasonably competent solicitor. But if the client employs a solicitor of high standard and great experience, will an action for negligence fail if it appears that the solicitor did not exercise the care and skill to be expected of him, though he did not fall below the standard of a reasonably competent solicitor? If the client engages an expert, and doubtless expects to pay commensurate fees, is he not entitled to expect something more than the standard of the reasonably competent? I am speaking not merely of those expert in a particular branch of the law, as contrasted with those practising in the same field of law but being of a more ordinary calibre and having less experience.

'The essence of the contract retainer, it may be said, is that the client is retaining the particular solicitor of the firm in question, and is therefore entitled to expect from that solicitor or firm a standard of care and skill commensurate with the skill and experience which that solicitor or firm has. The uniform standard of care postulated to the world at large in tort hardly seems appropriate when the duty is not one imposed by the law of tort but arises from a contractual obligation existing between the client and the particular solicitor or firm in question. If, as is usual, the retainer contains no express term as to the solicitor's duty of care, and the matter rests upon the implied terms, what is that term in the case of a solicitor of long experience or specialist skill? Is it that he will put at his client's disposal the care and skill of an average solicitor, or that care and skill that he has?'

prospective purchaser, Finlay CJ stated that there *'were no conceivable grounds established on the evidence whereby Mr Gannon could have anticipated the making of any representation by the plaintiff at the auction, nor were there any grounds for him to anticipate any issue or dispute about the making of any representation at the auction'*

- The second of the plaintiff's arguments was that the defendant engaged counsel in the action by the purchasers against him and that he lost that case because counsel had failed adequately or properly to cross-examine the witnesses. He argued that the defendant was vicariously responsible for the conduct of counsel in such circumstances.

Finlay held that a *'solicitor has not got vicarious responsibility for the individual conduct of counsel. There can be no doubt that the solicitor in this case briefed competent counsel, and, having considered the transcript of the trial of the action by the purchasers, I am satisfied that they dealt competently and correctly with the case which was then tried. As was correctly decided by McMahon J in the High Court in this case, even if they had not, the solicitor would not be responsible in law for any negligence or want of care on their part'*.

The withholding by a solicitor of material information from counsel, whether innocent or deliberate, will almost certainly lead to a finding of negligence on the part of the solicitor. In *McGrath v Kiely* ([1965] IR 497), the solicitor was held liable in negligence for not including in the brief to counsel reference to the fact that the plaintiff had suffered a fracture of her left clavicle, notwithstanding that the medical reports made no reference to that injury. The plaintiff brought proceedings against her surgeon for his breach of contract in failing to include reference to her fractured clavicle in his medical reports and against her solicitor for omitting to include reference to that injury in his brief to counsel for the hearing.

The court held that the solicitor had been made aware of the injury by the plaintiff but did not adequately refer to it in his brief to counsel. The court held that each defendant was in breach of his contract with the plaintiff. In the course of his judgment in that case at page 511, Henchy J says: *'When eventually after the pleadings were closed, a written statement was obtained from the plaintiff which disclosed a substantial and unpleaded injury, it became Mr Powell's duty, on the principle of* respondeat superior, *to refer the statement to counsel for the purpose of an amendment of the pleadings, if counsel considered that necessary'*.

It is clear from the report and from the judgment that Powell did include the plaintiff's statement referring to the injury with the briefs to counsel (which were dispatched some 16 days before the trial) without specifically drawing counsel's attention to the additional injury. This was not good enough. Henchy found that the solicitor had not thereby discharged his duty to his client because he *'ought reasonably to have known, having regard to the exigencies of practice at the bar and the fact that proofs had been advised, that it was a possibility, if not a probability, that counsel would not read their briefs until shortly before the hearing, when it would then be too late to have the pleadings amended without loss to the plaintiff'*.

Earlier in his judgment (at page 510), Henchy said that the contract between a solicitor and his client in personal injuries litigation *'requires the solicitor to prosecute the claim with due professional skill and care.*

'He ought to have known that it was a probability that counsel would not read their briefs until shortly before the hearing'

CONFIDENTIALITY OF COMMUNICATIONS

The confidentiality that attaches to communications between solicitor and client is fundamental to their relationship. It is designed to protect that relationship. The confidentiality is the entitlement of the client. Subject to limited exceptions, it cannot be interfered with at the discretion of the solicitor.

Lynch J defined this confidentiality in *McMullen v Carty* (Supreme Court, unreported, 28 January 1998) in the following terms: *'A lawyer, whether solicitor or barrister, is under a duty not to communicate to any third party information entrusted to him by or on behalf of his lay client. This privilege of confidentiality belongs to the client, not to the lawyer. It may be waived by the client, not the lawyer, but such waiver may be implied in certain circumstances as well as being express'.*

In the same case, the plaintiff objected to the fact that counsel who had previously acted on his behalf in earlier litigation was permitted to give evidence in later High Court proceedings in which the plaintiff sued his former solicitors for negligence in respect of the first set of proceedings. The Supreme Court held that his objection was unfounded. Lynch J dealt with the argument in the following way: *'When a client sues his solicitor for damages for alleged negligence arising out of the conduct of previous litigation against third parties and especially as in this case arising out of the settlement of such previous litigation, the client thereby puts in issue all the communications as between the solicitor and the client and the barrister and the client and also as between the barrister and the solicitor relevant to the settlement of the case and thereby impliedly waives the privilege of confidentiality.*

'It would be manifestly unjust and wrong if the solicitor was precluded by the rule of confidentiality from making the case before the court that both he and counsel advised the client XYZ and that the settlement was indeed advantageous to the client. These facts were put in issue by the client who thereby impliedly waives his privilege of confidentiality'.

The extent of the solicitor's obligations to his client depends on the nature and particular circumstances of the specific case'.

Thus, if a solicitor were informed by a client that she suffered a certain injury, the duty which he owes to that client would appear to encompass the following:

- First, to communicate that information to counsel or otherwise to ensure that that information was considered by counsel or duly pleaded in the proceedings for consideration by the court
- Second, the solicitor's duty would appear to extend to checking the medical reports which he receives on his client so as to ensure that all injuries notified to him by his client are set out in it
- Third, the solicitor should bring any omission in the medical reports to the attention of the authors thereof so as to clarify the matter.

This point was emphasised in *McMullan v Carty* (High Court, unreported, 13 July 1993), where the court held that the defendant solicitor was not negligent. She had fully and carefully communicated her client's instructions and queries to a senior counsel nominated by the client and then relayed to the client the advice received. In addition, in a complex matter or one in which there is doubt, a solicitor should advise his client to obtain the opinion of appropriate and competent counsel rather than assume sole responsibility himself for advising the client.

A solicitor will not be liable in negligence if he fully presents his client's case to appropriate and competent counsel and then reasonably (as opposed to blindly) relies on the advices he receives. If sued, he should join counsel as a third party to any such proceedings.

In *Connolly v Casey* ([2000] 1 IR 345), the plaintiff sued her solicitors for professional negligence on the basis (among other things) that they had issued proceedings against an incorrect defendant and that her claim against the correct defendant was statute-barred. She was injured as a result of accidents at work that occurred during the course of her employment in St James' Hospital, Dublin. The defendants joined the third party, a barrister who had drafted proceedings on behalf of the plaintiff naming the Eastern Health Board as defendant instead of the hospital. The facts of the matter were that counsel was not briefed by the solicitors in the formal sense; instead, the solicitor handed the file to the barrister, who then drafted High Court proceedings on behalf of the plaintiff naming the health board as defendant. Counsel did not advise the solicitor to check that the health board was the correct defendant and the solicitor, without checking the matter further, instituted proceedings against the board. It was later discovered that the Eastern Health Board was not the correct defendant.

In this case, the plenary summons was issued on 21 February 1995 and the statement of claim was delivered on 3 March 1995. Notice of change of solicitor was served on 16 February 1996. On 14 March 1996, the solicitor for the defendant raised a notice for particulars. On 22 April 1996, the defence was delivered and it was clear from that that the defendants were alleging negligence and breach of duty on the part of counsel in respect of the advice which he gave concerning the institution of proceedings against the Eastern Health Board. On 14 January 1997, the solicitors for the plaintiff replied to the notice for particulars.

Notice of trial was served on 6 February 1997 and a second such notice was served on 13 January 1998. On 7 April 1997, the affidavit was sworn, grounding the motion seeking liberty to issue and serve a third-party notice on the third party. On 25 July 1997, the motion seeking liberty to issue and serve third-party proceedings was issued. On 20 October 1997, Kinlen J ordered that the defendants be at liberty to issue and serve a third-party notice on Michael Fitzgibbon, the proposed third party. On 19 January

1998, an appearance was entered for the third party. On 21 January 1998, the motion seeking relief for the third party, determined by the High Court to be the relief of setting aside the third-party notice, was issued. On 12 June 1998, Kelly J set aside the third-party notice. The defendants appealed that order to the Supreme Court.

The legal issue at the heart of *Connolly v Casey* was whether the defendants had delayed unreasonably in failing to apply to join the third party shortly after the delivery of the defence in April 1996. Under the provisions of section 27(1)(b) of the *Civil Liability Act, 1961*, there is an obligation on the party seeking to join a third party to serve such a notice 'upon such person as soon as is reasonably possible'. That section goes on to provide that if 'such third-party notice is not served as aforesaid, the court may in its discretion refuse to make an order for contribution against the person from whom contribution is claimed'.

In the course of his judgment in the High Court, Kelly J considered the terms of the defence and addressed the issue of delay in this case in the following terms:

'The insertion of these pleas in the defence suggests to me that at the time of its delivery the defendants were possessed of sufficient information to justify the inclusion of such a plea. An allegation of professional negligence is a serious matter and ought not to be made unless there are reasonable grounds for so doing. I do not believe that either counsel who signed the defence would have done so unless they were satisfied that such grounds did exist. Given, therefore, that the defendants were in a position to make such a plea as far back as April 1996, what is the explanation proffered for the delay between that date and the service of the third-party notice on 29 October 1997?'

The defendants sought to justify the delay on the basis that they had to await replies to the notice for particulars before they could move to join the third party and they also needed to obtain a statement from Mr Murphy (the solicitor who handled the matter at the start) prior to bringing that application. Kelly was satisfied that these explanations were not acceptable and he did not see that the replies to particulars could materially alter the defendants' state of knowledge in relation to the joinder of the third party and he set aside the third-party notice on that basis.

The Supreme Court reversed him, stating that he had applied the wrong test. The correct test was *'whether it was reasonable to await the replies to particulars. Whether the replies did or did not materially alter the defendant's state of knowledge is not the test. The queries raised in the notice for particulars were relevant to the claim against the third party and thus it was reasonable to await the replies'.*

In delivering judgment in the Supreme Court, Denham J allowed the appeal on the grounds that *'the delay of the defendants was not unreasonable and that in the circumstances of the case the third-party notice was served "as soon as is reasonably possible". However, this is a case with particular facts in a suit alleging professional negligence and the decision does not endorse delay; rather, it seeks to encourage a modern management of litigation to avoid a multiplicity of suits'.*

Earlier in her judgment, Denham stated: *'It is important in professional negligence cases to act reasonably. Proceedings must have an appropriate basis. Counsel have a duty of care. Reference has already been made to the need to develop modern case management in cases relating to professional negligence:* Cooke v Cronin *(unreported, Supreme Court, 14 July 1999)'.*

One has to look at all of the circumstances of the case and its general progress in analysing any delay in the service of third-party proceedings. Denham pointed out that the *'clear purpose of the sub-section is to ensure that a multiplicity of actions is avoided: see* Gilmore v Windle *([1967] IR 323). It is appropriate that third-party proceedings are dealt with as part of the main action. A multiplicity of actions is detrimental to the administration of justice, to the third party and to the issue of costs. To enable a third party to participate in the proceedings is to maximise his rights – he is not deprived of the benefit of participating in the main action'.* G

Patrick Groarke is the principal of the Longford law firm Groarke & Partners and a lecturer on the Law Society's continuing professional development programme. This is an edited version of his lecture on professional negligence.

FAMILY fo

A wealth of experience was shared with practitioners at the recent *Family law in Ireland conference.* Keith Walsh outlines the key points highlighted by speakers as well as some practical tips for solicitors

If you ask family lawyers to identify the main practice and procedure issues they have faced over the past 12 months, their extensive list will probably include most, if not all, of the following: the implications for their clients of the judgments in *K v K* and *T v T*; the rights of cohabitees; conveyancing and probate in the family law context; preparing and presenting cases in the Circuit Court; and avoiding ancillary relief problems.

In organising the *Family law in Ireland conference 2003*, Jordan Publishing obviously put this question to their speakers, who each took one of these topics and dealt with it in his or her own fastidious and informative fashion. This article briefly relays the advice and wisdom of some speakers in relation to these matters, which arise daily or weekly for most family law solicitors.

T v T and *K v K*

Solicitors at this year's conference expecting guidance in predicting the outcome of divorce cases following the judgments in the long-awaited Supreme Court case of *T v T* and the decision of the High Court in *K v K* were disappointed (but not surprised) when Gerard Durcan SC told them that it was still virtually impossible to estimate with any certainty the probable outcome of divorce cases. While the relevant legal principles were clarified, the application of these principles means that each case is assessed by the trial judge on its own facts and having regard to section 20 of the 1996 *Family Law (Divorce) Act*. This uncertainty as to result is, Durcan asserted, unsatisfactory in an area of the law that affects people's lives more than any other.

He forensically examined the judgments in these cases and also focused on the difference between 'old' and 'new' separation agreements. When taking instructions, Durcan advised that following O'Neill J's judgment in *K v K*, the age or date of the separation agreement is of critical importance. O'Neill J's approach differentiated between recent separation agreements which were more likely to constitute 'proper provision' than separation agreement concluded 20 years ago.

Durcan suggested that generally the older the separation agreement, the more difficult it will be to

MAIN POINTS

- **Estimating the outcome of divorce**
- **Cohabitation rights**
- **Discovery in family law cases**

rtunes

persuade a court that its terms constitute 'proper provision'. Also significant is whether the separation agreement was concluded before or after the 1995 act, which introduced a raft of new statutory reliefs for spouses. Separation agreements dated prior to the introduction of this act may be especially vulnerable on this basis.

He pointed out that *K v K* may herald a change in pre-trial practices for lawyers as in this case, prior to the court hearing, the husband wrote to the wife setting out in an open letter what he was prepared to offer her and the wife wrote to him by open letter setting out what she was prepared to accept. In his judgment, Mr Justice O'Neill complimented the parties on setting out what they considered to be proper provision in the context of their case and stated that it greatly assisted the court. Durcan wondered whether it would now become standard practice at the start of each hearing in divorce cases for the court to ask the parties what they consider to be proper provision in the circumstances. If this approach is adopted, it may have implications for costs if parties refuse to set out their view of 'proper provision' prior to the hearing.

Unmarried couples

In her introduction to the conference, Judge Elizabeth Dunne stated that if anyone was in any doubt about the progress made in family law over the last 30 years, all they had to do was to contrast the legal position of the marital family with the lack of legal protection afforded to unmarried couples under the law in 2003. David Bergin of solicitors O'Connor & Bergin developed this theme in relation to property rights of cohabitees.

Essentially, there are two types of cohabiting couples outside marriage: those who were engaged at the relevant time and those who were not. The *Family Law Act, 1981* deals with the determination of property disputes in relation to engaged couples whose engagement has terminated. Those unmarried couples who were not engaged to each other must revert to the *Partition Acts 1863-1876* to determine their property disputes.

Dealing with engaged couples first, section 5 of the 1981 act states:

(1) 'Where an agreement to marry is terminated, the rules of law relating to the rights of spouses in relation to property in which either or both of them have a beneficial interest shall apply in relation to any property in which either or both of the parties to the agreement had a beneficial interest while the agreement was in force as they apply in relation to property in which either or both spouses have a beneficial interest

(2) Where an agreement to marry is terminated, section 12 of the Married Woman's Status Act, 1957 *(which relates to the determination of questions between husband*

David Bergin: 'ambiguities in the 1981 act'

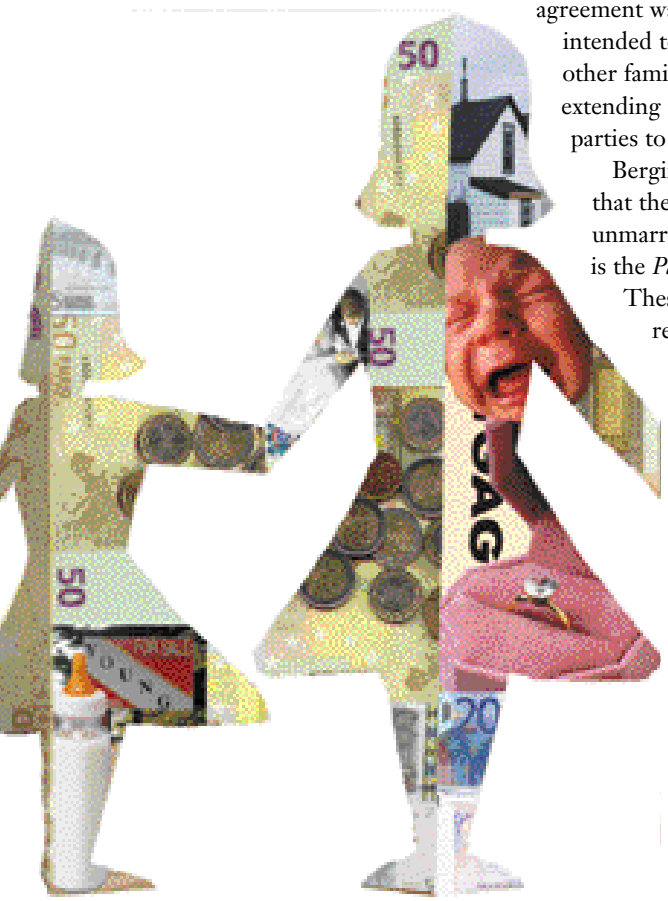
and wife as to property) shall apply, as if the parties to the agreement were married, to any dispute between them or claim by one of them in relation to property in which either or both had a beneficial interest while the agreement was in force).

Rules of engagement

Bergin confirmed that this section means that the same principles apply to engaged couples as to married couples and introduces the doctrine of advancement to engaged couples. This has two advantages, the first being that the summary procedure of section 36 of the *Family Law Act, 1995* is available to formerly engaged couples to resolve their property dispute.

The second advantage – for the female only – is that if her fiancé purchases a property with his own money and transfers it to her, then the doctrine of advancement means that the legal presumption is that he meant the property to be owned by her. This doctrine of advancement does not work in reverse, so the male cannot benefit from his fiancée's generosity.

Bergin identifies one of the ambiguities facing practitioners when dealing with the 1981 act as being the lack of a definition of 'agreement to marry' there or elsewhere. He also notes that section 44 of the *Family Law (Divorce) Act, 1996* clarifies section 36 of the *Family Law Act, 1995* by providing that section 36 applies to the parties to an engagement which has been terminated, by treating them as if they were married to each other in relation to property in which either or both of them had a beneficial interest while the agreement was in force. This was intended to prevent the provisions of other family law legislation extending to property owned by parties to a broken engagement.



Bergin believes that it is absurd that the applicable legislation for unmarried, non-engaged couples is the *Partition Acts 1863-1876*. These acts were designed to resolve property issues arising from the dissolution of business partnerships, not disputes involving cohabitees. In resolving disputes between cohabitees, the courts may decide that a resulting trust exists or impose a constructive trust.

A resulting trust arises from the presumed intention of the parties. Bergin gives the example of a house purchased in the girlfriend's name although all the purchase monies were provided by the boyfriend. In this case, the court may presume that the girlfriend holds the property on a resulting trust for the boyfriend unless there is a clear intention to the contrary.

A constructive trust, according to Bergin, arises by operation of law and is imposed by the court in the interests of justice. Cohabitees have no protection under the *Family Home Protection Act, 1976* and the criteria set down in section 16 of the *Family Law Act, 1995* or section 20 of the *Family Law (Divorce) Act, 1996* are not relevant in the division of cohabitees' property. Many of these cases start when the cohabiting partner issues ejectment proceedings against the other partner who has made no direct or indirect financial contribution.

Disputes between cohabiting partners will be heard in public unless they relate to children or domestic violence (only since the *Domestic Violence Act, 1996* have non-marital couples been given statutory protection against domestic violence). Judge Elizabeth Dunne compared the considerable publicity associated with non-marital cases with the lack of publicity in marital cases due to the protection of the *in camera* rule.

Bergin believed that there were many cohabitee cases which had not been argued in court due to fear of the attendant publicity; equally, there were a number of cases without merit which had ended up in court because the applicant believed the respondent would not endure the publicity.

Bills, wills and automobiles

In determining these cases, the Irish courts examine the contribution of each partner and these contributions can be direct (for instance, towards the purchase price or mortgage repayments) or indirect (such as contributions to the general living fund). The indirect contributions may, in the absence of any express or implied agreement to the contrary, infer a trust in favour of the cohabitee on the grounds that they relieved the other of the financial burden incurred in purchasing the property. The indirect contributions must be of a reasonable size and the court may ignore minor contributions made.

In *Conroy v Power* (unreported, High Court, 22 February 1980), McWilliam J stated that *'the correct approach is to try to ascertain what sums have been paid by the parties towards the acquisition of the house and that in doing this I must take into account such contributions towards the household living expenses made by either party as enabled the other party to make such payments as were made by him or her. Having done this, I should treat the house as being held by the defendant, on trust for the parties in the shares which they contributed either directly or indirectly towards its purchase'.*

Bergin also reports that in the Circuit Court, a number of (unreported) decisions were made where an applicant was given rights to or a share in a property on the basis of spurious indirect contributions. He believes that in some cases the courts will have sympathy for an individual,

especially if the relationship has lasted for a long time or if there are children of the relationship. In these cases, the court will do its best to identify reasons why it should give a cohabitee a legal or beneficial interest in a property.

Bergin also points out that it is easier to gather evidence proving payment of deposit and mortgage than it is to establish payment of indirect contributions, such as household bills and repairs, which are unlikely to be either sought or retained.

Based on his vast experience of dealing with cohabitees, he expressed his surprise at the lack of wills made by cohabitees, as well as the rush to buy property jointly as opposed to as tenants in common, which he would favour. Finally, Bergin sees this area developing further and says solicitors must be aware of the lack of legislative cover for their clients.

Complete lawyer

Muriel Walls: 'don't rely entirely on the client'

Family lawyers are more in touch with general practice than any other specialists are, according to Muriel Walls of solicitors McCann FitzGerald. Even in the simplest cases there is generally a property to be transferred and a will to be made, while further down the line there is usually an estate to be administered. Walls presented an overview of all areas of practice connected with family law entitled *The complete family lawyer*.

Preparing a will for a family law client is an area of immediate danger for solicitors and Walls believes that while making a will can be a potential minefield, not making a will is also a danger area. When taking instructions, full marital and family background information must be obtained.

Walls refers to Smyth J's criticism of the solicitor involved in drafting a will when he did not have a full understanding of the family history in *Crawford and Hogan v Lawless* (High Court, November 2002). The will was unclear and it fell to the High Court to interpret the will, based on the testator's intentions.

'While making a will can be a potential minefield, not making a will is also a danger area'

Solicitors should not rely entirely on the client and should examine copies of any separation agreement, decree of judicial separation or divorce or other relevant documentation.

Another difficulty is the status of divorces granted in another jurisdiction because, if the divorce is not recognised here, the testator may not in fact be lawfully married to the person for whom they are making provision. If this is discovered during the lifetime of the spouse, then at least the situation can be regularised by applying for an Irish divorce and remarrying. Most of the High and Supreme Court decisions on the recognition of foreign divorces have, according to Walls, not granted recognition of foreign divorces based on the facts presented.

She advises that it is essential that details of the title to the family home and any other property owned by both spouses or either of them is obtained early on in a family law case and she recommends searches on the property at the start. The folio can be obtained from the Land Registry, or a copy of the deed may be got from the lending institution and this can often identify any problems with the title that would cause difficulty later. Where the property is leasehold, it is advisable to discover from the client whether the freehold has been bought out, as the vesting certificate will often have been placed with the title deeds.

If a spouse is transferring a property to the other spouse for no consideration or for some, or full, value, then he or she must be released from all liability on foot of the existing mortgage if that is what is agreed. Practitioners should co-operate to get their clients to sign the necessary authority to take up the title deeds at the earliest opportunity.

According to Walls, a release from a mortgage can be achieved in one of two ways:

- The transferee spouse takes out a new mortgage and redeems the entirety of the joint mortgage
- Release of the liability of the transferor spouse under the existing mortgage. This is both a legal and an administrative task. Each financial institution now has its own procedures and requirements to obtain the release of a spouse from an existing mortgage. The financial institution will require evidence of ability to pay

by the transferee spouse, either by production of a P60 or books of account, and in many cases will also wish to see the deed or decree to ascertain maintenance levels. There will also be conditions in relation to mortgage protection, life insurance, valuation report and survey.

50 ways to leave your lover

The key message emphasised by Walls was that, in each case where the transferor spouse is being released from the mortgage, it is essential that the financial institution joins in the transfer deed as a party to that deed so as to release the spouse from liability on foot of the mortgage. The financial institution must also be a party to the deed in order to consent to the transfer as all mortgages contain a covenant against assignment.

Sections 9(5) of the 1995 act and 14(5) of the 1996 act require the registrar of the court to lodge a certified copy of every property adjustment order with the registrar of titles. This is why details of title must be contained in every family law civil bill. When a property adjustment order is made, it is registered on the relevant Land Registry folio and/or registered in the Registry of Deeds. As it is registered as a burden under section 69.1(h) of the *Registration of Title Act, 1964*, then unless this burden is specifically removed, it remains on title even if the transfer giving effect to the order of the court is subsequently made and the transferee spouse is registered as owner.

Therefore, in Land Registry cases the transfer should contain a specific discharge within the deed itself. Walls suggests this:
'The transferor hereby requires a note of the discharge of the burden registered at [ ] of part [ ] of the folio'.

The correct revenue certificates in respect of transfers of property on foot of separations or divorce are set out in section 96 (separation) and section 97 (divorce) of the *Stamp Duty Consolidation Act, 2000* respectively.

Walls also pointed out that there are no formal guidelines for closing requirements for transfers following separation or divorce. While some solicitors acting for the transferees raise full requisitions on title, many solicitors acting for the transferors are simply not prepared to go to the trouble or expense of answering them. Walls advocates the raising of a short form of requisitions dealing with notices, purchase of the freehold (if leasehold title), extensions to the property and compliance with planning. A formal closing is preferable in relation to the property aspect as, if this is not done, documents (such as the PD form)

can be promised which may not come in a timely fashion and may delay stamping and registration.

While there is no practice direction from the Law Society's Conveyancing Committee, Walls strongly advised that the normal formalities of closing are followed in a transfer between husband and wife. A closing day should be nominated, searches done and the documents exchanged in a single transaction.

She cautioned that solicitors should not be bullied into accepting less than what would be normal practice in a regular conveyancing transaction, for instance, accepting a client's personal cheque in respect of the consideration. A deed of waiver should also be prepared so as to avoid future difficulties.

Finally, if the acquisition is over €1 million in value, an RP54 (residential tax) certificate should be obtained to ensure there are no outstanding taxes due. Walls notes that there is no practice direction on whether a capital gains tax certificate is required in respect of the transfer but recommends that it is probably better to get it to ensure there are no difficulties if a property is disposed of in the future.

View from the bench

Michael White, a solicitor with 21 years' experience in practice and latterly a judge of the Circuit Family Court, gave practitioners a unique and most welcome insight into how he viewed the adjudication of family law matters. The role of the solicitor, he believes, is to assist the client to get justice or, alternatively, to achieve a favourable outcome.

In examining evidence from both sides, Judge White has observed there are almost always central themes on which decisions are based in each case. He encouraged practitioners to identify the central themes on which the judge has to adjudicate, since by concentrating on these they will greatly assist their client. By implication, it appears that advocates wandering off the central themes and into other, irrelevant areas may be doing their clients a considerable disservice. White believes the trial judge has a relatively broad discretion in dealing with family law matters and, even if appealed, the appellate court is bound to give reasonable latitude to the trial judge (as did Keane CJ in *T v T*).

Discovery and related applications proliferate in the motion lists of the Circuit Family Courts. Judge White views discovery as a growth industry – sometimes necessary but often counter-productive. In cases where one spouse is self-employed, discovery should be more extensive and an order for discovery is advisable. Discovery should be concentrated on essential information; discovery left unread and unanalysed is a complete waste of time. If serious non-disclosure is suspected, then third-party discovery may be required to obtain key financial information. Similarly, before initiating the use of experts in a family law case, the legal advisor must first ensure that the benefit is worth the cost.

The most difficult cases to settle or adjudicate on are limited assets cases where, for example, the only asset is the family home and neither party is in a position to buy the other one out. Judge White sees a negotiated settlement as the best solution for clients as they retain control of their own destiny. However, this is often not possible and there are times, particularly when dealing with a difficult client, where a court hearing is the only option.

Judge Michael White: 'it is important to know the judge'

In response to questions from the floor (the majority of which related to financial disclosure), White addressed the issue of whether a beneficiary of a discretionary trust should disclose this benefit in their affidavit of means by stating that, in his view, they should. In response to another question, he indicated that in some cases property inherited by one of the spouses should be treated as part of the proceedings.

Finally, it is useful to recall in relation to Judge White's comments his own words that *'while judges apply the same law and exercise the same jurisdiction, the exercise of their discretion can vary. It is important, if possible, to know the judge who will be trying your case'*.

'Advocates wandering off the central themes and into other, irrelevant areas may be doing their clients a considerable disservice'

A lot done, more to do

The long-awaited judgments in *T v T* and *K v K*, while clarifying the legal principles involved in divorce cases, did not weigh the various factors to be assessed and stated that each case must be decided on its own facts. Unfortunately, this is not a great help to the solicitor who is asked to estimate the likely outcome of a family law case for his client. Further judicial developments and clarification would be most welcome.

Whatever the difficulties facing lawyers dealing with matrimonial law cases, the lack of legislative provision for cohabitees causes huge difficulties, uncertainty and worry for all concerned. Demographic trends mean that this area of law will increase as the institution of marriage declines. The Law Reform Commission is due to deliver its discussion paper on the rights of cohabitees later this year. Much future change is needed in this area, which will be obviously difficult to effect.

It is clear that standard conveyancing practices need to be put in place in relation to transfers of property between spouses following separation and divorce as these transactions are often conducted in an *ad hoc* and arbitrary fashion. Guidance from the Conveyancing Committee of the Law Society would be appreciated.

Practical guidance from the bench is always welcomed by practitioners and it is hoped that more judges will come forward to discuss and contribute their view of the best way to develop family law and procedure with practitioners.

The only dog that did not bark at this year's conference concerned the proposed changes to the *in camera* rule. Hopefully, there will be something to report in time for next year's conference. G

Keith Walsh is a solicitor with Dublin law firm Fawsitt Whitefriars.

NETGAI

The Law Society website has been a valuable resource for members and the general public for a number of years, but now it has been relaunched with a host of extra features, as Claire O'Sullivan explains

The Law Society made its first foray into the digital world in February 1999, with the launch of its public website, followed in November of that year by the development of a dedicated members' area. This website has served the society well over the last few years and allowed solicitors and the public to access large volumes of information relating to its work and general legal developments.

It became clear, however, that the increasing volume of information emanating from the society, its committees and the Law School, combined with the need to keep members constantly updated in relation to legal, practice and educational developments, was putting pressure on the original website. Moreover, its structure and layout meant that members and the public were finding it increasingly difficult to access information and to navigate the site easily. Accordingly, we felt that a new website with additional functionality and a more straightforward navigational structure was needed. So on 11 June last, the Law Society launched its new website.

As the law continues to develop and expand, the society is conscious of its responsibility to keep members constantly updated on developments, both in the legal environment and in relation to Law Society initiatives. The new website is an important medium for providing timely and comprehensive information to the membership at large, literally at the press of a button. It contains many new features, including a directory of solicitor firms, access to the library catalogue, an on-line booking and payment system for courses and examinations, and an entirely new student section. The emphasis throughout the site has been on clear layout and design and the development of an intuitive navigational system which we hope will greatly facilitate members wishing to locate and download information relevant to their practices and working lives.

The design of the new site has been radically transformed, incorporating an image of the society's premises at Blackhall Place on each page and using

the colours of the Law Society crest throughout the site for greater continuity. The site itself now comprises three main areas:

- The public area provides general information on the functions and activities of the society
- The members' area incorporates many of the existing features from the old site, while providing additional functionality, and
- The student area is designed to meet the requirements of trainee solicitors.

The home page is database-driven and incorporates four areas: news, forthcoming events, employment

MAIN POINTS

- **New and improved features**
- **Introduction of new students' area**
- **Library catalogue goes on-line**

opportunities and continuing professional development (CPD) seminars. These four areas will be regularly updated and the information appearing on the home page of each section will be tailored to the specific target audience – that is, the general public, members or students.

The menu, appearing on the left of each page, is the main navigational system driving the site. Main subject areas are listed here and when a user selects an individual topic, a drop-down menu appears, allowing the user to further browse the various sub-headings. New features such as the directory of solicitor firms allow browsers to search for a

ON-LINE LIBRARY

Keeping up-to-date with the changing legal environment is a challenge to every busy practitioner and trainee solicitor. With a constant stream of new books and journals being published, and legislative and case developments happening all the time, it is essential to have a system in place to ensure your legal research is accurate. The Law Society library catalogue is a source for tracking down these items and is now available on-line via the member and student areas of the newly-designed Law Society website. You can use the catalogue to find specific records or to check the current awareness features, which are updated regularly.

The library menu contains details on borrowing, document delivery, copyright arrangements, lists of journals and law reports and links to legal websites. It also contains current issues where current news items are posted for your information.

The catalogue itself contains records for textbooks, reports, journals and lectures. It also has entries for all Irish legislation from 1997, with detailed information about each item, including commencement dates, amending provisions, and implementation of EU directives. There are also comprehensive entries for all written reserved judgments from 1990, including citations for law reports, abstracts of the key facts and findings and a link, where available, to the full text of the judgment on the British and Irish Legal Information Institute (Bailii) website.

Searching the catalogue is easy using the quick search default screen, which allows searching by author, title, subject and a catch-all search-everything option. You can also combine any of these options in the complex search screen. If you are unsure of the name of an author or what subject term is used for a particular legal concept, you can browse alphabetical lists of names and subjects to help you identify exactly what you want. Full instructions on how to carry out an efficient search are available on the library menu under *Catalogue*.

A further current awareness feature is available by clicking into the information desk where you can access lists of the most recently received books/reports/lectures, legislation and judgments. These lists contain items received and catalogued during the last three months in reverse chronological order. By checking the information desk on a regular basis, you can easily keep yourself informed on subject areas that affect your practice and thereby enhance the quality of service you can give to your clients.

If you want to check your own user record, click on *User information* where you can log in and see what items you have on loan and the status of any items you may have reserved. Instructions for accessing this area are available on screen.

On-screen help is available throughout the catalogue. Further assistance is available by contacting the library staff who will be happy to guide you through any difficulties you may be having.

We would also welcome your comments and suggestions about using the catalogue and its future development. Watch next month's *Gazette* for useful searching tips.

Mary Gaynor is the Law Society's deputy librarian.

Webmaster Claire O'Sullivan (*left*) pictured at the launch of the new website with deputy librarian Mary Gaynor and Denise O'Kelly from Volta Digital Media, which developed the site

solicitor's firm using the name of the firm or its geographical location.

By clicking on the login button on the top right hand corner of the home page, members and students can access their respective areas using their member or student numbers.

The members' area of the site offers a range of new features. The library section has been greatly improved and expanded and members will now be able to access the library catalogue on-line (see **panel** on previous page).

A new section has been created, detailing the work of the society's committees. All committee projects, news and initiatives can be found within each one's discrete area.

The new *Gazette* section allows members to search the magazine's archive using a keyword search and also contains all back issues of the *Gazette* since its relaunch in January 1997.

The CPD area allows members to view the range of current seminars and to make on-line bookings for courses using their credit card. This on-line booking and payment system should greatly facilitate those who wish to avoid the inconvenience of writing or telephoning the CPD section to obtain a place on the course of their choice. The expanded area also includes comprehensive information on the new CPD scheme, which came into effect on 1 July, and also contains a downloadable version of the CPD card and a frequently-asked questions page.

The diploma and certificate section has also been greatly expanded and includes comprehensive information on all diploma and certificate courses run by the society, together with course content, timetables and application forms. Interested members may also submit their details on-line to the course administrator and be added to the diploma database for notification about future courses.

The employment opportunities section – always a popular feature of the site – offers a free service to members wishing to advertise legal vacancies. Employers may also submit vacancies on-line and will be able to see exactly when each vacancy was posted, with the most recent vacancies appearing first.

The practice notes and precedents for practice section, which has proved extremely useful to members in the running of their practices, is also available in the members' area. The policy documents section comprises all submissions and reports made by the Law Society and its committees to various government and non-governmental bodies over the past number of years. These documents may be downloaded in printed document format (pdf).

For the first time, the new website incorporates an entirely new student area, accessible by student name and number. Previously, the society did not have a dedicated area for its student body and it is hoped that students and trainee solicitors will find this new section practical and informative.

This area contains many new features, including information on the professional practice course (PPC) I and PPC II courses, which expands into more detailed information on examinations, assessments, subjects and timetables. Information relevant to trainees, including details of salary scales and funding, has also been included. Further sections contain information on extra-curricular activities and resources and services.

The student repository has also been incorporated into this area of the site. This facility allows students to readily access handouts, assessment details, timetables and legislation. It will also prove very useful for training solicitors as a significant amount of information applicable to trainees could also be used by their employers. Students and prospective students will for the first time be able to apply and pay for examinations on-line, including repeat applications, and to purchase past examination papers and examiners' reports.

The new Law Society website should prove a useful tool to solicitors in the running of their practices by allowing them to simply and speedily access news and information and keep abreast of legal developments. Any members who have queries or difficulties in accessing any part of the site may contact me at the society, and I will be only too pleased to assist them. G

Claire O'Sullivan is the Law Society's member services executive.

Tough talking

Mediation aims to resolve disputes and avoid the day in court – but while clients may save money and salvage relationships, solicitors must consider how traditional litigation practice will be affected, writes Michael Williams

Let me begin by explaining the stance from which this article is written. I worked as a solicitor for 30 years, changed careers in the 1980s, and worked until recently as a mediator and mediation trainer. Now semi-retired, I am an enthusiast for my second profession, a supporter of my first, and a life-long member of the Law Society.

I think the solicitors' profession is wise to welcome mediation; clients will increasingly want to use it, and to resist would be counter-productive. But increased use of mediation in litigated disputes is going to lead to changes for lawyers, not all of them welcome, and it would be foolish to pretend otherwise.

The first change we can expect is in the pattern by which no serious settlement negotiations take place until just before a hearing is due. Any experienced mediator knows that clients who use mediation at an early stage in their dispute have a better chance of settling it amicably than those who put it off until the last minute. Mediators probably won't say this to clients who come to them late in the process – what would be the point? But the word will get out. Clients will begin to wonder why they have to pay lawyers to bring their case through all the stages of preparing for a trial if it is going to be settled through mediation, and may instead instruct their lawyers to try mediation first and start litigation only if it fails.

Horses for courses

Next, clients whose cases have settled through mediation may begin to question the need to retain two sets of professionals. I think this will happen most often in what I call 'settlement cases', where the parties are strangers to each other and will have no need to see each other again when their dispute is over. I distinguish them from disputes between parties who typically have had a relationship interrupted by their dispute, and who want or need to deal with each other in the future. I call these 'resolution cases', because the parties may need a *resolution* of their dispute, restoring their ability to collaborate in future, not just an end to their litigation.

In resolution cases, mediation offers a service for which there is so far no substitute. In settlement cases, where most defendants and almost all plaintiffs want a speedy result, clients will ask: 'If we could settle this dispute in mediation, why could our lawyers not do the same thing – negotiate a deal – without outside help?' This will be a reasonable question. In the majority of settlement cases, lawyers

MAIN POINTS

- **Mediation as an alternative**
- **Pain as well as profit for the profession**
- **Need for industry standards**

who recommend their clients to try mediation thereby tacitly admit that one or both of them has failed to get what both clients wanted – settlement of the dispute without big legal bills.

So, it is likely that as mediation is used more in litigation, we will see it tried early in the process more often; not after notice of trial, when the bulk of legal fees have been incurred. This will mean lawyers' fee income from cases that settle will reduce, perhaps significantly. Clients will, of course, benefit, but for lawyers there will be pain as well as benefit.

If this pattern emerges, I expect it will lead to an important change in how commercial mediation is conducted. The practice of not bringing disputes to mediation until a hearing is imminent has led to mediation of non-family disputes being confined to one session, which may continue into the small hours of the next morning. If common sense and client pressure promotes early use of mediation, the '*one day only, keep at it till you drop*' formula will probably fall into disuse.

Improved service

If so, the service that mediators can give to their clients should improve. The process of helping reluctant clients to change from a non-settling to a settling pattern – which only mediation can offer at present – often needs time. It may be helped by having more than one session, with time in between for clients to change their attitudes.

I hope, too, that if lawyers accept mediation, they may contribute to improving the quality of mediation as well as improving client service. Mediating is not easy. Becoming a competent mediator requires constant work. But it is an unregulated profession and anyone who chooses to do so may set up in practice. There are people who describe themselves as mediators who have not strived to acquire professional competence and do not respect ethical boundaries. At present, Ireland does not have a mediators' organisation with standards that command and deserve public confidence.

Lawyers are discriminating, and won't accept a poor service. I hope that as the legal profession accepts mediation, lawyers will get to know which mediators strive to offer a competent and ethically-based service, recommend them to clients, and avoid the others. If they do, the quality of mediation available to their clients should improve, perhaps dramatically.

To any enthusiast for mediation, that would be good news indeed. G

Michael Williams is a former solicitor and mediator.

Book reviews

The law of private companies (second edition)

Thomas B Courtney. Butterworths (2002), 26 Ormond Quay Upper, Dublin 7. ISBN: 1-85475-265-0. Price: €150

Some of us are old enough to remember the days where there were perhaps fewer than a dozen Irish law books in print. Kiely's *Law of equity* and the *Black Deale* had pride of place in our libraries. The late 1970s saw the advent of the *Red Wylie* and then the *Green Wylie*. Thankfully, that has changed and there is now a wealth of Irish law books and periodicals.

The second edition of Tom Courtney's acclaimed *The law of private companies* was published by Butterworths just before Christmas. When I had the pleasure of reviewing the first edition for the *Gazette* back in 1994, I stated that the book was an essential component of any solicitor's library.

Eight years on, Tom Courtney has produced a book almost doubled in size to over 1,600 pages. He has done this in the context of another three *Companies Acts*, four review group reports on company law, innumerable proposals and directives from the EU, with their consequent enactment by regulation, and the continuing development of judge-made law.

While 20 years ago we would welcome each book as a landmark in Irish legal publishing for its novelty, among other reasons, we now welcome new law books into a better legal publishing environment, and look at their merits in a comparative context.

That said, this book is a landmark: it stands head and shoulders over its peers for content, presentation and relevance. It is a compulsory purchase for all solicitors, not just those with an interest, a patience or a requirement for company law. In particular, as I read the book, I realised that anyone with a wish to expand their litigation competence and practice should take the time to read chapters 6, 16 and 19 of the book, which deal with corporate litigation, share transfers and remedies of shareholders respectively.

Why private companies? Courtney reminds us that of the 150,000 companies on our companies register, a good 90% are private companies limited by shares. There are fewer than 80 listed companies and maybe up to 2,000 investment companies with plc status. Important as these are, it is the remainder of the companies on the register that keep the economy going, as well as being those most likely to keep solicitors gainfully occupied.

The book's focus is the law that applies to private companies, though chapter 28 provides an excellent primer on the fundamentals of the law as it extends to public companies. Law affecting plcs is, of course, under intense review at EU level, with a myriad of proposals on their way to enrich (depending on one's perspective) our company law.

The law of private companies begins with the background to our law; without some history, our present law would be impossible to explain. It then moves into incorporation, constitutional documentation and the consequences of

incorporation. As with the first edition, Courtney is ably assisted by Brian Hutchinson, who contributes five of the 28 chapters, including that relating to the circumstances where corporate personality is disregarded. The book progresses through corporate civil litigation and corporate capacity to corporate governance. Corporate governance is looked at from the perspective of management by the directors and meetings of the members. This leads into directors' duties and liabilities.

Since the first edition, the big change in directors' duties is the new section 383 of the *Companies Act, 1963* inserted by the *Company Law Enforcement Act, 2001*. This makes the directors and the secretary of a company expressly responsible for the company's compliance with the *Companies Acts* – with the added kicker that it is presumed where the company is in default that the directors and secretary are in default. This controversial amendment is only now beginning to get the attention of directors and advisers, and its impact is properly emphasised in the book.

Chapter 11, which relates to the almost inscrutable area of transactions with directors, is excellent in terms of both pure legal analysis and application to real situations. It even goes so far as to provide precedent wording for certain resolutions. This leads into the new law on compliance and enforcement brought in by the 2001 act. Again, it is only now that the reporting obligations to the director of corporate enforcement are beginning to bite, triggering suggestions from many that these requirements have generated an unwanted blizzard of correspondence on trifles from auditors (and others) with the director.

The book then deals with accounts and auditors, investigations and inspectors, and shares and membership. A full chapter is given over to share transfers in private companies. In this chapter, one can observe and appreciate the best attribute of this book: a relentless thoroughness of research which is on a par with the highest academic analysis, combined with an unbending concentration on the practical effects of the law. How often in practice have we been consulted by clients who can't transfer their shares or can't get themselves registered as shareholders? For this reason, the book should be on the shelves of not only company

Irish Competition Law: The Competition Act 2002

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lawyers and commercial lawyers, but also of litigators.

The book deals with groups of companies, capital maintenance and shareholder remedies. Corporate borrowing is meticulously covered – again combining comprehensive discourse on the law with the practical application of that law. Insolvency is covered in depth, from receivers, through examinerships, schemes of arrangement, liquidations and liquidators. It is impossible to do the book credit in this limited space. It is quite simply excellent.

Recent case law features throughout the book, covering for instance, judgments on:

- The interaction of agreements between shareholders and the court's discretion under the *Companies Acts*. In the case of *Via Net Works* (2002), the court refused a claim for oppression by a registered shareholder that had agreed to sell its shares. In *Murray Consultants* (1999), the court entertained such a claim, despite the existence of agreements regulating the valuation of shares on a shareholder exit (where such exit was the likely order of the court)
- *De facto* directors (increasingly relevant in the light of restriction and disqualification of directors), so often confused with shadow directors, tracing its provenance from the *Canadian Reclaiming and Colonising Co* case of 1880 to the Irish *Lynrowan Enterprises* case of 2002
- Security for costs, most recently summarised in the 1999 judgment in *Lismore Homes v Bank of Ireland Finance*, which held that security for costs means the security for the entire. Courtney comments: 'Where the effect of making an order that full security be provided would be to stifle a plaintiff company's action, it remains to be seen whether the courts will opt to exercise their discretion against making any order. The effect of the Supreme Court's decision may be less favourable to defendant applicants for security for costs than at first appeared to be the case'.

I had an advantage when I came to read the book as a reviewer. In practice, I had consulted it frequently since its publication. When I came to read the book in its entirety as a reviewer, I began to appreciate that Courtney writes as someone not only with great understanding of his subject matter but also with great enthusiasm. He achieves the near impossible of weaving three threads through the book – the case law, the statute law and the practical application of the law – in a logical and comprehensible manner.

Of immeasurable value in practice and beautifully put together, this magnificent book is an excellent read, and I unreservedly recommend it to all practitioners. G

Paul Egan is a partner in the Dublin law firm Mason Hayes & Curran and is chairman of the Law Society's Business Law Committee.

Divorce in Ireland: marital breakdown, answers and alternatives (second edition)

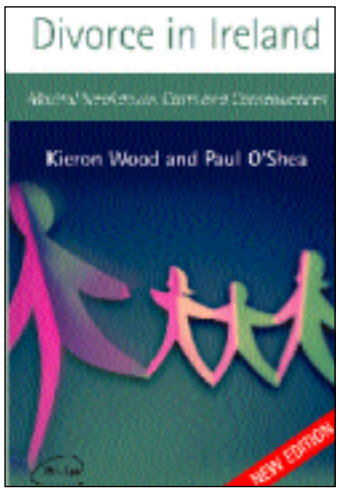
Kieron Wood and Paul O'Shea. FirstLaw (2003), Merchant's Court, Merchant's Quay, Dublin 8. ISBN: 1-904480-047. Price: €20

This most recent edition of Kieron Wood and Paul O'Shea's book on divorce in Ireland does much more than the main title suggests. The authors delve into the whole spectrum of issues that can arise on marital, or indeed any relationship, breakdown.

As with the first edition, the book is probably aimed more at non-practitioners who are experiencing marital problems. The authors' use of an everyday style of language and a user-friendly layout accurately describing the processes involved in marital breakdown makes this an extremely good starting point for any layperson, and there is also a useful glossary to explain the legal terms one is likely to encounter. However, this book is also of use to anyone connected with marital problems and the Family Court system in general, as it contains a breadth of useful practical information from the contact details of a whole host of useful marital support agencies to technical information on pensions and tax.

The book begins by briefly setting the present legislative framework in its historical context, before detailing the options that are available to try to salvage marriages that have run into difficulty. The importance of counselling and mediation are given particular attention, as are the benefits that settlement between the parties can have.

The book goes on to deal with the formalities of marriage from both a civil and religious perspective, as well as giving consideration to the issues of domestic violence, nullity, and judicial separation in turn. The divorce chapter itself deals clearly and concisely with the requirements of the



legislation and the possible orders that can be made. A useful questionnaire for a potential applicant to consider before their first visit to a solicitor is also provided, before more detailed consideration is given to arrangements that can be made in relation to the family home, children, wills, pensions and taxation. Sample divorce forms, a draft separation agreement and a guardianship declaration are also contained, as well as useful summaries of the 1996 act and the most recent European regulations regarding the recognition of foreign divorces.

Of particular use to someone who has had very little contact with the legal system is the chapter on a day in court. Everyday contact with the court system can cause practitioners to forget just how daunting the whole experience can be, and this practical guide helps to provide a frame of reference upon which expectations of the experience can be based. A questions and answers section gives the benefit of seeing problems that others have experienced when their relationships ran into difficulties. For those concerned with the possible costs involved in matrimonial

proceedings, the authors also give practical details of the legal aid system in place here in Ireland.

Another highly useful and practical section on unmarried couples is also included – a group that is all too often neglected in the context of relationship breakdown. While people involved in non-marital relationships are often under the impression that they are avoiding pitfalls, this often proves to be untrue as other unforeseen problems arise.

While the passage of time means that this second edition does have the benefit of seeing how the *Family Law (Divorce) Act, 1996* has operated over the last number of years, the authors also highlight the lack of statistical analysis of its impact. Instructive studies on the same topic are quoted from other jurisdictions, particularly the UK, but the strict application of the *in camera* rule hinders an overview that may highlight possible changes that would be of great practical benefit. The authors advocate, among other ideas, a system of reporting family cases that would protect the identity of the parties yet give enough information to gauge how the system is performing.

Family law in the modern era of divorce in Ireland is still in its infancy, but is rapidly becoming a more a specialised area of practice. This informative and accessible guide to marital breakdown helps to promote the idea that knowledge of the law must come with an understanding by people that a collaborative approach to the case with both the person and the lawyers on the other side can bring the family through the process of marital or relationship breakdown as calmly and sensibly as possible. G

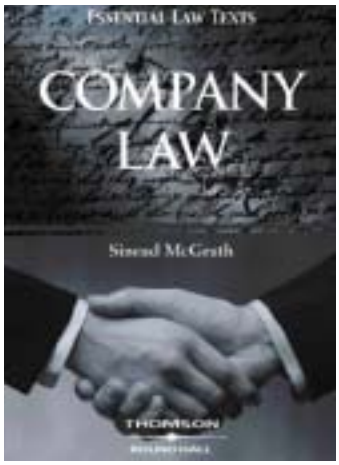
Muriel Walls is a partner in the Dublin law firm McCann FitzGerald and chairman of the Law Society's Family Law and Civil Legal Aid Committee.

Company law: an essential text

Sinéad McGrath. Thomson Round Hall (2003), 43 Fitzwilliam Place, Dublin 2. ISBN: 1-85800-286-9. Price: €42

Company law, written by Sinéad McGrath and published by Thomson Round Hall as part of the series of essential law texts, is exactly that: an essential law text for business law practitioners. McGrath has written an excellent and comprehensive book, delving into the many-faceted areas of company law.

The manual begins with the developments in company law, which includes a view of companies in general, the *Companies Acts*, and European developments impacting on Irish law. It also focuses on the ever-important Office of the Director of Corporate Enforcement, a crucial area of knowledge for any company law solicitor or barrister. The text goes on to introduce the reader to the formation of a company, examining the important differences between limited and unlimited companies, between private and public companies, and the concept of incorporation and its ensuing consequences. It then brings the reader through the constitution



of a company, including the memorandum of association and the articles of association. The corporate personality is also examined by way of the seminal *Salomon* case and the effect of piercing the corporate veil.

The basic issue of company contracts is thoroughly dealt with in the book, giving a detailed view of contracts in breach of the objects, of the express ancillary powers and of the internal rules of the company, as well as contracts without company authority. The chapter on company directors covers all of the necessary areas, namely, appointment and removal, meetings, disclosure of interests, substantial property transactions and prohibited transactions, and powers and duties of directors. The book moves on to look at company accounts, the role of auditors and the importance of annual returns, and then goes on interestingly to examine the areas of reckless and fraudulent trading and insider dealing.

The chapter on company shares gives the reader the basic knowledge of shares and dividends, shareholders' rights, classes of shares and share allotments, and disclosure of interests. Shareholders' remedies are outlined, examining the rule in *Foss v Harbottle*, and section 205 of the *Companies Act, 1963*, as are capital maintenance rules, examining redemption of shares and capital reduction and loss.

The chapter on company investigations is quite interesting as it covers the different categories of investigations: court investigations, formal investigations and informal investigations by the director of corporate enforcement, as well as the different topics of production of documents, search warrants and security reports.

Finally, the book takes us through the many areas of insolvency law, examining such issues as receiverships, examinerships, voluntary and involuntary winding up and disposition of company assets. In other words, *Company law* gives us a complete overview of the law from start to finish, from the birth to the death of a company.

Sinéad McGrath has produced a well-written book, going beyond the traditional areas of the law so as to make it an interesting read, not only for the everyday practitioner but also for those wishing to branch out into the area of company law. G

Anne-Marie Cotter is a course co-ordinator in the Law Society's Law School.

Davy
STOCKBROKERS

Which dividends are safe?

With even high-profile companies cutting dividends in recent times, David Killen looks in detail at how to select stocks in a way that will help you to avoid such cuts

David Killen: 'Keep an eye on the general health of a company's balance sheet'

Recently, big names such as Scottish & Newcastle, Abbey National, Aviva and Prudential announced dividend cuts. In such instances, investors are left with a stock that provides a yield less than anticipated, but may have also fallen in value as the market usually re-rates a company following a cut.

Market conditions change rapidly and stocks whose dividends may well be secure today can quickly move into unstable territory. You should be cognisant of this fact, and an understanding of the potential pitfalls should help you to identify the signals that a company's dividend is starting to look unsustainable.

Dividend cover

In the May issue (p37), we touched briefly on a cornerstone gauge of a healthy dividend – dividend cover. Dividend cover reflects how many times a company can pay the dividend from the earnings generated by each share. For example, if the dividend is 20c and the earnings per share (EPS) are 40c, the dividend cover is two times (or 2x, as you will see it commonly referred to in company reports).

Although a cover of 2x would usually suggest a healthy dividend, it is important to remember that this only reflects the cover for a given year. It would be wise to consider the historic pattern of cover over a number of years to gain a better understanding of the cover provided over time. Naturally, this can work both ways: since companies' earnings may fluctuate from year to year, healthy companies may appear to have little cover from time to time. A company whose dividend cover has been historically low would raise questions over the sustainability of holding a high dividend yield and low cover.

Another point to consider is which earnings figures you should use when calculating cover. The adjusted earnings figure as opposed to the reported figure is normally selected, as one-off events can easily boost or lower the reported earnings. Exactly what can be considered a suitable dividend cover level is largely dependent on the sector the company is in, so you will need to investigate the sector to gain a better understanding of a specific company. A basic rule of thumb would be for cover of about 2x. As cover moves closer and closer to 1x, the likelihood of a cut increases.

Pay-out ratio

Another useful tool is the pay-out ratio (this is calculated by dividing the dividend per share by the EPS, and it reflects the proportion of earnings paid out as dividends). Clearly, some of the earnings need to be reinvested back into the company to facilitate growth and expansion, and if the majority of the earnings are being paid out as a dividend, this may signal that a cut could be imminent.

Again, you need to look at the sector as a whole rather than at a company in isolation. With a mature company in a declining industry, it might make sense to pay a larger proportion of earnings out as a dividend. However, in the case of a young company in a growing industry, much of the earnings may be better employed within the company and here a high pay-out ratio might be unsustainable, where shareholders may prefer to see earnings being put to better use.

Balance sheet and cashflow

You should also keep an eye on both the general health of a company's balance sheet and its free cashflow. Reducing the dividend is often the first method of shoring up the balance sheet, and with many companies carrying large debt burdens, this can be a good indicator as to whether they may cut their dividends.

Also, examine its free cashflow (this is calculated by taking the company's operating cashflow minus interest charges, maintenance capital and tax charges; the remainder is left to pay dividends and pay down debt). From this figure, you can calculate whether the company has sufficient free cashflow to meet its dividend cover (calculated by dividing free cashflow by dividend). If the company's free cashflow can't cover the dividend payment, the company will have to use debt to make up the shortfall. While this can be done periodically, it is certainly not a suitable long-term option.

In May, we listed several high-dividend-yielding stocks that we believe offer you the potential for both income and growth in the coming years. It's important to stress that if you include these (or any other stocks that you feel fit the bill) in your portfolio, the checks we have highlighted should be performed on a regular basis to try to avoid dividend cuts. By employing these rules, you should be able to go some way towards minimising the shock of having your dividend income cut. G

David Killen is a portfolio manager with Davy Stockbrokers Private Clients Unit.

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Report of Law Society Council meeting held on 9 May 2003

Welcome

The president welcomed the members of the Council to the first Council meeting to be held in Sligo. She also welcomed the representatives of the local bar associations who were in attendance.

Personal Injuries Assessment Board

Ward McEllin reported that a meeting had been scheduled with the cabinet sub-committee on insurance reform, at which it was intended to raise various issues of concern to the society, including the proposal to require a claimant to swear an affidavit acknowledging that, if any part of a claim was overstated, all compensation would be forfeit. The director general noted that, in many respects, the focus now appeared to be moving towards the levels of awards, rather than the delivery costs. At a recent meeting with insurers, they had indicated that there would be no significant reductions in the levels of premiums unless there were reductions in the levels of awards. Orla Coyne noted that, at a recent consultation in the Law Library, counsel had indicated that awards and settlements had reduced in recent months by 20-30%. Gerard Griffin said that cases were currently being settled for the same amount in euros that would previously have been awarded in Irish punts, John D Shaw said that there had been a marked failure by the insurance companies to commit to any reduction in premiums.

Solicitors' undertaking to the VHI

Fiona Twomey reported that, following the publication of the practice note in the May issue of the *Gazette*, the VHI had written seeking a meeting with the society. This meeting would be held shortly and it was also hoped to hold a meeting with BUPA.

Proposed commercial court

Mr Justice Peter Kelly joined the meeting and addressed the Council in relation to the proposed new commercial court. He said that it had been self-evident for some time that there was a need for a court dealing specifically with commercial matters. There were three ways in which the matter could have been progressed: by practice direction, by legislation and by rules of court. The last option appeared the most expeditious way to proceed and, accordingly, work was well advanced on draft rules. He acknowledged the tremendous co-operation and assistance from both branches of the legal profession and from the Courts Service. The draft rules in most part accommodated the views expressed by both branches of the profession and envisaged that defined types of business would be dealt with by the court.

At the outset, it was agreed by all parties that only commercial cases relating to claims in excess of €1 million should be dealt with by the court. The court would deal with commercial cases, intellectual property cases and judicial review cases that involved a substantial commercial element. Cases would be heard by one of the three assigned judges – Mr Justice Peter Kelly, Mr Justice Philip O'Sullivan and Ms Justice Finlay-Geoghegan. Only those cases commenced after a particular date would be dealt with by the court and there would be an intensive case-management system, involving plenipotentiaries for both sides with authority to bind their client. There would be an early definition of issues and discovery would be sharp, focused and defined. Also, the judge would have a discretion to stay proceedings, if he or she believed that alternative dispute resolution (ADR) would assist.

Mr Justice Kelly said that the rules also envisaged substantial changes in evidence, with an end to 'trial-by-ambush'. A comprehensive exchange of witness statements would be required and it was also hoped that there would be no necessity for evidence-in-chief. While there would be a certain amount of front-loading of work and expense, trials would be shorter or would become unnecessary where matters were settled or resolved through ADR. Also, the court would operate on the basis of a guarantee of a judge to hear a case once a trial date had been fixed.

Mr Justice Kelly noted that the draft rules would now be considered by the rules committees before the new procedures could be put in place. In addition to procedures, dedicated premises and facilities would have to be assigned. It was hoped that there would be a dedicated block of courts outside the Four Courts, with the required technology to provide for the electronic exchange of information. The president thanked Mr Justice Kelly for his generosity of spirit and for agreeing to attend and address the Council in relation to the proposed commercial court.

Continuing professional development

The Council discussed the new continuing professional development (CPD) programme, which would commence from 1 July 2003, under which solicitors would be required to complete 20 hours of CPD over each two-year period. Gabriel Toolan, Leitrim Bar Association, said that there was universal acceptance that CPD was a welcome development. However, some members felt it should not involve any regulatory aspects. Patrick O'Connor said that, while it would be preferable not to have regulation in relation to many aspects of professional life, it was in the nature of things that regulation was required. However, the CPD programme was a very user-friendly scheme and the regulatory aspects were not onerous.

Jacqueline Durcan, Mayo Bar Association, asked whether assistance would be available from the Law Society and whether seminars could be run in conjunction with the bar associations. The president said that it was very much the intention that a considerable number of seminars would be provided by bar associations, but with support from the society by way of advice and assistance, the provision of speakers and so on. The director general noted that the majority of members of the CPD Task Force were solicitors from outside Dublin. G

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- Member services
- Services to the legal profession
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- State-sponsored bodies
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Committee reports

BUSINESS LAW

New Irish listing rules

The Irish Stock Exchange, in its capacity as listing authority for Ireland, has published its new *Notes on the UKLA listing rules*, dated 23 May 2003. These are available from the Irish Stock Exchange on Anglesea Street, Dublin 2, or at *www.ise.ie/markets/frlistingreqs.htm*.

Paul Egan, chairman

PROBATE, ADMINISTRATION AND TAXATION

Capital gains tax

The following extract from *Tax briefing*, issue 52, is reprinted with the kind permission of the Revenue Commissioners

This article deals with the submission of general capital gains tax correspondence, including:

- Payments in settlement of outstanding liabilities
- Capital gains tax returns for resident and non-resident individuals, estates and trusts
- Applications for certificates under section 980 of the *TCA, 1997*.

Correspondence of this nature should be sent directly to the inspector dealing with the client or to the collector-general. Increasingly, it is being directed to the Capital Gains Tax Unit, Setanta Centre and Capital Taxes Branch in Dublin Castle. We would ask practitioners to ensure all correspondence is directed to the appropriate office. The following guidelines should assist you in this:

- Payments, with the exception of those relating to an application for a certificate under section 980(8) of the *TCA, 1997*, should be submitted to the collector-general. Payments for the purpose of section 980(8)(c) of the *TCA, 1997* should continue to be sent to the inspector dealing with the application
- Capital gains returns for chargeable persons should normally be submitted to the collector general. If, however, your client is a PAYE taxpayer, the return should be submitted to his/her inspector.

Applications for certificates under section 980(8) of the *TCA, 1997* should be dealt with as follows:

- **Applicant is resident:** if the applicant is registered for tax, the application should be submitted to his/her inspector. If not registered, for example, a pensioner, the local inspector of taxes will process the application
- **Applicant is non-resident:** the application together with a computation of gain/loss and remittance, where appropriate, should be submitted to the tax district dealing with the postal address of the Irish resident agent. For example, if the non-resident vendor has a Cork-based solicitor acting, the application should be submitted to Cork tax district, regardless of the location of the asset.

In cases of difficulty, please contact your local tax office before making a submission.

Personal injury judgment

Negligence – unlocked car with keys in ignition parked outside coffee shop on busy street – car stolen – action instituted in High Court against owner and the Motor Insurers Bureau of Ireland – issue of *novus actus interveniens* in the context of relieving the owner of the car of responsibility – High Court award – appeal to the Supreme Court – consideration of law relating to an intervening event

CASE

***Patrick Breslin v Noel Corcoran and the Motor Insurers Bureau of Ireland*, High Court, Butler J; Supreme Court (Denham, Murray and Fennelly JJ). Judgment of the Supreme Court delivered by Fennelly J on 27 March 2003.**

THE FACTS

Noel Corcoran left his car outside the Tea Time Express Coffee Shop in Talbot Street in Dublin, unlocked with the keys in the ignition. He had gone into the coffee shop to buy a sandwich. As he came out, he saw an unknown person jump into the car and drive it off at speed. The car turned from Talbot Street into Talbot Lane. Patrick Breslin was walking across Talbot Lane. The car ran into Mr Breslin and injured him. Mr Breslin brought an action in the High Court against Mr Corcoran, alleging negligence in leaving the car unattended with the keys in the ignition. He also joined the Motor Insurers Bureau of Ireland (MIBI) as the second defendant. This was pursuant to the terms of an agreement dated 21 December 1988 between the minister for the environment and the MIBI.

JUDGMENT OF THE HIGH COURT

The case came before Butler J of the High Court. Counsel for MIBI argued in the High Court that Mr Corcoran had been negligent. In the circumstances, counsel argued that it was probable that the car was going to be stolen and that it was reasonably foreseeable that the thief of the car (the expression 'thief' is used here for convenience) would injure somebody. The concept of *novus actus interveniens* was central to the argument in the High Court. Two cases in particular were considered, a Circuit Court decision of McWilliam J, *Dockery v O'Brien* ([1975] ILTR 127) referred to as *Dockery*, and an English case of *Topp v London Country Bus (South West Limited)* ([1993] 3 All ER 488) referred to as the *Topp* case. There was also reference made to the decision of the Supreme Court in *Conole v Redbank Oyster Company* ([1976] IR 191). In the High Court, Butler J held that the act of the person described as the thief amounted to a *novus actus interveniens* which broke the chain of causation. He considered that to impose any liability on the part of Mr Corcoran (who had left his keys in the car), it would be necessary to have evidence that the car was left in an area where it should be known to the owner that people routinely stole cars for the purpose of driving them around in a reckless and dangerous fashion.

THE HIGH COURT AWARD

Mr Breslin succeeded against the MIBI only.
Damages with costs were determined at £65,000.

JUDGMENT OF THE SUPREME COURT

The MIBI appealed. The matter came before the Supreme Court composed of Denham, Murray and Fennelly JJ, with Fennelly J delivering the judgment of the court on 27 March 2003. In very compelling terms, Fennelly J began his judgment with the following words: 'It is an act of folly to leave one's motor car in the public street, even for a short time, with the keys in the ignition. There are plenty of ill-intentioned persons around to take advantage. The consequences can be tragic. But what is the liability of the imprudent car owner to a person injured by the bad driving of the thief?' These and related issues were all considered in the judgment of the Supreme Court.

At the Supreme Court hearing, the MIBI contested the *dicta* of Butler J in the High Court. In particular, the MIBI stated that the High Court was wrong not to find that the negligence of Mr Corcoran, the owner of the car, was the cause of Mr Breslin's injuries. It was argued that the act of leaving a motor car unattended and unguarded for any length of time in a public street with the keys in the ignition was clearly an act of carelessness. There was an obvious and serious risk of the car being taken, whether by way of theft, in order to commit some crime, or merely for joyriding. The culprit must necessarily be a person who does not respect the law and was likely to be a danger to others whether by reason of general irresponsibility or while trying to get away from the scene.

Noel Corcoran's lawyers argued that the taking of a car in such a situation was a *novus actus interveniens*, an independent illegal act of a third party. Essentially, it was argued that the car owner, Mr Corcoran, was not responsible for the way in which the thief drove the vehicle.

Fennelly J in his judgment stated that it was necessary to consider both the scope of the duty of care in negligence and

the cause of the damage. Specifically, the court raised the issue: does the person injured by a stolen motor car come within the range of people who can complain? He stated that, once again, the case raised the sufficiency of the test of foreseeability and hence the range of damage for which the person performing a careless act is liable. He stated that it was particularly helpful that Keane CJ in a recent judgment in *Glencar Exploration plc v Mayo County Council* ([2002] 1 IR 84) had reviewed in a considered manner the very difficult question of the proper test for the imposition of a duty of care. Fennelly J stated that, in so doing, the chief justice went a long way towards resolving the apparent divergence that had manifested itself from the mid-1980s between the approaches of the courts of Ireland and those of other common-law jurisdictions, in particular, those of England and Wales.

Fennelly J stated that the well-known two-stage test enunciated by Lord Willberforce in what was once regarded as the landmark case, *Anns v London Borough of Merton* ([1978] AC 728 at 751), led to confusion both in Ireland and in England. After a period of some doubt in the English and Commonwealth courts, the House of Lords, taking its lead in part from the High Court of Australia (*Council of the Shire of Sutherland v Heyman* [1985] 157 CLR 424), departed from the *Anns* case. That was in *Murphy v Brentwood District Council* ([1991] AC 391). Keane CJ in *Glencar*, citing *Council of the Shire of Sutherland v Heyman*, referred to the need to maintain the distinction between duties on the moral plane and those whose breach could be invoked in the law of negligence. The chief justice continued:

'It is precisely that distinction between the requirements of altruism on the one hand and the law of negligence on the other hand which is in grave danger of being eroded by the approach adopted in *Anns v Merton London Borough* ([1978] AC 728), as it has subsequently been interpreted by some. There is, in my view, no reason why courts determining whether a duty of care arises should consider themselves obliged to hold that it does in every case where injury or damage to property was reasonably foreseeable and the notoriously difficult and elusive test of "proximity" or "neighbourhood" can be said to have been met, unless very powerful public policy considerations dictate otherwise. It seems to me that no injustice will be done if they are required to take the further step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff, as held by Costello J, at first instance, in *Ward v McMaster* ([1985] IR 29), by Brennan J in *Sutherland Shire Council v Heyman* ([1985] 157 CLR 424) and by the House of Lords in *Caparo plc v Dickman* ([1990] 2 AC 605). As Brennan J pointed out, there is a significant risk that any other approach will result in what he called a "massive extension of a *prima facie* duty of care restrained only by undefinable considerations" …'.

The Supreme Court considered that this passage represented the most authoritative statement of the general approach to be adopted by the Irish courts when ruling on the existence of a duty of care. Fennelly J considered that, in addition to the elements of foreseeability and proximity, it was natural to have regard to considerations of fairness, justice and reasonableness. Almost anything may be foreseeable. What was reasonably foreseeable was closely linked to the concept of proximity as explained in the cases. The judge of fact would naturally also consider whether it was fair and just to impose the liability. The judge said, put otherwise, it was necessary to have regard to all the relevant circumstances.

In the instant case, the issue concerned a narrower application of the question of to whom a duty of care was owed. It raised circumstances in which it may be proper to fix a person with liability for an act of carelessness where a third person's independent act had intervened between that act and had directly caused the damage. However, Fennelly J noted that the general principles laid down by Keane CJ in the above case provided useful guidance.

The judge then referred to cases which dealt with the taking of unattended motor vehicles. He referred to two Irish Circuit Court decisions. The facts of *Dockery* (referred to earlier) were similar to the present action. An owner left his car in the street with his keys in the ignition. An intoxicated person took the car and crashed into the plaintiff's parked car. Judge McWilliam in the Circuit Court said with regard to a *novus actus interveniens* that if the want of care which is alleged takes place, the principle involved in the maxim *novus actus interveniens* is no defence.

In *Cahill v Kenneally* ([1955-56] Ir Jur Rep 127), a bus driver had driven some darts players to a competition. The driver allowed some of the players back on to the bus after the event and then left the bus unattended while he went off to look for some of the passengers. Persons then drove the bus away; in fact, the people who drove the bus away were themselves passengers who started the bus and crashed it into a parked car. Judge Roe ruled that it was negligence on the part of the driver when he obviously knew that the bus, if unattended, should be locked so that it may be safe.

The Supreme Court noted that the English courts took a strikingly different view in the *Topp* case. In *Topp*, a bus company had a system of leaving mini-buses parked in the public street with the keys in, to facilitate changeover of drivers. Normally there would only be an eight-minute interval, but the accident happened on a day when one driver failed to attend for duty. The bus was left for over nine hours. It was driven away and crashed into a cyclist. May J reviewed the authorities, not only concerning the misfortunes flowing from the taking of motor vehicles but touched on the general issue of liability where an intervening person had done the damage. He concluded that the likelihood of an unlocked and unattended mini-bus with its keys in the ignition being both stolen and so negligently driven as to cause injury was sufficiently strong to compel the law to impose a duty of care on the owners of the mini-bus. The Court of Appeal approved the decision of May J. Dillon LJ held that the case was ruled by the earlier unreported case of *Denton*, where a bus had been taken from the private property of the bus company. Neither Dillon LJ nor May J thought that it made any difference whether the vehicle had been left on private property or on the public road. Nevertheless, the Supreme Court considered that it did not appear that the Court of Appeal entirely closed the door to liability in circumstances of this sort. The Court of Appeal in *Topp* said that May J had not laid down too rigid a line. The judge was deciding the case before him. It was stated that an appeal court should be slow to interfere with the determination of a trial judge.

Fennelly J considered that it was of some importance that May J referred to the decision of the House of Lords in *Smith v Littlewoods Organisation Limited* ([1987] AC 241). The Littlewoods organisation had bought a disused cinema in

Dunfermline. It left it vacant pending its conversion into a supermarket. It was set on fire by some teenagers. The fire spread to nearby buildings, whose owners sued for damages. The claim was that as owners and occupiers of a disused cinema, Littlewoods owed a duty of care to the owners of neighbouring properties to take reasonable care against vandals gaining entry and setting a fire in the old cinema. On the other hand, there was nothing inherently dangerous stored in the premises; the owner was not on notice of any dangerous activity by trespassers. It was common case that only a 24-hour guard would have been likely to prevent the fire from taking. Lord Mackay of Clashfern stated that it was plain from the authorities that the facts of the damage upon which a claim was founded was caused by a human agent quite independent of the person against whom a claim in negligence was made did not of itself preclude success of the claim, since breach of duty on the part of the person against whom the claim was made may also have played a part in causing the damage. The case was lost essentially because there was no evidence that the defendants had knowledge of the fact that the vandalising trespassers in the disused cinema were in the habit of starting fires. The House of Lords' decision turned on the absence of any evidence to bring the activities of those people within the knowledge or control of the defendants and the fact that the only remedy would have been a 24-hour guard.

The *Dorset Yacht Company Limited v Home Office* case ([1970] AC 1004) featured in the decision of the Supreme Court and in other cases. There, seven borstal boys who were working as trainees on an island under the control and supervision of three officers of the Home Office escaped from the island at night. They boarded, cast adrift and damaged a yacht that was moored off-shore. The officers were assumed to have gone to bed in breach of their instructions, leaving the trainees to their own devices. The owners of the damaged yacht, in their action against the Home Office, alleged negligence consisting in the officers' failure, knowing as they did of the boys' criminal records and records of previous escapes from borstal institutions, to exercise any effective control and supervision over them and knowing that crafts such as the plaintiff's yacht were moored off-shore. Lord Reid said in that case that it had never been the law that the intervention of some independent human action 'always prevents the ultimate damage from being regarded as having been caused by the original carelessness'.

Fennelly J stated that an important element in the assessment by the House of Lords in the *Dorset Yacht* case of what is reasonably foreseeable was whether the event in question is 'the very kind of thing' against which precautions must be taken. Lord Reid's analysis, based as it was on the insufficiency of mere foreseeability and the need for compliance with the additional test of reasonable probability, was the most helpful for the case in the Supreme Court, according to Fennelly J. The Supreme Court (and Fennelly J referred to this) adopted the approach in *Cunningham v McGrath Brothers* ([1964] IR 209) as had been adopted by Lord Reid. There, McGrath Brothers had left a ladder in the street leaning against their premises after the completion of work. An unknown person moved the ladder to another nearby street, where it later fell upon and injured the plaintiff.

Kingsmill Moore J in a unanimous judgment responded to an argument based on the breaking of the chain of causation and said that it was not every *novus actus* which breaks the chain of causation.

From all those cases, Fennelly J drew the following conclusion. A person is not normally liable if he has committed an act of carelessness where the damage has been directly caused by the intervening independent act of another person, for whom he is not otherwise vicariously responsible. Such liability may exist where the damage caused by that other person was the very kind of thing which he was bound to expect and guard against and the resulting damage was likely to happen if he did not.

The judge concluded that the test then was not merely that of reasonable foreseeability. It was, in addition, necessary to ask whether it was probable that the unattended car, if taken, would be driven carelessly so as to cause damage to others. It seemed to the judge to be beyond argument and it was not really disputed that it was reasonably foreseeable that the car would be stolen. The judge stated that it couldn't be seriously disputed that it was reasonably foreseeable as well as likely that the unattended car with the keys in the ignition would be stolen. It was obvious that to do all these things in a busy city street, without any mitigating circumstances, was an act of gross carelessness.

In modern circumstances, according to the judge, it was obvious that failure to exercise proper control and supervision over motor cars involved a serious risk of damage and worse to innocent people. It was equally clear that it was reasonably foreseeable that any goods which might have been left in the car would be stolen. Thus, if the motor car owner had been carrying goods commercially, and perhaps even looking after them gratuitously for others, he would probably have been liable to the owners for their loss; similarly, if he had borrowed or rented the car, he would have been liable in respect of any damage to the vehicle. In each of these cases, it seemed to the judge that the test of proximity would be satisfied. The theft of the car or its contents could be regarded as 'the very thing' against which the custodian of the car should guard. They directly related to the act of theft.

According to the Supreme Court, the nub of the case was, of course, the possible liability of Noel Corcoran for injuries caused by the negligent driving of the thief. Even if the owner of the car, or the driver, if not the owner, should be held liable to the owner of contents or of the car itself for damage to either of these items of property, is not easy to articulate the basis for automatic liability to the victim of negligent driving of the car.

It was the negligent driving, not the taking of the car, which had caused the damage. It would have to be shown that the owner should have foreseen not merely the taking but also the negligent driving. There would have to be some basis on the evidence, such as that suggested by the trial judge, for a finding that the car, if stolen, was likely to be driven in such a way as to endanger others. Cars may be stolen for reasons which do not carry such implications. Some of these, though criminal, do not necessarily imply dangerous driving. The line would, in the judge's view, have to be drawn somewhere. If a car was stolen for resale, the owner could scarcely be responsible for the driving of the purchaser, whether that person was honest or not.

In Fennelly J's view, there was nothing in the present case to suggest that Noel Corcoran should have anticipated that there was a reasonable probability that the car, if stolen, would be driven so carelessly as to cause injury to another user of the road such as Patrick Breslin. Accordingly, the court dismissed the appeal of the MIBI. G

This judgment was summarised by solicitor Dr Eamonn Hall.

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CRIMINAL

Case stated, delay

Social welfare offences – fairness of procedures – whether excessive delay in prosecution of offences – whether delay such that accused's right to fair trial prejudiced – Social Welfare (Consolidation) Act, 1993

The defendant was summonsed for two offences of making false representations for the purpose of obtaining unemployment assistance contrary to section 213 of the *Social Welfare (Consolidation) Act, 1993*, the dates of the alleged offences being in 1997. The summonses before the District Court were re-issued in 2001, the original summonses having been issued in 1999 but not served on the accused at that time. The accused submitted that the delay was excessive and that it would be unfair to proceed with the prosecution as they were summary proceedings. District Court Judge Martin stated a case to the High Court at the request of the prosecutor as to whether the delay in the case by its nature and extent was of such a degree as of itself to be excessive and to justify her in dismissing the summonses.

In answering the case stated in the negative and remitting the matter back to District Court, Caoimh J held that an accused must satisfy two tests before being granted relief in respect of delay. Addressing the first test, the delay of itself was not so excessive or inordinate as to give rise to a necessary inference that there was a real risk that the trial would be unfair. As to the second test, which focuses on the causes for the delay or the reasons or excuses that are advanced to justify it, the District Court would have to address that aspect in light of any explanation that may be given for the delay by the prosecutor and account would have to be taken therein of the nature of the charge and nature of the proofs in the case.

***The Minister for Social, Community and Family Affairs v Lawlor*, High Court, Mr Justice Ó Caoimh, 17/2/2003** [FL7292]

Delay, judicial review

Road traffic – delay in serving summons – prejudice – whether delay such that applicant unfairly prejudiced in conduct of defence

The applicant was summonsed to appear on charges of driving without a licence and insurance and failing to produce such documents. He was given leave to seek an order of prohibition restraining the first respondents from hearing the summonses served against him and an injunction restraining the prosecution of those summonses by the second respondent on the grounds that there had been unreasonable delay in the issue of the summonses and that the applicant in making his defence had been prejudiced by that delay which amounted to between 17 and 19 months.

Ó Caoimh J refused the relief sought, holding that there had been inordinate delay in the service of the summonses upon the applicant but the applicant had failed to show that he was unfairly prejudiced by the delay.

***Grendon v The Judges attached to the Dublin Metropolitan District Court and the DPP*, High Court, Mr Justice Ó Caoimh, 16/10/2002** [FL7268]

Detention, drug offences

Arrest and detention – drugs offences – defence of duress – sentencing – whether applicant unlawfully detained – whether applicant received fair trial – whether state agencies conspired to detain applicant – Misuse of Drugs Acts, 1977-1984 – Criminal Justice (Drug Trafficking) Act, 1996

The applicant sought leave to appeal against both his conviction and sentence for drugs offences. The applicant contended that he had not received a fair trial for a variety of reasons. It was submitted that the trial judge had improperly admitted evidence into the trial, that the trial judge had erred in law in holding that the applicant had not been unlawfully detained by custom officials, and that the judge's charge to the jury was erroneous and unfair to the applicant. The applicant had received a sentence of 20 years.

The Court of Criminal Appeal (Denham J delivering judgment; Kelly J and Peart J agreeing) allowed the application in part. The rulings made by the trial judge in the course of the trial were correct. Although the trial judge's charge to the jury was robust, it was not in error. However, the trial judge should have considered the factor of duress when sentencing the applicant. Accordingly, the original sentence would be quashed and one of 16 years imposed in its place.

***DPP v O'Toole*, Court of Criminal Appeal, 25/3/2003** [FL7365]

Firearms, sentencing

Possession of firearms – severity of sentences – whether disparity in sentences imposed – whether sentences should be reduced

The applicants had pleaded guilty to firearms and false imprisonment offences arising out of a violent incident which involved a number of people and which also resulted in the death of one of the participants. The applicants had sought leave to appeal against sentences imposed, claiming that there was a disparity between the sentences they received and that received by another participant in the affair in a separate trial. The other participant had received a six-year sentence on a false imprisonment charge, four years of which were suspended by a differently constituted Court of Criminal Appeal.

The Court of Criminal Appeal (Keane CJ delivering judgment; O'Sullivan J and Peart J agreeing) allowed the application in part. It was clear that the first applicant had a considerably more important role in the whole affair than the second applicant and any disparity in the sentences imposed in his case was justified. However, in the case of the second applicant, there was an unjustified disparity in the sentence imposed for false imprisonment and the court would quash the original sentence and impose seven-year sentence with the last two years suspended.

***DPP v Duffy and O'Toole*, Court of Criminal Appeal, 21/3/2003** [FL7296]

Judicial review

Mala fides – *failure to prosecute co-accused – right to fair trial – director of public prosecutions – whether prosecution tainted by* mala fides – *whether applicant's defence prejudiced* – Misuse of Drugs Acts, 1977-1984

The applicant had been charged with drug offences contrary to the *Misuse of Drugs Act, 1977*. The applicant had been arrested in a car in which a quantity of cannabis was

found. The applicant initiated judicial review proceedings, claiming that his prosecution had been tainted by *mala fides* in that the driver of the vehicle had not been prosecuted with drug offences. It was claimed that this had occurred as the driver was a relative of a senior garda. The applicant contended that the failure to prosecute the driver had prejudiced his own defence. The driver of the car had in fact been prosecuted with a summary drugs offence but the charges became statute-barred as more than six months had elapsed between the incident in question and the subsequent prosecution. A detective inspector gave evidence denying that the driver of the car was related to any current or former senior officers of An Garda Síochána.

Caoimh J dismissed the proceedings. The case as advanced by the applicant did not amount to a sufficient basis for a plea of *mala fides* to be tendered. It was doubtful whether sufficient evidence existed to charge the driver of the car with an indictable offence. The applicant had not been prejudiced in his offence and had not shown that he had been deprived of the possibility of a fair trial.

***Fearon v DPP*, High Court, Mr Justice Ó Caoimh, 24/7/2002** [FL7329]

DAMAGES

Injunction, practice and procedure

Interlocutory injunction – imminent breach of restrictive covenant alleged – whether fair issue to be tried – balance of convenience – whether damages would be adequate remedy – whether respondent in position to meet any award of damages

The plaintiffs sought an interlocutory injunction restraining the first defendant from attending a trade fair in Moscow on the grounds that it would breach a restrictive covenant entered into by him as part of a share sale agreement with the plaintiffs in 1998 and which they say would cause irreparable harm to their business. The defendant alleged that the covenants were unenforceable and that the balance of convenience favoured the refusal of the relief sought.

Peart J refused the relief sought, holding that there was a fair issue to be tried which had to await the full hearing. On balance, any detriment to the plaintiffs' business which may flow from the defendant's attendance at the trade fair could be dealt with by way of damages, which the first defendant could meet should an award be made. This was on the condition that the first defendant keep accurate records of any business which he may transact at the trade fair to be used should there be a need to calculate damages in the event of an award being made against him.

***Study Group International v Declan Miller t/a High Schools Internationals*, High Court, Mr Justice Peart, 28/3/2002** [FL7346]

ENVIRONMENTAL

Local authorities, waste management

Planning and environmental law – waste management – local authorities – disposal of household waste – whether local authority obliged under statute to collect waste – whether actions of respondents ultra vires – Waste Management Act, 1996, *section 33*

The applicant was given leave to apply for *mandamus* compelling the respondent to collect all domestic refuse in an area of Cork which was serviced by private contractors that imposed charges for such collection. He alleged that the respondent, by failing to do so, was in breach of its duties under section 33 of the *Waste Management Act, 1996* and was acting unreasonably. He further alleged that the service provided by the private contractors was inadequate and that the absence of a provision for waiver of collection charges in appropriate cases was unreasonable and breached the provisions of section 33 of the *Waste Management Act, 1996*.

O'Higgins J refused the reliefs sought, holding that the respondent was not under a statutory duty to collect domestic waste where an adequate service already exists. The respondent's decision that an adequate domestic waste service exists was neither unreasonable nor unsupported by evidence.

***O'Connell v Cork County Council*, High Court, Mr Justice O'Higgins, 9/4/2003** [FL7278]

FAMILY

Nullity petition

Nullity – duress – marriage – whether decree of nullity should be granted – whether spouse incapable of consenting to marriage – Judicial Separation and Family Law Reform Act, 1989 – Family Law Act, 1995

The applicant and respondent had married in 1998. At this stage, the couple already had a child. Shortly after their marriage, the respondent wife began a new relationship and had two children in this new relationship, which was currently on-going. The applicant husband instituted proceedings

seeking a decree of nullity pursuant to section 39 of the *Family Law Act, 1995*. The applicant claimed that the respondent had married as a result of duress and was incapable of consenting to marriage. The respondent denied that there were any grounds for a nullity decree and counter-claimed for a decree of judicial separation.

Judge McMahon refused the decree of nullity. There was no evidence of duress. The critical question for the court related to the capacity of the respondent at the time of entering into the marital contract. The present case did not warrant a determination that the respondent did not possess the required emotional capacity to sustain a viable marriage relationship.

***C(N) v McL(K)*, Circuit Court, Judge McMahon, 22/2/2002** [FL7277]

JUDICIAL REVIEW

Certiorari, Defence Forces

Defence Forces – certiorari – *whether decision to discharge applicant from Defence Forces ought to be quashed – whether breach of natural and constitutional justice – whether respondents truly considered applicant's condition on the merits*

The applicant applied for judicial review seeking an order of *certiorari* quashing the decision of a medical board to categorise her as 'not having been finally approved' and, secondly, as a direct result of such finding, to recommend her discharge from the Defence Forces. The applicant contended that the decision was unreasonable and irrational and that the first respondent failed to act in accordance with natural justice in not asking her about her condition. The applicant also stated that she had a legitimate expectation that on completion of her training she would be given a full hearing concerning her medical condition.

In setting aside the decision of the medical board, McKechnie J held that the applicant was not aware of the significance of her medical examination and as a result was disadvantaged and accordingly her rights, guaranteed under natural and constitutional justice, were not adhered to. The applicant's right to have an opportunity of pursuing her career dictated that each essential step of the process had to comply with the requirements of natural and constitutional justice and omissions in that regard could not be corrected by the availability of an appeal.

***Fitzgerald v Minister for Defence*, High Court, Mr Justice McKechnie, 22/3/2003** [FL7355]

JUDICIARY

Slander

Practice and procedure – judiciary – immunity from suit – slander, malice and malicious falsehood – proceedings issued against District Court judge and minister – whether proceedings ought to be struck out as frivolous and vexatious – whether minister answerable for judge

The defendants applied to have the plaintiff's proceedings struck out as being frivolous and vexatious. The plaintiff issued proceedings stating that the second defendant (a District Court judge) had acted maliciously towards him and in doing so had slandered him. The first defendant was sued on grounds that the minister was responsible for the actions of the district judge.

Ó Caoimh J granted the defendants the relief sought and dismissing the plaintiff's claim that the plaintiff could not succeed in the proceedings in any claim for slander or malice against the District Court judge. The judge enjoyed immunity from suit. With regard to the claim against the minister, it was misconceived as a judge is independent in his judicial functions and the minister is not answerable for them.

***Flynn v Minister for Justice, Equality and Law Reform*, High Court, Mr Justice Ó Caoimh, 30/4/2003** [FL7298]

LAND LAW

Property, trusts

Ownership – beneficial interest – declaration – waiver – whether plaintiff had interest in properties – whether claim should be dismissed – whether action vexatious

The plaintiff initiated proceedings seeking orders relating to the ownership of certain properties. The plaintiff claimed that his name had been appended to purported waivers of his interest in properties without his knowledge. The defendant had an interest in these properties and was also involved in bankruptcy proceedings. Some of the properties involved in the bankruptcy proceedings were registered in the name of a company in which the plaintiff held shares. The plaintiff claimed that sums had been invested with a third party who in turn had business dealings with the defendant.

In making the following order, Smyth J held that whatever interest the plaintiff had related solely to one property only. Given the confused state of affairs, it was not clear against whom the plaintiff's claim would lie. The plaintiff would execute all necessary waivers as set out in a previous compromise. Proceeds of sale of a certain property would be lodged in court to the credit of the bankruptcy matter. The defendant would not be permitted to reduce his assets below a certain level. The plaintiff's action would proceed on directions as issued by the court.

***Kelly v Kelly*, High Court, Mr Justice Smyth, 20/1/2003** [FL7276]

LITIGATION

Security for costs

Practice and procedure – security for costs – litigation – assessment – definition of sufficient security – whether sufficient means actual costs – Companies Act, 1963, *section 390*

Both parties were engaged in expensive on-going litigation arising out of a fire which occurred at the plaintiffs' premises, and, as a result, the plaintiffs sought to recover from their insurers (the defendants). The case had already been in the High Court and then on appeal to the Supreme Court, where it was remitted to the High Court. The case was on appeal again to the Supreme Court, which had directed the plaintiffs to furnish security for costs. The master of the High Court had directed that approximately €1.6 million be furnished as security. The plaintiffs disputed this amount and appealed to the High Court.

Peart J upheld the order of the master of the High Court, holding that the term 'sufficient' as set out in section 390 of the *Companies Act, 1963* involved making an assessment of the actual costs that a defendant would occur. The case would be assessed as lasting 20 days in the High Court and the estimate of costs put forward by the defendants and ordered by the master of the High Court would be accepted. The plaintiffs would be directed to lodge such a sum within 21 days of the perfection of the order.

***Superwood Holdings Plc and Others v Sun Alliance and London Insurance Plc and Others*, High Court, Mr Justice Peart, 26/3/2003** [FL7321]

PLANNING AND DEVELOPMENT

Injunction

Injunction restraining use of premises as public bar pending further grant of planning permission – whether intensification of use amounting to material change of use – whether use of premises as public bar materially different to use as restaurant with licence attached – licensing – planning permission attaching to premises

authorising restaurant/bar use – licence attaching to premises for use as licensed restaurant

The High Court, on application to it by the respondent's neighbour, ordered that pursuant to section 160 of the *Planning and Development Act, 2002*, the respondent be restrained from operating a public bar without a further grant of planning permission having been first obtained on the grounds that, although a previous planning permission had authorised use of the premises in question as a restaurant and/or bar, during the relevant prior five-year period the only trading on the premises had been as a restaurant with a restaurant licence attached. It was held by the High Court that public bar use could not be regarded as merely a continuation of the licensed restaurant use and, accordingly, that the addition of a publican's trade would amount to an intensification and, therefore, material change of use. In appealing that decision, the respondent argued that it was entitled to a publican's licence as it would merely be licensing a continuation of activities which it had carried on in the premises previously.

Delivering the judgment of the Supreme Court in dismissing the appeal, Geoghegan J held that the only use to which the premises had been put was a licensed restaurant use and that an alteration from restaurant trading accompanied with the limited serving of alcohol was a wholly different use than an ordinary seven-day publican's trade use which the applicant sought to restrain.

Obiter dictum: that planning documents are to be construed in their ordinary meaning and legal definitions of words are of limited value in interpreting planning permissions or conditions attached thereto.

***Ampleforth Limited t/a the Fitzwilliam Hotel v Cherating Limited*, Supreme Court, Mr Justice Geoghegan, 11/4/2003** [FL7319]

PROCEEDS OF CRIME

Pleadings, practice and procedure

Proceeds of crime – whether proceedings disclose cause of action – plaintiff seeking to attach property alleged to be proceeds of crime – application to dismiss proceedings – whether plaintiff must show property subject matter of proceedings linked to specific crime – Proceeds of Crime Act, 1996, *sections 2,3 and 8*

The defendants sought an order dismissing the proceedings on the ground that they no longer disclosed a cause of action as the plaintiff had stated in replies to particulars that he was not making the case that each item of property the subject matter of the proceedings was acquired or funded with the proceeds of a specific crime.

Finnegan P refused the reliefs sought, holding that the *Proceeds of Crime Act, 1996* in sections 2, 3 and 8 refers to 'proceeds of crime'. The word 'crime' is not preceded by a definite or indefinite article which indicates a legislative intent that the 1996 act should have application in circumstances where the plaintiff is unable to show a relationship between the property alleged to be the proceeds of crime and a particular crime or crimes.

***In the matter of the* Proceeds of Crime Act, 1996 – *McK v F and F*, High Court, Mr Justice Finnegan, 24/2/2003** [FL7318]

WILLS

Succession, trusts

Testator – moral duty – application to claim share in testator's estate – challenge to will – discretionary trust established by testator for benefit of plaintiffs – trustees also beneficiaries under will – whether testator failed in moral duty to provide for children – whether proper provision made for children of deceased – criteria to be applied – Succession Act, 1965, *section 117*

The plaintiffs applied under section 117 of the *Succession Act, 1965* for an order that proper provision be made for them out of their father's estate. They complained that the trustees of a discretionary trust established by the testator for the benefit of the plaintiffs were also the executors and beneficiaries under the will and that a clear conflict of interest arose in those circumstances.

Kearns J refused the plaintiffs' claims, holding that the court, in applications under section 117 of the 1965 act, must consider the moral duty towards his children as of the date of the testator's death and whether he had failed in that duty. The following criteria applied when making that decision: the duty under section 117 is not to make adequate provision but to provide proper provision in accordance with the testator's means; a just parent must take into account not just his moral obligations to his children and to his wife, but all his moral obligations, for example to aged and infirm parents; and before a court could intervene, there must be clear circumstances and a positive failure in moral duty must be established.

In the circumstances, the duty owed to the plaintiffs was discharged by the creation of a discretionary trust for their benefit and the court, in a section 117 application, must avoid the temptation to enter into the arena of adjudicating on the manner in which executors discharge their obligations in the administration of the estate and how trustees discharge their obligations to the beneficiaries of a trust.

***In the Estate of ABC deceased XC, YC and ZC v RT, KU and JL*, High Court, Mr Justice Kearns, 2/4/2003** [FL7270] 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

New regulatory framework for electronic communications

The European Commission proposed a package of measures in July 2000 for a new regulatory framework for electronic communications and services. The package consists of six directives and a proposed commission decision on a regulatory framework for the radio spectrum.[1] The directives are due to be implemented no later than 25 July 2003 and implementing legislation has been published in draft form.

The purpose of the new regulatory structure is to harmonise regulation of electronic communications networks and services. This is considerably broader than the existing regulatory structure, which is mainly based on telecommunications services, which gave rise to disparities in regulated areas. For example, some national regulators took the view that the provision of voice over internet protocol (VOIP) services (whereby voice calls can be carried as data packets like e-mail) constituted voice telephony necessitating a licence, and some took the view that VOIP constituted data transmission. Divergences in national regulation of key areas such as licensing, access, interconnection and so on had the potential to impede competition and market development.

The objectives of the regulatory framework are as follows:

1) The establishment of a regulatory structure for electronic communications networks and services. Electronic communication networks include fixed and mobile telecommunications networks, cable television networks, networks used for terrestrial broadcasting, satellite networks and internet networks, whether used for voice, fax, data or images. Electronic communication services include services consisting of the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting. This is a very broad definition, designed to bring a wide range of electronic communications services within the remit of the regulatory structure
2) The imposition of a structure for fair, reasonable and non-discriminatory access to network facilities and infrastructure for all providers of electronic communication networks and services throughout the EU
3) The continued imposition on undertakings possessing significant market power (SMP) of specific obligations relating to interconnection and access. The definition of 'significant market power', which had previously been based on a market share analysis, is now based on the competition law concept of dominance, where an undertaking enjoys a position of economic strength allowing it to behave, to an appreciable extent, independently of its competitors, customers, and ultimately consumers. This is intended to enable the regulatory structure to interact with the market in a more dynamic manner and contemplates regulation being replaced by competition where possible
4) The protection of the rights of consumers in terms of access to public telephone services
5) The removal of national licensing regimes with regard to electronic communications services, and the introduction of a system of general authorisations based on notification only.

EU legal framework

Four directives were introduced on 24 April 2002. The directives, together with a decision on management of the radio spectrum and a directive on data protection, form the basis of the new regulatory framework for electronic communications applicable in all member states from 25 July 2003.

Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (*Framework directive*). The recitals to the *Framework directive* make clear that the objective of the directives is to create a common regulatory framework for transmission networks and services on the basis of the convergence of the telecommunications, media and information technology sectors.

The directive obliges member states to establish an independent national regulatory authority (referred to in this article as NRAs) to carry out the tasks set out in the directives. The principal task of the NRA is to promote competition in the market, to ensure that users derive the maximum benefit (in terms of choice, price and quality of services), to encourage infrastructural investment and the efficient use of radio frequencies and numbering resources.

The NRAs are given the specific task of promoting the interests of citizens by ensuring that citizens have access to universal service, that personal data is protected, that information on tariffs and pricing is clear, and that the integrity of the public communications networks is maintained.

Member states must ensure, in relation to public authorities, the separation of the functions of granting access to facilities from the ownership of property on which those facilities are situated, and must encourage facility-sharing between operators and owners of property.

Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (*Access directive*). The *Access directive* covers access and interconnection arrangements between service suppliers, and how networks and services will be accessed, and governs relationships between suppliers rather than relationships between service providers and end-users.

The main provisions are as follows:

- Undertakings requesting access or interconnection to the facilities of another operator in a member state do not need to be operating a service or network in that member state to be entitled to negoti-

SUMMARY

- The scope of communications services for which an authorisation is required is expanded, but the general authorisation system introduced by the framework means that most communications service providers will be obliged to notify Comreg (and NRAs elsewhere in the EU) of their activities, rather than being obliged to secure a licence
- All communications providers may be obliged either to provide or to contribute to the funding of the universal service obligation
- Operators will be entitled to negotiate interconnection to services and access to facilities even where they are not authorised to operate in the member state in which such interconnection or access is sought
- An appeals board is to be established to deal with appeals from decisions by Comreg.

ate access and interconnection
- Operators of public communications networks must have the right and obligation to interconnect with, and to provide interconnection to, other operators, subject to confidentiality obligations on the information disclosed during interconnection negotiations
- NRAs are obliged to ensure that access and interconnection takes place, and may direct operators to grant access to facilities and interconnection on fair, reasonable and non-discriminatory terms.

Directive 2002/20 on the authorisation of electronic communications networks and services (*Authorisation directive*). The regime for licensing and authorisation of communications networks and services up to now has varied as between member states, increasing the compliance burden on telecommunications operators. The purpose of the *Authorisation directive* is to facilitate the implementation of the least onerous authorisation system possible between the member states in order to stimulate the development of networks and services and to allow consumers to benefit from economies of scale.

The main provisions are as follows:
- Member states must ensure the freedom of operators to provide electronic communication networks and services, subject to limited restrictions relating to public policy, security or health
- Undertakings providing electronic communications networks or services may only be subject to a general authorisation and may not be required to obtain an explicit decision or other administrative act from the NRA before exercising their rights. Such undertakings must also have the right to negotiate interconnection and access with other authorised network and service providers throughout the EU in accordance with the terms of the *Access directive*
- Member states must bring authorisation procedures already in existence at the date of the directive into line with the provisions of the directive.

Directive 2002/22 on universal service and users' rights relating to electronic communications networks and services (*Universal service directive*). The principle of universal service is that a connection to the public telephone network, and certain associated services (directory enquiry, emergency services and internet access) be made available to all end-users in their territory at an affordable price. Universal service obligations are essential to ensure that increased competition in telecommunications does not result in certain categories of customers being deprived of basic telephone services (for example, in remote areas).

The main provisions are as follows:
- Member states must ensure that certain services are available at a certain quality to all end-users in their territory, regardless of their geographical location, at an affordable price
- Member states must ensure that telephone directories and public pay telephones can be provided by undertakings, and that it is possible to make emergency calls using the number 112 free of charge from all public telephones
- Member states may designate one or more undertakings to guarantee provision of universal service
- Where the NRA considers that the funding of the universal service obligation represents a disproportionate burden on a designated undertaking, the member states in question may introduce a compensation scheme from public funds, or may oblige other operators to share in the cost.

Irish legislation

The existing system of individual licensing for telecommunications and broadcasting services will be replaced by the new authorisation system.

Communications Regulation Act, 2002

The 2002 act establishes the Commission for Communications Regulation (Comreg) and assigns various functions and objectives to the commission. Comreg is obliged to ensure compliance by undertakings with obligations in relation to the supply of and access to electronic communications networks and services, and to investigate complaints by undertakings and consumers in this regard. The principle of independence of the regulatory authority mandated by the *Framework directive* is established by section 11. That section specifically provides that Comreg will be independent in the exercise of its functions.

Part 5 of the act deals with infrastructure road works and sharing, and obliges operators to secure the prior consent of a local authority before commencing or carrying out road works in the functional area of that authority.

Draft regulations implementing the EU directives

It is proposed to implement the four directives referred to above by statutory instruments, which have been published in draft form. The text of the directives can be found at the website of the Department of Communications, Marine and Natural Resources at *www.dcmnr.gov.ie/display.asp/pg=929*

Draft access regulations

Regulations 3 and 4 mirror the directive's provisions regarding the entitlement and obligation of operators in relation to interconnection and access. Comreg may impose obligations on operators to ensure transparency in relation to access and interconnection, by giving access to technical and network information, accounting information, terms and conditions of supply, and so on. Operators designated as having significant market power may be subject to additional obligations, such as the publication of accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices.

Draft authorisation regulations

The most significant change to the existing regime by the authorisation regulations is that a person intending to provide an electronic communications network or service must now make a notification in the prescribed form to Comreg. Therefore, the requirement to secure a licence for such services will be abolished. The person is deemed to be authorised to provide the electronic communications network or service once Comreg has

received the notification.

Once an undertaking has been deemed authorised, it may negotiate interconnection and access with other undertakings deemed to be authorised in the state or in another member state to provide a publicly-available electronic communication network or service.

Draft universal service regulations

Comreg is obliged by regulation 7(1) to designate one or more undertakings to comply with a universal service obligation. In designating an undertaking to provide universal service, Comreg shall adopt an efficient, objective, transparent and non-discriminatory designation mechanism.

An undertaking designated as subject to the universal service obligation may receive funding for the net costs of meeting the obligation. Comreg is obliged to establish a sharing mechanism for the purpose of apportioning the net cost of the universal service obligation between other providers of electronic communication networks and services.

An undertaking providing access to the public telephone network to end-users must provide those users with a written contract, and with such information relating to price tariffs and terms and conditions of access as may be specified by Comreg.

The regulations also oblige undertakings providing publicly-available telephone services to make provision for number portability (that is, the ability of a person to retain a number at a specific location, for geographic numbers, or at any location, for non-geographic numbers).

Draft framework regulations

The functions of the national regulatory authorities as set out in the EU *Framework directive* have already been incorporated into Irish law by the *Communications Regulation Act, 2002*, and accordingly the framework regulations deal with various matters including appeals, challenges to decisions, directions by Comreg, accounting separation, and assessment of significant market power.

In its submission to the Department of Communications, Marine and Natural Resources relating to the draft legislation,[2] Comreg voiced concern regarding the appeal procedures contemplated by the framework regulations. Regulation 4 allows any user or undertaking affected by a decision of Comreg to appeal the decision within 28 days, whereupon the minister shall establish an appeal panel to hear the matter or shall refer the matter to an appeal panel already established.

Comreg is of the view that the courts may represent a better option than appeals panels, and considers that the proposals as currently drafted would allow appellants to challenge the same decision twice. Its concern is that appellants could go through the appeal process and then launch judicial review proceedings, and it suggests that appellants should be obliged to elect between the two remedies.

In an appendix to its submission, Comreg sets out views of various official reports suggesting that the introduction of an additional appeals panel (rather than having recourse directly to the courts) would cause additional delay and would enable further tactical appeals. Comreg quotes from a European Commission report on implementation of telecommunications regulation which notes that Irish telecommunications operators have a particular tendency to appeal all decisions and therefore to use the appeals system strategically. The danger is that the appeals board could become in effect the regulator (if all decisions are appealed) and that the system could be used as a delaying tactic to postpone implementation of the regulator's decision. Comreg notes that the creation of an appeal board amounts in effect to the creation of a 'regulator of the regulator' and is unprecedented in Irish law.

Comreg also expresses serious concern at the power of the appeals panel to vary a decision of the regulator pending the determination of the appeal. In its view, this violates the principle of *audi alteram partem*, as Comreg will not have the opportunity to be heard before the decision to vary its decision, and amounts to a pre-determination of the issues.

Since the *Framework directive* provides that the decision of the national regulatory authority shall stand pending the outcome of an appeal, the power to vary the NRA's decision runs counter to the directive. Crucially, Comreg notes that the power to vary an order of a regulatory authority goes beyond the power even of a court in respect of a judicial review or full court appeal of a decision, and that the appeal panel will not have the experience or resources of the regulator in taking its decision.

Footnotes

1) europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/index_en.htm
2) *Future regulations of electronic communications networks and services* – Comreg submission in connection with the Department of Communications, Marine and Natural Resources consultation on draft legislation, Comreg document 03/12, 31 January 2003 www.comreg.ie. G

Deirdre Ní Fhloinn is a senior associate with the Dublin law firm Reddy Charlton McKnight.

Recent developments in European law

CHOICE OF LAW

On 1 January 2003, the commission adopted a green paper on the conversion of the *Rome convention* on choice of law into an EC regulation. This would mean that the Rome regulation would form part of the body of regular EC law and could be amended without the need for a treaty requiring ratification by all the signatory states. It would also mean that national courts could refer questions of its interpretation to the European Court of Justice (ECJ). The draft regulation is very similar to the current convention. The commission has invited written submissions before 15 September. A public hearing on the proposal will be organised before the end of the year.

FREE MOVEMENT OF PERSONS

Case C-100/01 *Ministre de l'Intérieur v Aitor Oteiza Olazabal*, 26 November 2002. Mr Olazabal is a Spanish national of Basque origin. He left Spain in 1986 and entered France, where he applied for refugee status. In 1991, a French court sentenced him for his role in a kidnapping in Spain. He was given a custodial sentence and a four-year residence ban was imposed. In 1996, the minister for the interior prohibited him from living in 31 *departments* in order to keep him away from the Spanish border. This prohibition was imposed on the basis of police reports on the applicant's continuing links with Basque separatist organisation ETA. The French Council of State referred the case to the ECJ. The court held that member states may limit rights of residence for EU citizens, where those citizens pose a serious threat to public order or public security. Provided that the measures taken apply equally to French nationals, they would not be contrary to EC law.

LITIGATION

Consumer contracts

Rayner v Davies ([2002] EWCA Civ 1880, Court of Appeal [England and Wales]). Rayner, a chartered accountant, wished to purchase a yacht and was interested in one that was available in Italy. Davies is a marine surveyor based in Italy. The two met in Italy to make arrangements for an urgent survey. Following a meeting, Davies sent a fax to Rayner offering to survey the vessel at a cost of $3,350 and requiring payment into his account either in the UK or the USA. The following day, Rayner signed a 'for acceptance' box on the offer and faxed this back to Davies. The fee was paid into Davies' account in London. The survey was carried out and on the strength of it Rayner purchased the yacht, which was delivered to him in France. The yacht had a number of defects that had not been detected by Davies. Rayner started proceedings in England, arguing that the survey had been carried out negligently. Davies applied to have the English proceedings stayed for want of jurisdiction. Rayner had relied on the consumer protection provisions in the *Brussels convention*. A consumer can sue in the courts of his own domicile. Article 13(3) provides that a contract is entitled to the consumer protection rules if '…the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; and the consumer took in that state the necessary steps for the conclusion of the contract'. At first instance, the district judge held that the consumer protection rules applied, as the fax was a specific invitation or advertising to enter into the contract. The Court of Appeal reversed this finding. It held that the provisions in the convention contemplated some form of solicitation from the supplier preceding the consumer's involvement. The test was who invited whom to do the business. On the facts, Davies had not solicited the business in England. The parties had met and negotiated in Italy. The exchange of faxes was the outcome of these negotiations. The faxed offer was not the marketing of Davies' services in England.

Forum non conveniens

BFC Aircraft Sales and Leasing Ltd v AGES Group LLP, December 2001, Morrison J. BFC are aircraft leasing brokers, based in Spain and the Bahamas. AGES is a US company based in Florida. BFC was appointed as the exclusive leasing agent for AGES in respect of leases to a Colombian airline. The leasing agreement was governed by Florida law and provided for rental payments to be made to AGES in Florida, with the consultancy payments calculated as a percentage of the rental payments. The consultancy agreement was governed by English law and was to last for five years or until determination of the lease. AGES ceased paying the consultancy payments at the end of 1999 and BFC commenced proceedings in England. The airline had defaulted on the lease. The dispute concerned an interpretation of the lease in accordance with Florida law to determine whether there had been a valid termination so as to bring an end to the consultancy agreement. AGES argued that the jurisdiction of the English courts ought to be set aside on the basis that Florida was the appropriate forum for the resolution of the dispute. Morrison J held that England was the appropriate forum. He held that a choice of law clause was not as important as a choice of jurisdiction clause in deciding on whether a court should assert jurisdiction, but in this case it was all but conclusive. This was so as neither party had a connection with England but had chosen English law to govern any dispute between them. This was to be taken as a strong indication of the parties' expectation that the trial would be held in England. The court also took a number of other factors into account.

Orders for payment

On 23 December 2002, the commission adopted a green paper on a European order for payment and measures to simplify and speed up small claims litigation. The paper sets out various options. G

Eat, drink and be merry
At a recent dinner hosted by the Law Society were *(from left)*: Law Society senior vice-president Gerry Griffin, Brian Geoghegan, Law Society president Geraldine Clarke, Dr Eric Falkiner, An Tánaiste Mary Harney, Law Society director general Ken Murphy and immediate past president Elma Lynch

Pushing all the right buttons
Webmaster Claire O'Sullivan is pictured here at the launch of the Law Society's new website. To her left were *(from left)*: deputy director general Mary Keane, deputy librarian Mary Gaynor and Michelle Nolan, information and professional development executive

Life-long learning
The continuing professional development programme for solicitors was officially launched on 11 June. Pictured here are *(from left)*: Raphael King, John Furlong, Eamon Keenan, Barbara Cotter, Kevin O'Higgins and CPD co-ordinator Barbara Joyce

Young Parisians, always called Dubois

The AGM of the European Young Bar Association was hosted by the Society of Young Solicitors in Dublin on 8-10 May. In the photo are: *(back row, from left)* Murrough McMahon, William Aylmer, Paul Murray, Mr Justice Ronan Keane, Ian Dillon; *(front row, from left)* Mrs Finnegan, Nóra Lillis, Louise Gallagher, Nessa Agnew, Mr Justice Joseph Finnegan, Mr Justice Esmond Smyth and Richard Willis

Saints and scholars

The Society of Legal Scholars met recently at the Long Room in Trinity College. In the photo are *(from left)* Peter Birks, Sylvia McNeece, Bruce Carolan and Geoffrey Shannon

Building bridges

Pictured on the announcement of the merger between Eugene F Collins, Solicitors, and GD Fottrell and Sons are (*from left*): John Twomey, GD Fotrell and Sons; David Cantrell, managing partner at Eugene F Collins, and Sean Twomey and John Territt of GD Fottrell and Sons

Judgment day

Pictured at the recent seminar on judicial review were *(left to right)* Barbara Joyce, Mr Justice Peter Kelly, Gerard Hogan SC and Ken Murphy, director general of the Law Society

Giant steps

Pictured at a conference held by the Society of Trust and Estate Practitioners in May were *(from left)*: STEP chairman John O'Connor; High Court president Mr Justice Joseph Finnegan; STEP secretary and vice-chairman Susan O'Connell; and Cedric Christie

Wexford Bar Association

Pictured at a recent meeting of Wexford Bar Association were *(front row, from left)*: PRO Martin Lawlor; Law Society director general Ken Murphy; association president Helen Doyle; secretary John Garaghy; treasurer and former Law Society president Anthony Ensor; *(second row)* Suzanne Carthy; Jimmy Murphy; Tara Smith; Declan Joyce; Carol Murphy; Aislinn Daly; Eoin Furlong; Niamh Moriarty; *(third row)* Ann Gallagher; Ed King; Noeleen Redmond; Anita Kent; Eoin Gorman; Derek Murphy; Cathal O'Dee; *(back row)* Liam Hipwell; Nigel Allen; John Burke-O'Leary; Seán Lowney; Bill O'Connor; Rory Deane

PPC II open day

The 2003 PPC II open day was held in the Presidents' Hall in the Law Society on Thursday 1 May.

Law Society staff were on hand to offer information and advice to the students who visited the exhibition. Details on Law Society services for qualified solicitors were showcased, and the students had the opportunity of meeting representatives from all departments of the Law Society. Feedback from the event has been very positive and it is hoped that next year there will be even more information available on recruitment and careers.

LOST LAND CERTIFICATES

Registration of Title Act, 1964

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

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

(Published 4 July 2003)

Regd owner: Alfie Devine, Derrymoney, Bawnboy County Cavan; folio: 16787; lands: Derrymoney; area: 602523 hectares, 40.3850 hectares; **Co Cavan**

Regd owners: Noreen Fitzgerald and Alun Gaulder; folio: 19923; lands: townland of Shantraud and barony of Tulla Lower; area: 20 perches; **Co Clare**

Regd owner: Comhlucht Siuicre Eireann Teoranta; folio: 1516; lands: a plot of ground being part of the townland of Ballybeg West and barony of Orrery and Kilmore; **Co Cork**

Regd owner: Cornelius O'Donovan; folio: 22254F; lands: a plot of ground situate in the townland of Lehenaghmore and the barony of Cork in the County of Cork; **Co Cork**

Regd owner: Richard O'Mahony (deceased); folio: 28234F; lands: a plot of ground known as 173 Pearse Road situate in the parish of Saint Finbar's and in the county borough of Cork; **Co Cork**

Regd owner: Clonakilty Urban District Council; folio: 29540; lands: a plot of ground being part of the townland of Youghals and barony of Carbery East (east division) and County of Cork; **Co Cork**

Regd owner: Deasy & Co Ltd; folio: 6674; lands: a plot of ground being part of the townland of Kilnameela and barony of Carbery East (east division) and County of Cork; **Co Cork**

Regd owner: Ann Mankowitz; folio: 6169F; lands: (1) a plot of ground being part of the townland of Rossnacaheragh and barony of Carbery West (west division) and County of Cork, (2) a plot of ground being part of the townland of Reenacappul and barony of Carbery West (west division) and County of Cork; **Co Cork**

Regd owner: Jack (John) O'Callaghan; folio: 72352F; lands: a plot known as site no 70 Nun's Walk being part of the parish of St Finbar and county borough of Cork; **Co Cork**

Regd owner: John O'Connor; folio: 9494 and 9495; lands: a plot of ground being part of the townland of Dromore and barony of Carbery West (west division); **Co Cork**

Regd owner: Timothy O'Reilly; folio: 4561; lands: a plot of ground being part of the townland of Mitchellsfort and barony of Barrymore and County of Cork; **Co Cork**

Regd owner: Manus Boyle, Errity House, Manorcunningham, Co Donegal; folio: 40371; lands: Manorcunningham, Errity Churchland; area: 5.615 hectares, 15.013 hectares; **Co Donegal**

Regd owner: Kathleen McGeehin, Treankeel, Breenagh, Letterkenny, Donegal; folio: 22387F; lands: Treankeel and Treankeel; area: 0.638 acres and 0.148 acres; **Co Donegal**

Regd owners: James and Brid McPaul, Maghery, Dungloe, County Donegal; folio: 29840F; lands: Maghery Glebe; area: 0.669 hectares; **Co Donegal**

Regd owner: Rev Joseph Gillespie, Stranacorcragh, Derrybeg, Co Donegal; folio: 23572F; lands: Derrybeg; area: 2.081 acres; **Co Donegal**

Regd owner: Elizabeth Connery; folio: DN18519F; lands: property known as 20 Castleknock Pines situate in the townland of Castleknock and barony of Castleknock; **Co Dublin**

Regd owner: Elizabeth Field; folio: DN3853; lands: property situate in the townland of Balally and barony of Rathdown; **Co Dublin**

Regd owner: Alex Kerrigan and Linda Kerrigan; folio: DN134241F; lands: a plot of ground known as no 70 South Bank, Castlefarm, Swords, situate in the townland of Castlefarm and barony of Nethercross; **Co Dublin**

Regd owners: Mark Stapleton and Dolores O'Rourke; folio: DN143192F; lands: property known as site no 7, Cois Inbhir, Beaverstown, Donabate and situate in the townland of Beaverstown and barony of Nethercross; **Co Dublin**

Regd owners: Dermot Tobin and Gabrielle Tobin; folio: DN19729L; lands: property situate in the townland of Cooldrinagh and barony of Newcastle; **Co Dublin**

Regd owner: Julia Connell, Cloondalgin, Dunmore, Co Galway; folio: 34012; lands: (1), (2), (3), (4), (5), (6), townland of Kinnakinelly and barony of Dunmore; area: (1) 2.0360 hectares; (2) 3.8316 hectares, (3) 2.3244 hectares, (4) 2.4104 hectares, (5) 0.2605 hectares, (6) 0.3262 hectares; **Co Galway**

Regd owner: Nancy Cunningham, Mountbellew, Co Galway; folio: 26713; lands: townland of Mountbellew Demesne and barony of Killian; **Co Galway**

Regd owners: Patrick and Kathleen Kelly; folio: 56392; lands: townland of Carrowmoneem and barony of Dunmore; area: 2 roods 14 perches; **Co Galway**

Regd owners: Robert and Diane McQuaid; folio: 21688F; lands: townland of Townparks and barony of Narragh and Reban West; **Co Kildare**

Regd owner: Sean Power; folio: 57L; lands: a plot of ground being part of the townland of Newrath and barony of Kilculliheen and County of Kilkenny; **Co Kilkenny**

Regd owners: Kieran and Elizabeth Barry; folio: 25610; lands: townland of Gouldavoher and barony of Pubblebrien; **Co Limerick**

Regd owner: William Sampson; folio: 4294 and 6225; lands: townland of Duntryleague and Curraghroche and barony of Coshlea; **Co Limerick**

Regd owner: William Walsh; folio: 16367; lands: townland of Templemichael and barony of Clanwilliam; **Co Limerick**

Regd owner: John Valentine Butler, Kilkieran, Kilmane, Co Mayo; folio: 13613F; **Co Mayo**

Regd owner: Peter Joseph Kelly; folio: 52541; lands: townland of Money and barony of Burrishoole; area: 0.2529 hectares; **Co Mayo**

Regd owner: Martin McGinn, Dooega, Achill, Co Mayo; folio: 25104; lands: (1), (2), (3), Dooega and barony of Burrishoole; area: (1) 4 acres 1 rood 16 perches, (2) 2727 acres 3 roods 5 perches, (3) 7 acres 16 perches; **Co Mayo**

Regd owner: Thomas Sweeney, Tully, Rehins, Castlebar, Co Mayo; folio: 50102; lands: (1) townland of Tully and barony of Carra, (2) townland of Struaun and barony of Carra, (3) townland of Drumshinnagh and barony of Carra; area: (1) 10.582 hectares, (2) 2.569 hectares, (3) 3.429 hectares; **Co Mayo**

Regd owner: Thomas Browne, Martry, Kells, Co Meath; folio: 21971; lands: Hurdlestown; **Co Meath**

Regd owner: Cavebury Company Limited, 17 Percy Place, Dublin 4; folio: 18109F; lands: Strokestown and Freffans Little; **Co Meath**

Regd owner: Clayton Coulter, Portinaghy, Emyvale, Co Monaghan; folio: 8321; lands: Pullis; area: 6.5887 hectares; **Co Monaghan**

Regd owner: Patrick Brendan McKenna, Dernagola, Emyvale, Co Monaghan; folio: 15004; lands: Girfin, Mullanacross, Mullanacross; area: 3.219, 2.797, 5.809; **Co Monaghan**

Regd owner: Simon Burke; folio: 5556F; lands: property at Curraghlahan, Garrycastle, Co Offaly; area: approximately 1 acre; **Co Offaly**

Regd owners: Desmond and Margaret McLoughin; folio: 36020; lands: Warren or Drum and barony of Boyle; area: 0.0859 hectares; **Co Roscommon**

Regd owner: Patrick Morahan; folios: 14987 and 16681; lands: townland of: (1) and (2) Laughil and (3) Cleaheen; area: (1) 3.8398 hectares, (2) 0.44451 hectares, (3) 0.3414 hectares; and townland of; (1) and (2) Laughil, (3) and (4) Cleaheen, and barony of Boyle; area: (1) 3.1148 hectares, (2) 0.4982 hectares, (3) 0.5716 hectares, (4) 0.8599 hectares; **Co Roscommon**

Regd owner: Bridget Mullooly, Tullyvarn, Curraghroe, Co Roscommon; folio: 1019; lands: Culleenanory and barony of Roscommon; area: 8 acres 2 roods 36 perches; **Co Roscommon**

Regd owners: John and Mary Allen; folio: 4957F; lands: townland of Cummeen and barony of Carbury; area: 0.794 acres; **Co Sligo**

Regd owner: Raymond Brett; folio: 23655; lands: (1) townland of Muckelty and barony of Leyny, (2) townland of Achonry an barony of Leyny; area: (1) 14 acres 2 roods 8 perches, (2) 14 acres 2 roods 5 perches; **Co Sligo**

Regd owner: Patrick Harte, Carrownadargny, Geevagh, Sligo; folio: 7574; lands: townland of Carrownadargny and barony of Tirerrill; area: 0.6627 hectares; **Co Sligo**

Regd owner: Shane Higgins, Sligo Motor Company, Ballinode, Sligo; folio: 19427; lands: townland of Ballanode and barony of Carbury; area: 1 roods 4 perches; **Co Sligo**

Regd owner: Margaret Morahan; folio: 2130F; lands: Tubbercurry and barony of Leyny; **Co Sligo**

Regd owners: Vincent and Josephine O'Connor; folio: 29533F; lands: townland of Boscabell and barony of Middlethird; **Co Tipperary**

Regd owner: James Ryan; folio: 7999; lands: townland of Barnane and barony of Ikerrin; **Co Tipperary**

Regd owner: John Henry Orpen (deceased); folio: 11575; lands: a plot of ground known as Kealfoun and barony of Decies without Drum in the County of Waterford; **Co Waterford**

Regd owners: Brian Power and Brid Power; folio: 1281F; lands: a plot of ground being part of the townland of Shanaclone and barony of Middlethird and County of Waterford; **Co Waterford**

Regd owner: Edmund (otherwise Edmond) Mills (deceased); folio: 9592; lands: a plot of ground being part of the townland of Carrigeen and barony of Coshmore and Coshbride and County of Waterford; **Co Waterford**

Regd owner: John Sykes and Mairead Sykes; folio: 758F; lands: a plot of ground known as Crobally Upper situate in the Town of Tramore and barony of Middlethird in the County of Waterford; **Co Waterford**

Regd owner: Michael Molloy, Monroe, Slanemore, Mullingar, County Westmeath; folios: 17956 and 587; lands: Wattstown and Johnstown or Monroe; area: 29.742 acres and 13.862 acres; **Co Westmeath**

Regd owner: Mary K Foley, Reynella, Bracklyn, Mullingar, Co Westmeath; folio: 6662; lands: Killynan (Cooke); area: 8.5843 hectares; **Co Westmeath**

Regd owner: Mary Vincent Reif, c/o NJ Downes & Co Solicitors, Mullingar, Co Westmeath; folio: 2666; lands: Calliaghstown, area: 7.2944 hectares; **Co Westmeath**

Regd owner: Brian AE Hardy; folio: 11614; lands: townland of Tiknock and barony of Arklow; **Co Wicklow**

Regd owners: Gerard and Mary Hill; folio: 13889F; lands: townland of Mount Kennedy Demesne and barony of Newcastle; **Co Wicklow**

WILLS

Dingle, Peter (deceased), late of 105 Crumlin road, Crumlin, Dublin 12. Would any person having any knowledge of a will made by the above named deceased who died on 16 April 2003 at St James Hospital, Dublin 8, please contact Bowler Geraghty & Co, Solicitors, 2 Lower Ormond Quay, Dublin 1, tel: 01 8728233, fax: 01 872 8115, e-mail: **bg@bowlergeraghty.ie**

Fahey, James (deceased), late of Main Street, Golden, Cashel, Co Tipperary. Would any solicitor holding any deeds to the premises owned by James Fahey at Main Street, Golden, Cashel, Co Tipperary, please contact O'Connor Tormey & Co, Solicitors, Slievenamon Road, Thurles, Co Tipperary, tel: 0504 22231, fax: 0504 22172

Goggin, William (deceased), late of Gurranes, Caheragh, Drimoleague, County Cork. Would any person having knowledge of a will made by the above named deceased who died on 6 July 2002, please contact Wolfe & Company, Solicitors, Market Street, Skibbereen, Co Cork (ref: MO'D/01575), tel: 028 21177, fax: 028 21676

Hayden, Thomas (deceased), late of Clopook, Stradbally, Co Laois. Would any person having knowledge of a will made by the above named deceased who died on 24 April 2003 in the Midland Regional Hospital, Portlaoise, please contact RA Osborne & Son, Solicitors, Emily Square, Athy, tel: 0507 31277, fax: 0507 31006

Hegarty, John (deceased), late of Glencrow, Moville, Co Donegal. Would any person having any knowledge of the whereabouts of the original will dated 2 May 1989 and codicil dated 14 December 1993 of the above named

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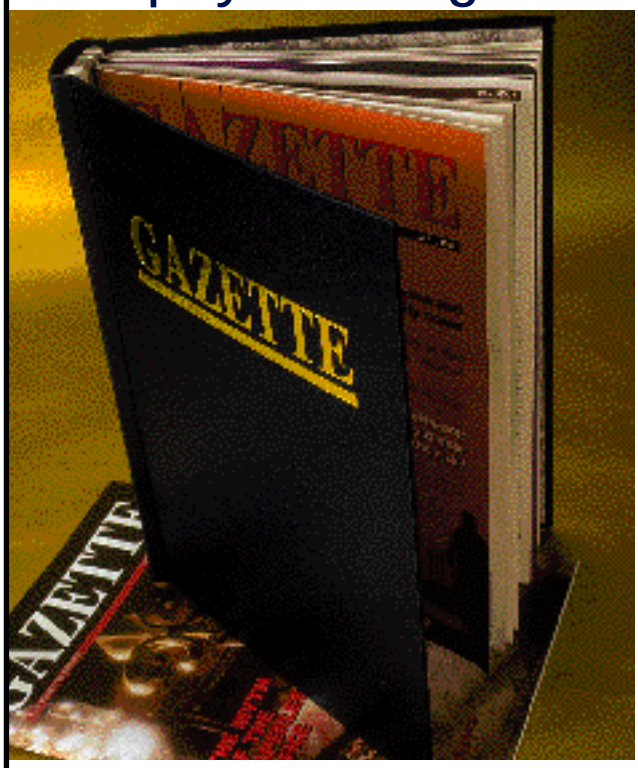

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deceased who died on 13 December 2002, please contact MacBride Conaghan, Solicitors, Malin Road, Moville, Co Donegal, tel: 077 82184/82269, fax: 077 82256, e-mail: **info@donegallaw.com**

Higgins, Mary Margaret (deceased), late of 6 Castle Street, Elphin, Co Roscommon. Would any person having knowledge of a will made by the above named deceased who died on 2 December 2000 please contact Cathal L Flynn & Co, Solicitors, Carrick-on-Shannon, Co Leitrim, tel: 078 20009; fax: 078 50748. Ref: JF/MR/H21

McCann, Marie (deceased), late of 24 Stradbrook, Blackrock Park, Blackrock, County Dublin. Would any person having knowledge of a will made by the above named deceased who died on 29 January 2003, please contact Sean Allen and Company, Solicitors, 67 Pembroke Road, Dublin 4, tel: 01 660 4790, fax: 01 660 7948

Nolan, Ellen Josephine (otherwise Helena) if anyone is aware of the whereabouts of the original last will and testament of the above named late of 68 Galtymore Drive, Drimnagh, Dublin 12, dated 12 June 1980, please contact Thomas Byrne & Co, Solicitors of Unit 4, 78 Walkinstown Road, Dublin 12, tel: 01 456 6221 and 01 450 3633. We are instructed that the original will was drafted and executed in the offices of Desmond G Houston of Celbridge, Co Kildare

O'Callaghan, Mary (née Collins), property at 7 Harrington's Square (formerly Harrington Avenue), Ballyhooly Road, Dillon's Cross, Cork. Would any person having knowledge of the whereabouts of any deeds or documents regarding the above property, please contact Henry PE Donegan & Son, Solicitors, 74 South Mall, Cork; tel: 021 4277155

O'Donnell, Daniel (deceased), (known in religion as Brother Albinus O'Donnell) formerly of Presentation Monastery, Killarney, Co Kerry and late of Coláiste Mhuire, Douglas, Cork. Would any person having knowledge of a will made by the above-named deceased who died on 3 July 1989 please contact O'Flynn Exhams & Partners, Solicitors, 58 South Mall, Cork, tel: 021 2277788, fax: 021 4272117, e-mail: **susan.lee@oflynexhams.ie**

O'Malley, Michael Joe (deceased) late of Glensaul, Tourmakeady in the county of Mayo. Would any person having knowledge of a will made by the above named deceased who also went by the name Michael Joe Malley, who died on 8 July 2002 at Mayo General Hospital please contact Durcan's, Solicitors, Castlebar, Co Mayo, fax: 094 23780 or DX 33011, reference C/JD5089

Reade, Margaret (deceased) and **Reade, Kathleen** (deceased), both late of 84 Ranelagh Road, Dublin 6. Would any person having knowledge of a will executed by either of the above named, who died on 5 February 1968 and 10 April 1988, please contact A&L Goodbody (ref: SCH), IFSC, North Wall Quay, Dublin 1, tel: 01 649 2000, fax: 01 649 2649

Sheil, John (deceased) late of 43 Old Rectory, Lucan, County Dublin. Would any person having knowledge of the whereabouts of a will made by the above named deceased please contact O'Grady's, Solicitors, 5 Upper Fitzwilliam Street, Dublin 2, reference SN/LW, tel: 01 661 3960, e-mail: **ogradysolicitors@securemail.ie**, DX 109034 Fitzwilliam

White, Paul (deceased), late of 64 Rialto Court, Rialto, Dublin 8. Would any person having knowledge of a will made by the above named deceased who died on 20 March 2003 at St James Hospital, Dublin, please contact Messrs MacCormack, Solicitors, Unit 2a, Bawnogue Enterprise Centre, Clondalkin, Dublin 22, tel: 1850 926 626 or 01 457 9238 within one month of publication of this notice

EMPLOYMENT

Assistant solicitor required for well-established general practice in south Tipperary. Please reply with CV to **box no 60**

Assistant solicitor with general and conveyancing experience required for busy practice in north-west, with good long-term prospects. Reply to **box no 61**

Experienced solicitor available for locum/part-time work in north Kerry area from October 2003 onwards. Please reply to **box no 66**

Female solicitor, 20 years' PQE, specialist in family law and general litigation, seeks change to general practice (four-day week), Dublin area. Reply to **box no 62**

O'Donnell Sweeney seek experienced solicitor to manage expanding building estates department. Must have a minimum of five years' PQE. Previous experience of acting for builders essential. New role, may suit part-time/flexible hours. Apply to O'Donnell Sweeney, Solicitors, The Earlsfort Centre, Earlsfort Terrace, Dublin 2 (ref: PH)

Office to let by retired solicitor, Dublin 2. At 75% discount to market rent. Possibly suitable for solicitor desiring to establish himself/herself in own practice and willing to work on landlord's family work. Reply to **box no 65**

Solicitor working in London wishing to relocate in Ireland. Three years' post-qualification experience – civil, criminal, litigation. Willing to re-train, conveyancing/commercial property and wills and probate. Please reply to **box no 64**

Solicitor wanted. Minimum three years' post-qualified experience. For north east area. Probate/conveyancing experience preferred. Apply in writing to Thornton & Co, Solicitors, 1 Mauldin Street, Kells, Co Meath

Solicitor with own practising cert seeks locum or part-time vacancy in general practice in Dublin. Computer literate. Tel: 01 668 6901

MISCELLANEOUS

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

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e-mail: info@laverykirby.ie

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

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

Wanted: publican's licence anywhere in Ireland, best price. Contact: Malcomson Law, Court Place, Carlow

Wanted: seven-day ordinary publican's licence. Enquiries to O'Donovan Murphy & Partners, Solicitors, Wolfe Tone Square, Bantry, Co Cork, tel: 027 50808, fax: 027 51554, (Reference – MFC/CH/3859/2)

Practice for sale, half share partnership for sale in two principal firms in north west. Excellent client base in conveyancing/probate and valuable on-going litigation caseload. Reply to **box no 63**

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TITLE DEEDS

In the matter of the Townsend Estate and property in South Tipperary, in particular property situate in the barony of Kilnamanagh: would anybody having any knowledge of the aforementioned estate or any property connected thereto, please contact English Leahy Donovan Solicitors, 8 St Michael Street, Tipperary Town, tel: 062 52577/52737

Any person having knowledge of original title documents relating to no 3 Cleamore Terrace, Kildare, Co Kildare, the property of the above named deceased persons, please contact O'Sullivan & Hutchinson, Solicitors, Portlarlington, Co Laois, tel: 0502 23182, fax: 0502 23984

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 Anthony and Deirdre Lonergan

Take notice that any person having any interest in the freehold estate of the following property: all that shop and parlour and lavatory at the rear of the premises known as 67a Phibsborough Road, situate in the parish of Grangegorman and the city of Dublin.

Take notice that Anthony and Deirdre Lonergan 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 ascertaining that they hold a superior interest in the aforesaid premises (or any of them) are called upon to furnish evidence of title to the aforementioned premises to the below named within 21 days from the date of publication of this notice.

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

Date: 19 June 2003
Signed: FH O'Reilly & Co, Solicitors, The Red Church, NCR, Phibsborough, Dublin 7

In the matter of the *Landlord and Tenant (Ground Rents) Acts, 1967-1994* and In the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978*: an application by John O'Keeffe

Take notice that any person having an interest in the following property: all that and those 136 Morehampton Road, Donnybrook, Dublin 4, more particularly described in a lease dated 26 July 1904, between Samuel Nelson of the first part, the City and County (Permanent) Benefit Building Society of the second part and William Wallet of the third part for a term of 143 years from 1 January 1904 less the last three days thereof, subject to a rent of £8 and to the covenants and the conditions therein contained.

Take notice that John O'Keeffe intends to apply to the county registrar for the county/city of Dublin for the acquisition of the freehold interest in the aforesaid property and that any party asserting that they hold a superior interest in the aforesaid property or any part thereof are called upon to furnish evidence of title to the aforementioned property to the below named within 21 days from the date of this notice.

In default of any such notice being received John O'Keeffe 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 Dublin for directions as may be appropriate on that basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the property are unknown or unascertained.

Dated: 19 June 2003
Signed: David Walsh & Co, Solicitors, 109 Ranelagh, Dublin 6