Law Society Gazette

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COVER: CATHERINE ZETA-JONES AND MICHAEL DOUGLAS, PHOTO BY STEWART COOK/REX FEATURES

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LAW SOCIETY TO RELAUNCH WEBSITE

The Law Society will launch its revamped website, *www.lawsociety.ie,* on Wednesday 11 June. The site has been live since 30 May to allow the designers to carry out a number of security checks. The planned relaunch of the site was postponed earlier this year to cater for a number of technical issues with the society's library server. A full article about the new website will appear in next month's *Gazette.*

LAWYERS BACK LITERACY CAMPAIGN

Lawyers are backing a new campaign which aims to highlight the difficulties that people with literacy problems face when seeking access to justice. The National Adult Literacy Agency (NALA) has chosen literacy and law/justice as the theme for its yearly national literacy awareness week next September. The Law Society is supporting NALA's initiative, and other legal organisations, including the Bar Council, are also lending their help. According to NALA director, Tommy Byrne, the high point of the week will be a half-day seminar in Dublin aimed at lawyers.

Regulatory task force still seeking views

The Regulatory Review Task Force was set up late last year with the following terms of reference:

'To examine the procedures and systems whereby the society: a) regulates its members; and b) deals with complaints concerning solicitors, having regard to best practice in similar professional organisations both in Ireland and abroad and to make recommendations arising from such examination'.

In the Jan/Feb 2003 issue of the *Gazette* (page 3), the task force invited submissions from members, giving their views on the current regulatory systems and procedures in place. The task force has been greatly helped in its deliberations by the receipt of a number of helpful responses from the profession to that invitation and by a full day's comparative discussion with specialists in the regulatory field from the other law societies in these islands.

The task force's work is now at the stage where it will shortly be beginning to formulate its recommendations and to draft its report. Before doing so, it would like to give members of the profession another opportunity to submit any views they might wish to offer on the matters covered by its terms of reference. Written submissions should be forwarded to Tina Beattie, secretary to the task force, at the Law Society no later than 27 June.

Members of the society's Regulatory Review Task Force, with chairman Joe Brosnan (front row, centre)

Limerick court gets €10 million facelift

Limerick Circuit Court has been re-opened following a €10 million refurbishment that has added an extra floor, family law court, judges' chambers, jury and consultation rooms. The minister for justice, equality and law reform opened the upgraded facility in Limerick city recently. The ground floor now houses two main courtrooms, the first floor has a family law suite and the second floor holds the county registrar's offices. The work took 18 months to complete. Limerick Circuit Court is a grade A listed building.

ONE TO WATCH: NEW LEGISLATION

Employment Permits Act, 2003

This act was enacted and came into effect on 10 April. For the first time, it makes it an offence to employ certain categories of nationals without a work permit or the permission of the minister for justice, equality and law reform. It is also an offence for these nationals to enter or be in employment in the state. The penalties for both categories of offenders are:

- On summary conviction, a fine of up to €3,000 and/or up to 12 months' imprisonment, and
- On conviction on indictment, a fine of up to €250,000 and/or up to ten years' imprisonment.

If an offence is committed by a body corporate and 'is proved to have been committed with the consent or connivance of or to be attributable to any neglect on the part of the person being a director, manager, secretary or other officer of the body corporate', that person is also guilty of an offence and may be similarly penalised.

Nationals of eight of the EU accession states – the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia and the Slovak Republic – will be exempted from the requirement to obtain work permits for the duration of the transition period leading up to the union's enlargement. This begins in May 2004. (The remaining accession states of Malta and Cyprus are excluded.) However, if the labour market experiences 'disturbance', the minister for enterprise, trade and employment may by order re-impose the requirement to obtain work permits on accession state nationals for the duration of the transition period. Such an order will not apply to any accession state nationals who have already been in paid employment for longer than six weeks. In any application for work permits, the minister is to give preference to applicants from the accession states in respect of which an order is in force.

The act also provides for search powers on application to a District Court judge and arrests without warrant on suspicion of obstruction. The obstruction of a search is an offence punishable by a fine and/or imprisonment on summary conviction.

The explanatory memorandum for the bill notes that giving free access to the labour market to accession state nationals will mean a reduction of around €4 million in work permit processing fees received, but also a corresponding reduction in work permit applications 'thus facilitating a better customer service and better quality control'. G

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

Society to get access to family law cases

The Law Society will be allowed to inspect documents generated by family law proceedings when investigating complaints against members if the Oireachtas passes legislation relaxing the *in camera* rule. The new provision will be contained in a miscellaneous provisions bill dealing with several law reform issues to be published shortly by the minister of justice, equality and law reform Michael McDowell.

The government has taken the society's advice on the *in camera* issue. The new provisions will echo a formula proposed by the Law Society in a submission written by its deputy director of education, Geoffrey Shannon.

The proposed law will allow bodies with a legitimate interest to 'examine, consider and make proper use of any written material (including proceedings, pleadings and orders) which is part of, leads up to or flows from' *in camera* proceedings. The society has been lobbying for this change for several years, as the current law prevents it from carrying out any meaningful investigation into complaints against solicitors involved in family law cases.

Irish courts have ruled that despite having a duty to do so, professional bodies could not investigate anything protected by the rule. That means the society is barred from inspecting all pleadings, evidence (oral or affidavit), orders and judgments relating to cases that are the subject of complaints against members.

Shannon has pointed out that the current situation means that those solicitors who only practise family law cannot be regulated effectively by the Law Society. He added that the proposed change would also benefit other professional bodies whose members participate in trials held in private.

Brit wigs for the green?

The British government is considering consigning barristers' dress to the dust-bin. A recent survey of 2,000 people showed that 64% of them said wigs were old-fashioned and intimidating, while 35% said suits should replace gowns. As a result, the Lord Chancellor's Department has launched a consultation on court working dress. The Law Society of England and Wales has called for the abandonment of wigs on the grounds that it creates the impression that barristers are senior to solicitor advocates in English courts. Its president, Carolyn Kirby, also called this month for an end to the practice whereby queen's counsel sit in the front bench in court, while all other advocates sit behind them.

Irish reports go on-line

The *Irish reports* are now available on-line through electronic publisher Context's legal research service, *justis.com*. The company recently made a deal with the Incorporated Council of Law Reporting for Ireland (ICLR), allowing it to carry the full text of published cases from 1919. Context said its service dated back further than any other electronic series of Irish precedents. It officially launched the service late last month. The series is also available as a justis CD-ROM.

Pictured at the launch are chief justice Ronan Keane (*centre*), Gerry Hogan SC, chairman of the ICLR (*right*), and Dr Eamonn Hall, chair of the ICLR's business committee

COMPENSATION FUND PAYOUT

The following claim amount was admitted by the Compensation Fund Committee and approved for payment by the Law Society Council at its meeting in May 2003: Dermot Kavanagh, 2 Mary Street, New Ross, Co Wexford – €2,261.

CLOSED FOR BUSINESS

The Office of the Accountant of the Courts of Justice will be closed from Monday 3 June 2003 to Friday 11 July (both dates inclusive) for the purpose of enabling the accountant to balance the various accounts of suitors before the introduction of computerisation. The office says that this will result in a speedier and more focused service to practitioners. Lodgments may be made during the period.

RETIREMENT TRUST SCHEME

Unit prices: 1 May 2003
Managed fund: 377.113c
All-equity fund: 86.726c
Cash fund: 250:165c
Long bond fund: 107.238c

EURO FOUNDATION SEEKS LAWYERS

The Dublin-based European Foundation for the Improvement of Living and Working Conditions has invited tenders for the provision of legal advice. The foundation, which is an EU agency and headquartered in Loughlinstown, Dublin, is seeking a firm to provide legal advice on a range of issues, including employment and contract law and EU regulations. Lawyers will also be required to represent the body at meetings with plaintiffs and be available for meetings with management. The *Official journal* of the EU will publish full details of the tender in coming weeks. The deadline for submission of tenders is 12 noon on 18 July 2003.

Complaints against solicitors fall for second year running

Just 71 solicitors were responsible for over a quarter of the complaints made to the Law Society last year, according to the report of the independent adjudicator Eamon Condon, published at a press conference recently. The Minister for Justice, Equality and Law Reform, Michael McDowell, also attended and spoke at the press conference.

'The society should consider taking action against solicitors who have multiple complaints against them', said Condon in an interview with RTÉ television news.

In the same interview, Law Society president Geraldine Clarke referred to the new powers which the society has under the *Solicitors (Amendment) Act, 2002* in this regard and said 'any current complaints will be looked at in the light of previous complaints as well, and we will also be looking very carefully at what we can do to either control the way in which these solicitors practise or, in some cases, consider whether they should be in practice at all'.

The Law Society's independent adjudicator Eamon Condon (*left*) and justice minister Michael McDowell, pictured at the publication of Condon's report on the society's complaints-handling system

The independent adjudicator welcomed the fact that there had been a fall of 7% in the number of complaints made to the Law Society in 2002 from the year 2000. Director general Ken Murphy said this was 'very welcome news, particularly as in the same period the number of practising certificates increased by 11% to 6,172. We would estimate that a complaint is made to the society arising from 0.1% of the cases and transactions handled by solicitors each year'.

Minister McDowell also expressed himself 'happy that the number of complaints has declined', which he attributed both to the deterrent effect of the society's regulatory system and to the higher standard of service being given by solicitors. 'Standards are rising in my experience', he said.

Referring to the independent adjudicator, he said it was important that there was 'a watchdog who is not a solicitor'. He added that 'self-regulation depends on the energy and active engagement of the professional body' and he expressed himself pleased with the Law Society in this regard. He also recognised that many unjustified complaints against solicitors would be made. 'In an adversarial system, there will always be people unhappy with the outcome and a small minority will inevitably transfer their unhappiness to the people involved in the system. It is the job of the regulator to sort out and distinguish the genuine complaints from those who simply want to re-run the basic issue'.

Grant boost for law school students

The number of Law Society Law School students getting grant aid is expected to increase, thanks to the recent debate on third-level fees. The new access package announced by minister for education and science Noel Dempsey will increase the income threshold for local authority grant assistance for third-level students.

The society estimates that up to three out of four students on its professional practice training courses receive some form of local authority grant aid. This ranges from the payment of fees to maintenance grants. The society said this month that it expected the number of apprentices attending these courses, run by its Law School, to increase as a result of the government's initiative. The grant itself will increase by 15% next year.

The law school: taking a new angle on access

The move will be a shot in the arm for the Law Society's own efforts to attract students from under-privileged backgrounds. Two years ago, in consultation with the Solicitors' Apprentices Debating Society of Ireland (SADSI), the society's Education Committee signed up to a comprehensive access programme, designed to draw students who would otherwise not consider the profession because of financial, social and cultural barriers.

It awards five scholarships a year to eligible students. Successful candidates are exempt from all examination fees, and, depending on circumstances, individuals can receive maintenance payments of up to €4,000 a year. Eligible students are those who have completed a degree programme in a higher education institute with the support of an access initiative.

The programme fits in with a broader national policy aim of increasing access to third-level education to all social groups. Students from the lowest socio-economic groups, semi-skilled and unskilled manual workers, now have a four-and-a-half to one chance of reaching higher education, compared with a 17-to-one chance in 1980.

Society briefed on PIAB

Representatives of the Law Society met the cabinet sub-committee on insurance costs in Government Buildings on the morning of 22 May, *writes Ken Murphy*.

The cabinet sub-committee is chaired by the Tánaiste and Minister for Enterprise, Trade and Employment, Mary Harney, and includes the Minister for Justice, Equality and Law Reform, Michael McDowell, and the Minister for Transport, Seamus Brennan. The chair of the Interim Board of the Personal Injuries Assessment Board, Dorothea Dowling, also attended the meeting.

The Law Society was represented by senior vice-president Gerard Griffin, PIAB Task Force chairman Ward McEllin and me.

The society had previously made a detailed written submission (now available on the society's website) setting out its analysis of the reasons for the extraordinary escalation in the cost of insurance in Ireland in recent years – a phenomenon which cannot in any way be explained by the costs of the personal injury compensation system – together with the society's own cost-free and effective recommendations for reform.

In a meeting lasting 45 minutes, the society was given a briefing and answers to certain questions on the contents of two pending bills, one to establish the Personal Injuries Assessment Board and the other to amend the law of perjury and provide some significant reforms of civil procedure in personal injury litigation.

In response to what they heard, the society's representatives reiterated the views which had been frequently expressed privately to government decision-makers, as well as publicly, over many years, namely, that the society does not believe the introduction of PIAB will lead to reduced insurance premiums. In addition, PIAB is likely to operate in a manner that will be very unfair to claimants.

Chair of the interim board Dorothea Dowling with tánaiste Mary Harney

Unfairness towards claimants

The increasing unfairness towards claimants of the whole PIAB project was illustrated well when Dorothea Dowling, in the course of a lengthy briefing on how PIAB would operate, said that there would be no system of payment for claimants who retained professional assistance in formulating their claims. The society's representatives asked the tánaiste if what we now heard involved a recent change of policy. The PIAB Implementation Group chaired by Frank Cuneen, whose report had been published and approved by the tánaiste last October, had unreservedly accepted that there would be a need for claimants to have professional assistance in formulating their claims and had recommended that a system of payment for this assistance should be introduced. We asked why the policy on this had now changed.

Answering for the tánaiste, Dorothea Dowling said that PIAB would be a simple and user-friendly paper-based system and, in particular, because it would be an inquisitorial rather than adversarial system, there would be no need for lawyers or other advisors for claimants.

The society's representatives said that they were not opposed to PIAB in principle, provided that it was fair and made economic sense, but they were deeply concerned by what they had now heard. A personal injuries claim could be one of the most significant events in the life of a claimant and they would want and need professional assistance in ensuring that the claim was properly formulated. If the system did not pay for this, then one of two things would happen. Either claimants would proceed without professional assistance and would not formulate their claims to their fullest potential extent, in which case they would receive less compensation than they were entitled to; or else they would retain professional assistance, formulate their case properly but have to pay for the professional assistance out of the award. In either case, there would be *de facto* a reduction in the amount of compensation received by the claimant below current levels. This was contrary to what the tánaiste had said was the policy of not reducing compensation levels.

No guarantees

Questioned on the economics of the proposal, the tánaiste admitted that it was not intended now to undertake a cost-benefit analysis of PIAB in advance, as she had previously promised. The society's representatives expressed astonishment at this. In addition, she acknowledged that she had not received any guarantee from the insurance industry that if there were savings resulting from PIAB they would be passed on to premium payers and not simply retained for shareholders.

The society's view is that this creates an enormous credibility question over the value of PIAB and exposes the proposal as the product of a political rather than an economic agenda.

President slams courthouses and family law delays

'Many Irish courthouses are in a woefully dilapidated condition owing more to Dickens than Dúchas', said Law Society president Geraldine Clarke speaking in Sligo recently. She also described as 'outrageous' the delays in bringing family law cases to court in some parts of the country.

In a speech reported widely in the media, she called for the urgent appointment of more judges to deal with court backlogs in the worst affected areas.

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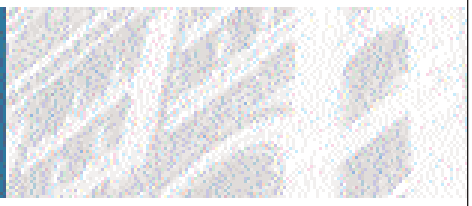

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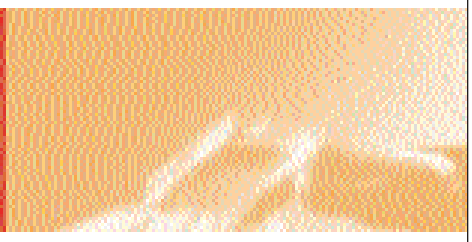

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Statute for PI claims to be slashed to one year

The Minister for Justice, Equality and Law Reform, Michael McDowell, will shortly publish a bill which, among many other things, will amend the *Statute of Limitations*. In future, actions for damages for personal injuries will have to be brought within one year, instead of three years as at present. This had been sought by the business lobby. He believes it will not lead to injustice in view of the discoverability provisions in the *Statute of Limitations (Amendment) Act, 1991*.

The minister briefed Law Society representatives on this and other aspects of his new bill at a meeting between society representatives and the cabinet sub-committee on insurance costs (see page 5).

The main thrust of the bill will be to introduce new provisions affecting the law of perjury and to provide for significant reforms of civil procedure and personal injury litigation. The bill will require that the case being made by a plaintiff and by a defendant must be made on affidavit at an early stage in the proceedings.

If matters averred to on affidavit are subsequently found by the trial judge to have been false, in that they were known to be false at the time of making the affidavit, then this would facilitate subsequent prosecution for perjury. In addition, if

something sworn by the plaintiff turns out to have been false and exaggerated and known to have been so at the time it was sworn, the entirety of the claim will fail. However, a discretion will be left with the trial judge not to apply this sanction if in the opinion of the judge it would lead to manifest injustice in the particular case.

In addition, civil procedure will be reformed to require the full facts of the case, not merely empty formulae, to be exchanged in correspondence by both plaintiffs and defendants prior to the issuing of proceedings, and then set out fully and openly in the proceedings.

The society's representatives were pleased to inform the minister that, with one or two exceptions, such as the *Statute of Limitations* change, everything which he was now proposing to enact had been called for by the society in its *Real reform* document published last October.

Government has more to do, one year on

A review of how the government has delivered on its commitments in areas such as law reform, crime and the courts shows it still has plenty 'more to do' after a year in office.

In a key area for many practitioners (particularly those dealing with children before the courts), the administration pledged last year to make 'full use of the probation service where appropriate as an alternative to custody'. Law Society Council member and consultant to its Criminal Law Committee, James MacGuill, pointed out this month that the government has yet to appoint the extra probation officers needed to make this a reality. The Department of Justice, Equality and Law Reform said that the minister had recently secured funding from the Department of Finance to do this. 'Recruited officers will be deployed to implement relevant sections of the *Children Act* on a phased basis', its spokesman told the *Gazette*.

A promise to extend the power of the director of public prosecutions (DPP) to appeal against lenient sentences in serious cases before the District Court has not happened, according to MacGuill. In fact, it looks as if it's been put on the governmental long finger, as the attorney general has referred the issue to the Law Reform Commission.

The commission has published several reports on another area singled out for reform, libel law. The government committed itself to reforming the law governing this in the context of a statutory press council and improved privacy laws. The minister is now considering the report of an advisory group set up last September to study a two-year-old scheme of a proposed *Defamation Bill*. The LRC reported on this originally in 1991 and on privacy in 1996.

The government promised to tackle corruption, and last year said we would have a *Proceeds of Corruption Act* modelled on the existing *Proceeds of Crime* legislation. This initiative is the subject of consultations with the attorney general and the Criminal Assets Bureau.

The government is also committed to comprehensive reform of charity law, to prevent the abuse of charitable status and fraud. The Law Society has been leading the charge in the move for change in this area, and last year published a document outlining the case for reform and making wide-ranging recommendations. At this stage, it could be 2005 before we get a bill, but the Department of Community, Rural and Gaeltacht Affairs is committed to producing one during this administration.

Twomey's thanks

The president of the Southern Law Association Fiona Twomey has expressed appreciation for the role played by the Minister for Justice, Equality and Law Reform, Michael McDowell, in the €25 million refurbishment of the courthouse on Washington Street, Cork.

Twomey also wants to specifically thank the President of the Circuit Court, Esmond Smyth (see *Gazette*, April issue, page 6) for assigning additional Circuit Court judges when extra sessions were required to deal with what would otherwise have been impossible backlogs.

Barristers are from Mars, soli

Are the two branches of the legal profession separated by something more fundamental than training and dress sense? Hugh O'Donoghue looks to the stars for an answer

Mars, as every solicitor's apprentice knows, is the fourth planet from the sun and named after the god of war. Venus, on the other hand, is closer to the sun, which, alone with the moon, outshines it and is associated with Aphrodite, the goddess of love and beauty in Greek mythology.

In a best-selling book, John Gray coined a phrase that inspired the title of this article. His thesis was that the female psyche owed its origins to Venus, while the masculine make-up was genetically warlike and aggressive – qualities akin to those of Ares, the god of war. Hence the phrase that men are from Mars, women are from Venus. Gray teaches that, by recognising their differences, both sexes can assist each other in overcoming their perennial problems.

VENUS AND MARS BY SANDRO BOTTICELLI

A match made in heaven? Or just another hard day at the office?

This proposal lacks the precision we lawyers have come to expect, reducing two colossal groupings into somewhat homogenous stereotypes. Yet, like superior insults, the grain of truth that gives these generalisations their impact – if not their sting – is worth considering. Can the same technique for instance apply in the familiar setting of our own legal profession? Is the bar, for example, more combative, while solicitors represent a gentler, more feminine aspect? If this is true, does it explain the differences, the distribution of men and women in each branch, the type of person who becomes involved as well as the personal qualities desirable, even necessary, in individual practitioners?

In the first place, men and women have reached a welcome stage of equality in the Irish legal world. Women

Letters

Being fleeced by the insurance companies

From: Richard E McDonnell, Ardee, Co Louth

Why, instead of arguing with insurance companies in the media about the red herring that is fraudulent claims and rogue lawyers, does the Law Society not have an effective spokesperson getting it across that the *real* reason we are being fleeced by insurance companies is because they have always derived the vast bulk of their profits from the investment of premia income in investments and the stock market, and they, like everybody else, have lost their (our?) shirts in the last couple of years?

Only a few weeks ago, FBD announced *underwriting profits* of over €30,000,000! So it is simply a lie to propagate the notion that claims are the cause of the current crisis in the cost of insurance cover.

Unfortunately, nobody (including Mary Harney) seems to know this or, more likely, wants to know it. It's far easier to blame lawyers as usual.

VHI undertakings and the

From: Thomas J Brooks, Collins Brooks & Associates, Clonakilty, Co Cork

As members of the profession are fully aware, the VHI is seeking undertakings from solicitors to recoup to the VHI the amount of benefits paid in circumstances where a third party holds responsibility to the member for his or her losses. The problem with the undertakings sought by the VHI is that they require full recoupment of the benefits paid, notwithstanding that liability may be an issue in the case, and ultimately only a percentage of the overall benefits are recovered.

In many cases where liability is an issue, I have been unable to give this open-ended undertaking and I have argued with the VHI that its request is draconian and could not possibly reflect the sense of the contract between the member and the VHI. I sought a copy of the rule 9g (ii) from the VHI and the clause reads as follows:

'Expenses which you can recover from someone else

If you claim benefits for treatment which is needed because a member was injured through the fault of some other person or body, you and the member (if the member is over 18) must fill in the relevant section of the claim form. We will pay the benefits if you or the member fills in a written undertaking to:

i) Include those benefits in any claim being made or to be

citors are from Venus

represent 49% of Irish solicitors, while, according to the Bar Council, about 35% of barristers are female. These statistics are a recent phenomenon, yet they show that gender alone does not resolve our questions. Neither does the spread of personality types because, as can be generally observed, barristers and solicitors come in all shapes and sizes, with varied dispositions and no doubt with a heterogeneous psychological profile. Alright, common sense suggests that there are traits more suited to one profession than the other, but I know of no scientific study that can conclusively help here with research as to what indeed are the ideal psychological specifications for aspirants to either branch.

Is there any real difference, then, between both branches? As is often the case, the answer is both yes and no. Yes, in that some functions of each profession are distinctly separate. No, in that, as we shall see, the similarities are more striking than their dissimilarities suggest.

Vestal virgins

Barristers generally plead and argue cases, and while solicitors are also present in court they usually serve counsel. In court, solicitors are the handmaidens of the bar. A barrister's opinion also contains an authority missing from that of a solicitor, no matter how learned. We all know of situations where a counsel-in-nappies has trumped the views of some solicitor burdened with an infinite knowledge of *shifting uses*!

Again, dare I say it, but counsel has greater access to the corridors of power, exemplified by their appointment as judges of the higher courts. It is true that there are recent appointments from the ranks of solicitors and that this is a growing trend, but the greater number of judges come from the bar. The bar argues that this is only right and proper, given barristers' experience and qualification. But aside from the preferential treatment in judicial appointments at present, barristers enter the courts with more ease. It is simply their rightful place. A solicitor, by comparison, strains a little when he pops his head above the parapet to speak in a superior court. Not that the judges are unwelcoming; the opposite is the case. But a sense of peculiarity prevails, one with which I am sure even the judge has to wrestle.

Legion of the rearguard

Solicitors of course play a major part in court proceedings but by and large leave the advocacy alone. This is not to say that there are no skilled courtroom solicitors. District Courts countrywide witness many a fine solicitor advocate, while recently they are becoming more involved, bit by bit, in the Circuit and High Courts. But while solicitors may be skilled diagnosticians – to adopt the language of a different calling – they are generally not surgeons. The cutting edge of forensic intervention is a matter for the bar. However, as if to compensate, solicitors have the field more or less to themselves in conveyancing and probate, while controlling large tracts of the commercial sector. Moreover, many are skilled draftsmen and negotiators, not to mention the expanding cadre of specialists in all areas.

So far, differences are seen as part of the institutional roles

solicitors' profession

made against the person who caused the injury, and

ii) Do everything we ask to recover those benefits and repay them to us'.

It is quite clear that the clause envisages a situation where no benefits are recovered, where there may be difficulty in recovering, or indeed only partial recovery is secured. Nonetheless, the VHI is now asking members to underwrite their own policies where there is any form of wrongdoing on the part of a third party

The extraordinary thing is that if the member is advised by his or her solicitor that there is no claim and he or she decides not to bring an action, the VHI under the contract would have to pay immediately. The intransigent attitude adopted by the VHI is causing great difficulty for solicitors and their clients. Many colleagues have spoken to me about the matter. All are adopting the attitude that they will not sign the undertaking where liability is an issue. The VHI is likewise taking a hard stance and returning the bills to the member.

I am wondering if any colleagues out there have found any solution to the problem. Have they had any success with their negotiations with the VHI in similar situations?

My view is that on an arbitration the VHI would almost certainly lose its argument. G

VOX POP

England and Wales are considering abandoning barristers' wigs and gowns. Should we take the same step?

'It makes people look like barristers, which gives younger practitioners the authority they need, and which, when you're dealing with an old lag, you might not otherwise have. If you want a formal situation such as a courtroom, why not increase the formality?'
Tim O'Connor, barrister

'I would not like to think that members of the judiciary would feel offended when people come into the courtroom with or without wigs. Only time will tell whether practitioners will choose to continue to wear them or otherwise, and whether the option would be introduced for judges, but it's not in our hands'.
The Honourable Mr Justice Aindrias Ó Caoimh of the High Court

'They've been in existence for a long time; it's very traditional. Wearing wigs has been optional since 1995, and maybe more barristers should be willing to opt not to wear them. But for criminal matters, the wig and the gown are appropriate'.
Cliona Costelloe, newly-qualified solicitor

'Abolishing wigs and gowns will bring us into the twenty-first century'.
Joe Brennan, regional manager, Courts Service

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– the conventional framework that bind the occupants – but does not explain the personal qualities of the practitioners. A review of these may point to more fundamental divisions.

A barrister needs a kind of robustness; the mental and physical ability to cope in a highly-charged competitive (if not combative) arena day in and day out, and the energy to follow through the day's fight with paperwork and research. For the solicitor, the corresponding but different capacity is to keep going and to bring a process over the finishing line despite myriad obstructions. All these qualities, of course, are aspects of endurance and tenacity, both positive and negative; Ying and Yang, as the ancient philosopher described it. In the solicitor's case, a dog with a bone. In the barrister's case, a dog looking for the bone!

Industry, application and focus may be common traits in any successful professional, but a solicitor requires discretion; needs to be confidential. Less so a barrister, for whom these traits are not as routinely tested. On the other hand, counsel must have judgement; less so a solicitor; while prudence and honesty are of incalculable value to a solicitor who hopes to be of any use. Again, the barrister has less need of those; the position is that of two sportsmen requiring similar athleticism but with different strong points.

I am Spartacus

A barrister needs to be mentally tough, particularly to meet the challenges of defeat and adversity, if not adversaries. He also needs a level of discipline and self-control, especially in the headier days. The danger of falling over the edge is not reserved for rock stars.

The solicitor also requires discipline, just as much as his counterpart at the bar. He needs to be systematic, ordered, meet important deadlines that he misses at his peril. Toughness, too, but not with the same emphasis. The solicitor has the choice to take the quieter, less confrontational role.

But a solicitor's relationship with the client is far different to that of his counterpart and demands different qualities. The solicitor must handle his client with as much solicitude as the caring professions, if not more. He must be a wife to them, minding, encouraging, praising, sometimes chiding. He must possess the steel to save the client from himself and sometimes save himself from the client! Solicitors, too, have been known to fall over the psychological precipice. A barrister may be – must be – less intimate. At times he has to be stark, almost brutally frank, yet civil and courteous. The dividing line is sometimes hard to find.

Looking deeper still, is there something else that separates the players? A search for reason and justice surely separates the jurist from the lawyer, but is there a more valuable currency? Could this quality be courage – moral and mental – as distinct from physical? This is rare enough even in Irish lawyers. Courage is, of course, at the heart of Mars. Can it then be said that lawyers are from Venus, advocates from Mars?

Barristers and solicitors are two sides of the same coin. Taking the conventional view, the barrister has more of a forensic role but, as for personal characteristics, they are for the most part accidental or indeed generated by differences in the institutional imperatives imposed on the practitioner. To assign a non-active, submissive, unassertive character to solicitors would be a mistake.

Yet, overall, there is a charm and elegance associated with the law that belongs undoubtedly to the sphere of Venus. For instance, the splendid architecture of the courts, the King's Inns and Blackhall Place. Their graceful interiors. The well-mannered occupants. Their cultured voices and cultured minds. The cut of their jibs, indeed the cut of their suits! All part of the world of Venus.

This is the outward attraction of the law. One that often annoys the critics. But what do they know? Mars and Venus have been an item for a long time. G

Hugh O'Donoghue is the principal of the Cork law firm HV O'Donoghue.

TO HAVE AN

Pre-nuptial agreements may sound like something out of *Lifestyles of the rich and famous*, but Irish lawyers are reporting an increase in the number of clients looking for them. Geoffrey Shannon discusses their changing legal position and asks whether they are worth the paper they're written on

MAIN POINTS

- The legal position in this country
- The English experience
- What should a pre-nuptial agreement cover?

Michael Douglas had a pre-nuptial contract drawn up before he married Catherine Zeta-Jones. Brooke Shields had one, so did André Agassi, Joan Collins and Elizabeth Taylor. And if you're not part of the Hollywood set, you can download pre-nuptial contracts from any number of legal websites.

But how relevant are such contracts to the Irish men and women whose main financial worries may centre on a holiday home in Belturbet rather than a mansion in Bel Air? There is nothing to stop anyone intending to marry from signing a pre-nuptial agreement. The drawback is that the courts are not obliged to enforce it. Irish family law gives judges a wider discretion over the distribution of a separating or divorcing couple's assets than their counterparts virtually anywhere else – and it is likely that this unfettered discretion will continue.

Binding pre-nuptial contracts are an integral part of the family law system in many EU states, Canadian provinces, US states, New Zealand and most recently Australia. The central purpose of such an agreement is to offer certainty for the future. It is primarily about money and property, but may also contain confidentiality clauses about lifestyle during the marriage.

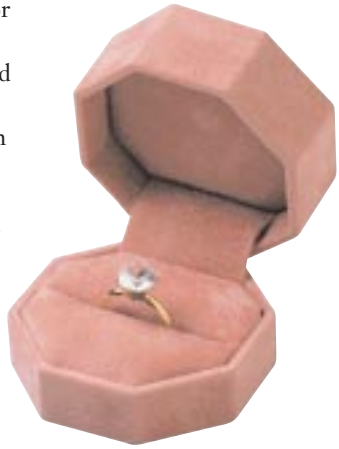
Irish family lawyers have experienced an increasing number of client enquiries about pre-nuptial contracts since the *Family Law (Divorce) Act, 1996* came into force. But while interest has increased, it appears that a pre-nuptial agreement remains a

PHOTO BY STEWART COOK/REX FEATURES

Pre-nuptial agreements

D TO HOLD?

relatively rare occurrence in Ireland. It is most likely to be found in relationships characterised by one or more of the following: people entering a second marriage seeking protection for properties they had before they wed; a significant asset imbalance between the parties; a foreign national marrying an Irish person who will want to protect properties owned in his or her home country should the marriage break down; and the presence of a family business that one spouse wishes to protect.



You can't always get what you want

In the past, where a pre-nuptial contract was executed prior to a marriage with a view to regulating the contingency of a future separation, such a contract was held to be void on the grounds of public policy since there should be no inducement to leave a marriage. One of the earliest authorities against the enforceability of pre-nuptial agreements was the case of *Brodie v Brodie* ([1917] volume 33 TLR 525). In this case, the parties executed a pre-nuptial agreement to live apart and subsequently on the marriage executed a postnuptial agreement, confirming the provisions in the pre-nuptial contract. The court held the agreements to be void in that they were drafted to facilitate a future separation. It further held that the two agreements were one and the same and were contrary to public policy.

In the case of *Wilson v Carnley* (24 TLR 227 [1908] 1 KB 729 CA), we find one of the clearest examples of judicial pronouncements against the enforceability of pre-nuptial agreements on public policy grounds. Kennedy LJ opined as follows: 'No court has ever yet held that a deed providing *in futuro* for the contingency of separation between husband and wife is in accordance with public policy'.

These cases would appear to be the main early authorities on marital agreements.

The removal of the constitutional prohibition on divorce weakens, but does not negative, the argument that a contract made in contemplation of a

PHOTO BY E CHARBONNEAU/REX FEATURES

Love bites: Zeta-Jones wonders what she signed up to, as father-in-law Kirk Douglas gives his personal imprimatur to the arrangement

separation which may occur at some future date and which is not inevitable is unenforceable for reasons of public policy. It does, however, strengthen the case for the validity of prenuptial agreements, at least in the exercise of the general judicial discretion. Authority for this proposition is to be found in the case of *Fender v St John Mildmay*[1] (1938] AC 1), where Lord Atkin stated that pre-nuptial contracts should be given the benefit of the doubt where they do not demonstrate substantially incontestable harm to the public. He noted in particular that 'legislation had been established that it is not contrary to public policy that married persons should obtain a divorce'. This raises the question as to whether parties in Ireland should be able to regulate in advance for the consequences of such a divorce? A further question arises as to what enforceable effect, if any, pre-nuptial agreements should have on divorce proceedings.

By virtue of article 41.3.2 of the constitution and the *Family Law (Divorce) Act, 1996*, the court must be satisfied that proper provision, 'having regard to the circumstances', has been or will be made for the spouses and any dependent members of the family. This constitutional imperative on the courts to ensure that 'proper provision' has been made before granting a divorce will, no doubt, make pre-nuptial agreements, which have been concluded several years prior to the divorce, no more than a factor in the overall consideration of a case. Barron J in *RC v CC* ([1997] 1 ILRM 401) alludes to this constitutional duty.

Notwithstanding all this, it is worth noting that even in the United States pre-nuptial agreements have raised public policy considerations and the courts continue to review the agreements in the light of their fairness and their tendency to encourage divorce. It is difficult to imagine the Irish courts ignoring either consideration.

Tumbling dice

It is because the court has a wide discretion to determine ancillary relief following a judicial separation or divorce that pre-nuptial agreements are believed to be unenforceable in Ireland. Objections to pre-nuptial agreements are not likely to be based so much on public policy grounds but are more likely to arise from the fact that such an agreement fetters the power of the courts to vary ancillary orders – a power that they guard zealously.

The enforceability of pre-nuptial agreements does not appear to be significantly enhanced by the provisions of the *Family Law Act, 1995* or the *Family Law (Divorce) Act, 1996*. The overall philosophy of

WHAT IS A PRE-NUPTIAL AGREEMENT?

A marital agreement is an agreement between two people who propose to marry each other (pre-nuptial agreement), or who have been married to each other (postnuptial agreement), in respect of property, maintenance and custody arrangements should the marriage breakdown. The most common purpose is to ensure the protection of property in an agreed way in the event of subsequent spousal disagreement and/or marriage breakdown. Essentially, the couple are trying to opt out of the current system of matrimonial law in the hope that they can remain subject to the legal provisions that would have obtained had they remained as co-habiting partners or legal strangers. Such agreements, however, have not been tested in recent times in the Irish courts.

Traditionally, pre-nuptial agreements were objected to on the following grounds:

1) The broad ground of public policy at common law that the marital union was for life and an agreement that envisaged a breakdown or the dissolution of that contract was inconsistent with the sanctity of marriage and was therefore contrary to the common good
2) The narrow and distinctively Irish theocratic constitutional ground that article 41 expressly provided that any agreement which envisaged a dissolution of marriage was contrary to the constitution as well as to the state's interest in preserving marriage, and
3) The legislature had enacted legislation permitting the judiciary to consider and, if necessary, vary the terms of pre-nuptial agreements in certain cases. (Marital agreements expressly purport to exclude the jurisdiction of the courts. This is in breach of the constitutional provision which enshrines the primacy of the courts.)

these acts is clearly not supportive of spousal autonomy. In *JD v DD (Judicial Separation)* ([1997] 3 IR 64), for example, McGuinness J held that the Oireachtas had legislated to permit repeated applications to court for ancillary relief to the extent that finality could not be achieved, and she continued (at page 89): 'This also appears to mean that no agreement on property between the parties can be completely final, since such finality would be contrary to the policy and provisions of the legislation'.

But to say that the provisions of the 1995 and 1996 acts exclude the enforcement of pre-nuptial agreements does not necessarily mean that they are totally irrelevant in the financial reordering after marriage breakdown. Keane CJ in *T v T* (unreported, Supreme Court, 14 December 2002) adopted an approach that could help parties seeking to enforce pre-nuptial agreements. The chief justice held that he did not believe that the Oireachtas intended that the courts should exclude the possibility of achieving certainty and finality when financially reordering assets upon divorce, or of avoiding further litigation between ex-spouses. He expressed approval for the approach adopted by Denham J in *F v F* ([1995] 2 IR 354), where she stated that the principles of certainty apply to family law as to other areas of the law. It appears from *T v T* that the Supreme Court values 'certainty and finality' over flexibility and the power of the court to vary under section 22 of the *Family Law (Divorce) Act, 1996* (see also *PO'D v AO'D* [1998] ILRM 543).

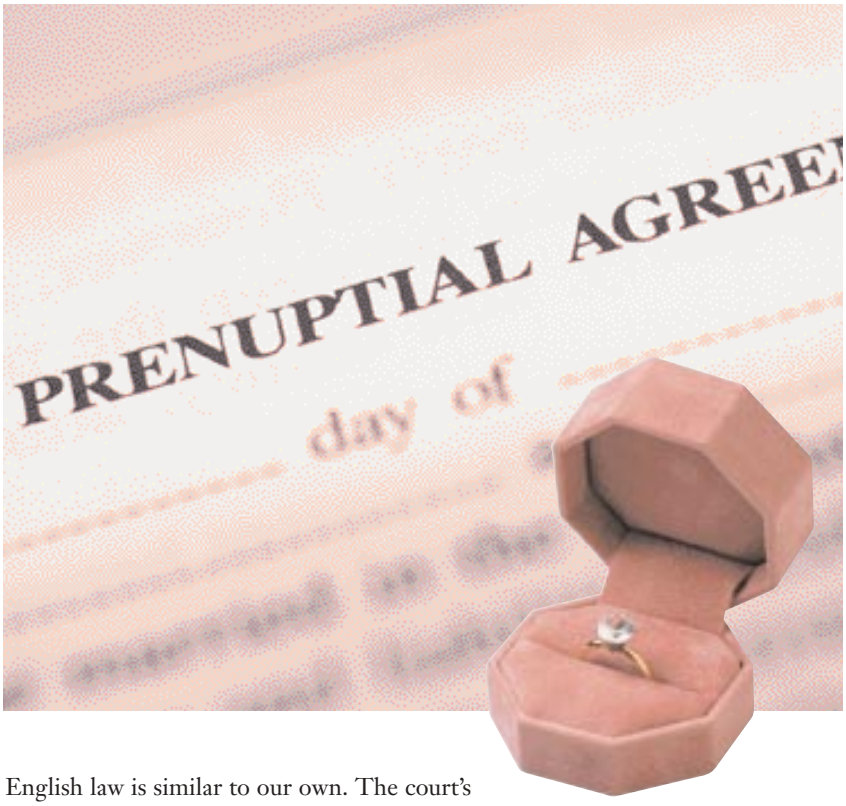
In determining generally when and how the courts can make ancillary relief under the 1996 act, section 20 provides that:
'*1) In deciding whether to make an order ... and in determining the provisions of such an order, the court shall ensure that such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent member of the family concerned*'.

A similar provision is contained in section 16 of the 1995 act, as amended by section 52 of the 1996 act: '*1) In deciding whether to make an order ... and in determining the provisions of such an order, the court shall endeavour to ensure that such provision exists or will be made for each spouse concerned and for any dependent member of the family concerned as is proper having regard to all the circumstances of the case*'.

Clearly, with regard to similarly worded statutes, there is room to consider a pre-nuptial agreement as part of 'the circumstances of the case', and it could be argued that in enacting such a provision the Oireachtas intended this result. This is not free from controversy, even in English law where the matter has been considered on a number of occasions. In *M v M* ([2002] 1 Fam Law 177), for example, Connell J considered the relevance of a pre-nuptial agreement signed by the pregnant wife-to-be, notwithstanding legal advice that it was not in her best interests. He stated that under section 25 of the UK's *Matrimonial Causes Act 1973*, the court's overriding duty was to attempt to arrive at a solution that was fair in all circumstances. He treated the pre-nuptial agreement as relevant either as part of the circumstances or specifically as conduct, but not as decisive. As the marriage was merely of five years' duration, the wife was awarded less than she would have received if the marriage had endured, but more than the pre-nuptial agreement would have given her if the court had enforced it. Under the pre-nuptial agreement, the husband was to pay the wife £275,000, whereas the court ordered him to pay her a lump sum of £875,000 and £15,000 a year for child maintenance plus school fees. The applicant wife had claimed £1.3 million. Pre-nuptial agreements are therefore not enforceable in England and Wales to conclusively determine the matter, but they are recognised to some degree.

Paint it black

The English provision dealing with the criteria to be taken into account when making orders (section 25 of the *Matrimonial Causes Act 1973*, as amended) is similar to Irish law by having a general provision to consider all the circumstances. There is also a provision in that law preventing maintenance agreements from making a subsequent order, and so



English law is similar to our own. The court's reluctance to give weight to pre-nuptial agreements in England and Wales can be seen in *F v F* ([1995] 2 FLR 45), where Thorpe J said that a pre-nuptial agreement must be of 'very little significance' as financial re-ordering is regulated by statute and 'cannot be much influenced by contractual terms'.

That view has not been fully accepted by other decisions. In *S v S* ([1997] 2 FLR 100), Wilson J left the questions more open and said: 'I am aware of a growing belief that in a dispatch of a claim for

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Legal Practitioners

Tendering of Court Evidence by Registrar of Companies

Use of Certificate Evidence

Since 1 October 2001, it has been possible by virtue of section 370 (4) of the Companies Act 1963 (inserted by section 62 of the Company Law Enforcement Act 2001) for evidence to be delivered in court on behalf of the Registrar of Companies by way of written certificate, where such evidence relates to:

- The contents of a register kept by the Registrar;
- The date on which a document was filed or registered with or delivered to the Registrar;
- The date on which a document was received by the Registrar; or
- The most recent date (if any) on which a requirement under the Companies Acts was complied with by or in relation to a company.

These matters cover the spectrum of issues on which a witness from the CRO would be expected to give evidence in court.

Accordingly, the Registrar of Companies requests that no further subpoenae or witness summons be served on him or on any of his staff. Save in the most exceptional circumstances, the proper course for a solicitor requiring evidence from the CRO is to request same from the Office on foot of the certificate procedure. This basis for the foregoing is:

- The recognition by the Oireachtas, in legislating for it, that the procedure is an appropriate and effective one;
- The disproportionate amount of CRO staff resources taken up in recent years by the need to prepare for, and travel to and from, court proceedings;
- The cost-effectiveness to all parties of use of the certificate procedure on a routine basis.

A more detailed note on the certificate procedure can be viewed on the CRO website at www.cro.ie.

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WHAT SHOULD A PRE-NUP AGREEMENT CONTAIN?

In the absence of legislation and case law, it would appear that pre-nuptial agreements are generally unenforceable. Notwithstanding the doubts surrounding their enforceability and the potential risks for solicitors involved in drafting such agreements, clients should be afforded the benefit of legal advice if they wish to proceed. In any assessment of the validity, enforcement and the legal weight to be given to a pre-nuptial agreement, the Irish courts are likely to examine the agreement for substantive and procedural fairness. Where a client wishes to effect a pre-nuptial agreement, the following steps should be taken.

1) Disclosure requirements must be explained to the client
2) Each party should receive separate independent legal advice on his or her rights in the absence of the pre-nuptial agreement and the manner in which those rights may be altered or extinguished by the agreement. I would recommend that a certificate, similar to that required in the new part VIIIA of the Australian *Family Law Act 1975*, acknowledging that each party has received independent 'legal' advice before signing the agreement, be kept with the pre-nuptial agreement
3) The recital portion of the agreement should contain a provision to the effect that both parties acknowledge and consent to the agreement being legally binding, notwithstanding any statutory provisions that exist or will come into existence
4) The agreement should cover such matters as the duration of the contract, division of present property, division of future property, beneficial interest, financial provisions on death (legal right share under the *Succession Act, 1965*), maintenance, religion, pensions, a provision for the dissolution of the marriage, debts, matters not covered by the agreement, the governing law, the circumstances in which the agreement can be varied, and costs. I would suggest confining the agreement largely to financial matters and would advise avoiding the personal aspects in such agreements. Arrangements in relation to children should not be addressed. A pre-nuptial agreement cannot be binding if there are children involved, as the Irish courts retain the right to deal with the welfare of the children
5) It is of paramount importance that the agreement contains periodic reviews after a period of three or five years and/or after a major event, for example, the birth of a child or a significant change in the income of either party, with parties obtaining independent legal advice at each review
6) I would also recommend that a provision should be inserted in the agreement to the effect that if a court finds any provision illegal, invalid or otherwise unenforceable, this provision should be capable of being severed without affecting the other provisions in the agreement, which will continue to be enforceable.

ancillary relief in this indication, no significant weight will be afforded to a pre-nuptial agreement, whatever the circumstances. I would like to sound a cautionary note in that respect … there will come a case ... where the circumstances surrounding the pre-nuptial agreement and the provisions therein might, when viewed in the context of the other circumstances of the case, prove influential or even crucial'.

In *N v N* ([1997] 1 FLR 573), Cazalet J commented that while the pre-nuptial agreement in question might be enforceable in Sweden (where it was made), it was no more than a material consideration in England. (See also *N v N* [1992] 2 FLR 583, where Wall J was even more forthright.)

Can't get no satisfaction

One possible use for pre-nuptial agreements is as a source of evidence of the parties' intentions at the time of the agreement. In *Edgar v Edgar* ([1980] 3 AER 887), the UK Court of Appeal provided some useful guidance in relation to the matters to be considered when dealing with a pre-nuptial contract. Among other things, the court considered: 'The parties' conduct leading up to the prior agreement, and to their subsequent conduct … and the circumstances surrounding the making of the agreement … [such as] undue pressure by one party on the other, exploitation by one party of a dominant position, the inadequate knowledge of one party, possible bad legal advice, [and any] unforeseen or overlooked change in the circumstances existing at the date of the agreement'.

In this case, the Court of Appeal took into account the pre-nuptial agreement by treating the agreement as 'conduct' of the parties, which was to be taken into account when reordering the assets. Will the Irish courts similarly consider properly-executed pre-nuptial agreements as conduct that it would be inequitable to disregard?

'No agreement on property can be completely final, since such finality would be contrary to the policy and provisions of legislation'

In conclusion, Irish courts should give effect to pre-nuptial agreements as long as they were fairly entered into, with independent legal advice and full disclosure of both sides' assets and property, subject to the interests of any children, and with a discretion for the court to disregard any agreement that produced an unfair result.

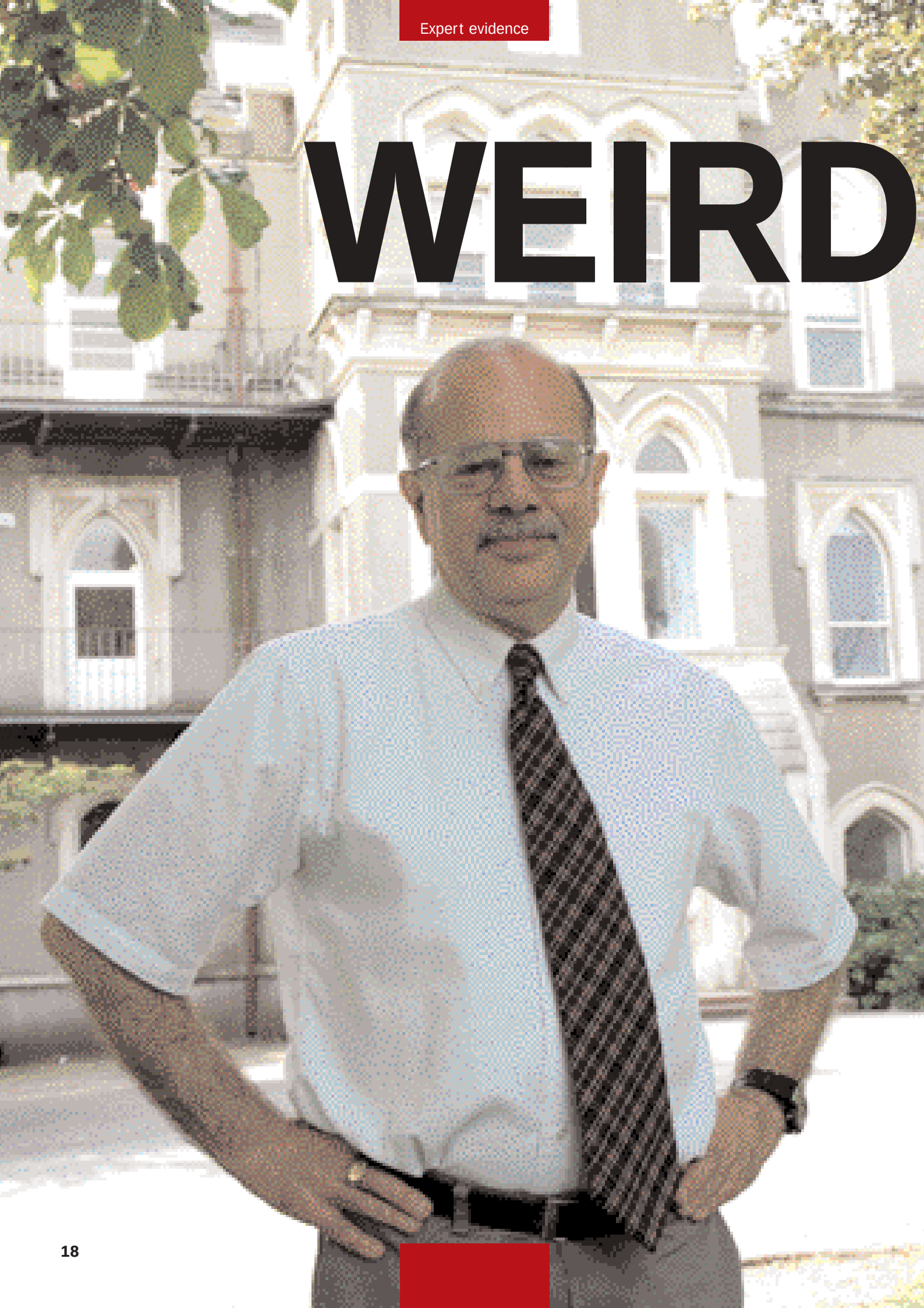
A system whereby couples can regulate to some degree the contingency of marriage breakdown seems sensible. The pre-nuptial agreement is merely a type of contract, 'an idea whose time has come'.

Footnote

1 See also Ormrod LJ's judgment in *Edgar v Edgar* ([1980] 3 All ER 887), where he stated: 'Formal agreements properly and fairly arrived at with competent advice should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreements … all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage'. G

Geoffrey Shannon is a solicitor and the Law Society's deputy director of education. The CLE department will be publishing a book this autumn entitled Divorce – six years on: practice and procedure, *which will contain a detailed paper, written by Geoffrey Shannon, on pre-nuptial agreements, as well as suggested precedent clauses.*

WEIRD



SCIENCE

Scientific evidence and expert testimony are facing new scrutiny in a revolution that began in the United States and will reach this country sooner or later. Barry O'Halloran collared the leading American academic in the field and got his, well, expert opinion

MAIN POINTS

- **Impact of *Daubert* ruling in United States**
- **New standards of admissibility**
- **Possible ramifications for Irish law**

Not long after he began his sabbatical in University College Dublin last January, Dr Edward J Imwinkelreid was reading a newspaper report of a murder trial in the Central Criminal Court. 'One of the local fingerprint experts took the stand and said "the error rate in fingerprint analysis is zero percent"', he recalls. 'Now, there was a proficiency study done in the United States of people who held themselves out as professional fingerprint examiners, and the error rate was 22%. Over one-fifth of identifications in that test were wrong! Forensic evidence is not infallible'.

Imwinkelreid is a leading legal academic and member of several bars and state supreme courts in the United States, but he readily confesses that these days he prefers reading scientific journals to judgments and legal opinions. (He says that legal opinions tend to remind him of what someone once said about Burt Bacharach songs: 'they're all medleys of the same hit'). It might seem a strange admission from someone of his background, but it's not so unusual at all when you consider where this erudite American's expertise lies.

Scientifically unproven

He is a member of the legal issues working group of the US Justice Department's commission on the future of DNA evidence and an expert testimony columnist with the *National law journal*. He began his legal and teaching career with the US Army's Judge Advocate General (JAG) corps. He has written a two-volume treatise, *Scientific evidence*, and a book on *The methods of attacking scientific evidence*. He and long-standing collaborator, Paul Giannelli, co-wrote the legal issues report for the aforementioned DNA evidence commission.

All this is outside his teaching job with the University of California's school of law and membership of a range of august legal bodies, including the Federal Evidence Discussion Group. In short, if you want to know anything about the state of American law on scientific evidence and expert testimony, you need go no further than Imwinkelreid.

And because his family likes Ireland, the *Gazette* did not have to go any further than Stillorgan in south Dublin to find him just before he concluded his sabbatical at the end of May. What he has to say will make a lot of litigators sit up and take notice. His position puts him at the heart of a decade-long debate that's been occupying the minds of many lawyers in the common-law world: whether the test for scientific evidence should shift from taking generally-accepted principles at face value to a standard that requires such evidence to be shown to be reliable by using scientific methods.

Imwinkelreid explains that the arrival of DNA evidence and a case involving the 1975 *Federal Rules of Evidence Act* prompted the US Supreme Court to change the standard for admitting scientific evidence in the country's federal courts in the landmark *Daubert* ruling in 1993. 'Essentially, what the court did was move from a traditional general acceptance test – that is, that scientific evidence is admitted only if the theory is generally accepted – to a validation test', he says.

'The essence of a validation test is that if you claim that this is scientific evidence, you've got to demonstrate that it's been validated or proven reliable by scientific methodology, by actual research. If you put those developments together, the advent of DNA forced the American courts to learn more scientific methodology'.

This means that federal courts and those in the 26 states that have adopted the *Daubert* test have to concern themselves with details such as the size and composition of databases used in research, and test conditions and validity rates in experiments.

Imwinkelreid says the case prompted a revolution.

He points out that, in contrast to the normal pattern in common-law jurisdictions where the pace of change tends to be gradual (if at all), in just ten years a majority of American states has adopted *Daubert*. Not only that, but the case raised a huge question mark over traditionally accepted forms of evidence.

'Now what's happening is that, having learned those lessons, American courts are applying them to lots of other different types of expert testimony, such as fingerprinting, document examination (to identify handwriting), and microscopic examination of hair. The upshot is that in many cases these very traditional techniques that we have used for years are being found wanting. We've accepted them for years, but the truth of the matter is that there is very little hard scientific research to validate the premises of a lot of these techniques'.

Write and wrong

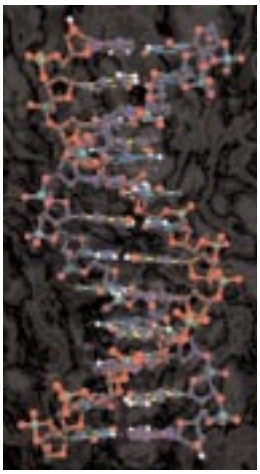
One area that has been the focus of a lot of change is handwriting examination. As a result, says Imwinkelreid, in many cases involving signatures on wills and other documents judges are cautioning juries to give little weight to testimony that would have been more or less unquestioningly admitted ten years ago.

'In other cases, the testimony has just plain been excluded', he says. 'There's a very famous case in the United States (*Fujii* [2000]) in which a document examiner was trying to identify someone who was supposedly the author of Japanese handwriting. And although in western cultures handwriting styles tend to be individualistic, in Japanese culture you're trained to follow the uniform standard. So the argument was made that there's no research showing that anyone can identify the author of a particular Japanese script. And the Federal District Court agreed with the defence and completely excluded the evidence'.

For practitioners, the new US regime has been a double-edged sword. On the one hand, they can challenge the admissibility of traditionally-accepted techniques and evidence, but lawyers whose armoury includes these techniques can no longer expect to have them 'grandfathered' into admissibility.

'It means that novel theories and statistical evidence are coming in more frequently in the United States than before. One of the things that the Supreme Court does in *Daubert* is confront the fact that science is uncertain. You can always conduct another experiment; there's always the possibility that your experiment is going to disprove a well-accepted theory. Nothing is absolutely certain', he says.

'And what is statistical evidence anyway? It's overtly uncertain expert testimony – somebody taking the stand and saying "I can't tell you what the real value is, but this is the probability. I can give you the probability that this bloodstain came from this person". So if you are an attorney trying to introduce a novel theory (that is, a previously uninvestigated theory) or statistical evidence, *Daubert* makes that possible'.



'Experts in the USA face much more sceptical courts than in the past'

At the same time, he says, 'soft' sciences such as psychology and psychiatry are getting a much rougher ride. 'In the past, because of the general acceptance theory, those techniques were exempt from close judicial scrutiny. The courts never really asked "Where's the research that underlies your theory?", but because the definition of science in *Daubert* is so broad, that exemption has effectively ended the United States.

'So now when a psychologist or a psychiatrist takes the stand and tries to testify as to someone's sanity or diminished capacity, it's much harder to get that evidence in because in many cases, frankly, they don't have good research. They've got theorising, they've got speculation, but they don't have the hard research that is the hallmark of science'.

These experts might have been able to avoid scrutiny by going under the flag of a 'non-scientific' expert until 1999, when the Federal Supreme Court handed down the *Kumho* ruling. This declared that all expert witness testimony had to have some showing of reliability. 'What that means is, if I've got a traditional technique, or I'm relying on soft science or non-scientific expertise, it's much harder for me to get my expert testimony in'.

In short, experts in the USA face much more sceptical courts than in the past. All this has helped change what many people believed to be a situation that made miscarriages of justice inevitable.

Toxic testimony

Imwinkelreid quotes an argument put forward by author Peter Huver in his book, *Galileo's revenge: junk science in the courtroom*, which states in effect that (before *Daubert* and *Kumho*) the United States had lax standards for admitting scientific evidence and expert testimony. 'He says "What attorneys are doing is going out and finding experts who, when paid enough, will say virtually anything on the witness stand". On the basis of this spurious expert testimony, Huver says there have been tremendous miscarriages of justice. Corporate defendants, to his mind, have particularly been victimised by spurious testimony about general causation in toxic tort and product liability cases, so that it is now a front-page issue in the United States'.

He adds that in the UK a royal commission found that some expert evidence had also led to miscarriages of justice.

Daubert looks set to have ramifications beyond the land of the free. Other common-law jurisdictions have taken notice too, and the case has been cited in Australia and the UK.

English courts have already been found to have wrongly convicted Irish people on the back of flawed forensic evidence. And yes, Imwinkelreid believes that sooner or later our courts will have to look at how they treat scientific evidence.

'It's coming', he says bluntly. 'Irish courts are going to have to face this issue'. G

Barry O'Halloran is a freelance journalist.

Learning cu

Continuing professional development (CPD) is now mandatory for solicitors in this country, but compulsory CPD has been a fact of life for Scottish solicitors for a number of years and brought enormous benefits to the profession there, as Douglas Mill explains

From human rights to criminal law, client relations to budget control, the Law Society of Scotland's continuing professional development programme spans the breadth of the legal profession and has proven to be a successful, rewarding and time-efficient way for solicitors to keep their knowledge up-to-date for the duration of their career.

Ten years ago, compulsory continuing professional development (CPD) was introduced for Scottish solicitors. CPD has now become a well-established facet of every solicitor's training. It is widely used internationally by professions across the board as a mechanism for maintaining standards.

The society's regulations describe CPD as 'relevant education and study by a solicitor to

MAIN POINTS

- CPD in Scotland ten years old
- Value as a marketing tool for firms
- Reduction in insurance claims

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develop his or her professional knowledge, skills and abilities'. This can be undertaken in many different ways, including in-house training, attending privately-run seminars or one of the many courses run by the society.

Solicitors in Scotland must undertake a minimum of 20 hours' CPD each year, of which a minimum of 15 hours has to be group study and five hours' private study. As well as keeping abreast of the latest on the legal scene, CPD has the scope to address the other real issues facing solicitors in their day-to-day professional lives.

The society has identified that problems can arise

TRAINING: A NEVER-ENDING PROCESS

CPD will help solicitors to better meet the needs of their clients, says Barbara Joyce

Continuing professional development has intrinsic value and is an essential pre-requisite to modern practice. Training supplements practical experience. It also fosters a culture of life-long learning. In view of the constant changes in the law and its ever-increasing complexity, it is critical that practitioners maintain their knowledge and skill at the level required to ensure that the professional advice that clients receive is based on up-to-date developments and practice.

Training for the legal profession has been described as a never-ending process. Initial qualification cannot equip a practitioner to deal with subsequent developments in the law. Knowledge is inevitably transitory and must be continuously updated.

Although a substantial number of solicitors undertake training to a far greater extent than is envisaged in the new scheme, it is also true that many of us find it difficult to devote time to training on an on-going basis. The Law Society hopes that the new framework for continuing professional development will facilitate and encourage practitioners to take the necessary time away from their practices to fulfil the requirement.

The number of hours to be undertaken is minimal in comparison with other jurisdictions. Essentially, practitioners are required to undertake 20 hours of continuing professional development during the relevant period. The initial cycle is two-and-a-half years and runs from 1 July 2003 to 31 December 2005. Thereafter, the cycles will consist of two-year periods. A minimum of 15 hours is required to be in group study and up to five hours can be by way of private study. At least five hours of the total cycle must be spent on training in management and professional development skills, which are very broadly defined within the scheme. This could, for example, include computer and language training relevant to a legal practice. It could also include skills-based training such as advocacy, negotiations and mediation.

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 practitioners. We have also done our utmost to ensure that the scheme is sufficiently flexible so that the focus remains firmly on the training needs of individuals and their practices. The entire thrust of the scheme has been designed to ensure that the individual practitioner's resources are devoted to the substance of continuing professional development rather than to record-keeping and compliance.

The Law Society acknowledges that certain circumstances will give rise to an exemption, either in whole or in part, of the obligation to fulfil the CPD requirement. Such circumstances will include long-term illness, maternity leave and retirement during the reporting cycle.

Many of you attend the excellent courses run as part of the existing continuing professional development programme (formerly the continuing legal education programme) and diploma programme. We hope that you will continue to attend these courses as a means of fulfilling your continuing professional development requirement.

We believe that the introduction of the new scheme heralds a new and exciting era in continuing professional development, which will undoubtedly equip us all to better meet the needs of our clients.

Barbara Joyce is the Law Society's CPD co-ordinator.

THE START OF A NEW ERA

Feedback from the profession has been unanimously positive towards the introduction of CPD, writes Donald Binchy

1 July marks the start of a new era for solicitors in Ireland. It is on this date that the *Continuing professional development regulations* come into effect. In general terms, what this means for solicitors is that we will all be required to undertake 20 hours of continuing professional development every two years.

This development has not come about overnight. Some years ago, the Law Society set up a task force to examine the desirability of introducing such a scheme, having regard to the ever-increasing complexity of our legal system, and the establishment of similar schemes in other jurisdictions, as well as in other professions both in Ireland and abroad. The task force was chaired by Mr Justice Michael Peart and included solicitors from across the spectrum of legal practice as well as solicitors and executive staff from the Law School.

Simultaneous to the study undertaken by the task force, the Law Society surveyed the membership of the profession itself, in particular through direct personal contact with members of the profession at bar association meetings. The feedback from the profession was overwhelmingly, indeed unanimously, in favour of the introduction of a CPD scheme. If any criticism has been made, it is that the scheme as now introduced does not go far enough.

Nonetheless, it was the considered view of the task force, and subsequently the Council of the society, that the emphasis of the scheme should be encouragement rather than compulsion, somewhat similar to the scheme that has been so successfully implemented in Scotland. (An interesting by-product of the Scottish scheme is that it has re-invigorated bar associations that had previously become practically moribund.)

The feedback that the society received (without exception) from bar associations around the country was that while practitioners acknowledged the need to engage in continuing professional development, many could not find the time to do so. The message conveyed to the society was that they would welcome an element of compulsion to force them to do that which they wanted to do anyway. There is clearly widespread recognition in the profession that professional competence is never achieved once and for all so as to preclude the need for further learning.

This is not to say, however, that the society expects every solicitor to welcome the introduction of the scheme. It is to be expected that some solicitors will consider that, for one reason or another, it is not appropriate that they be subjected to a compulsory scheme, particularly if it forces them to attend seminars which have no relevance to their practice. In an effort to address such concerns, the society has sought to ensure that the scheme is sufficiently flexible so that the focus remains firmly on the training needs of individuals and their practices. Credits can be obtained for writing articles in

Douglas Mill: 'CPD has revitalised many sectors of the profession'

for solicitors due to lapses in management of the office or poor communication with clients, rather than simple ignorance of the law or procedure. In light of this, the society determined that at least five hours must be dedicated to training in management, organisation, client care and communication skills. This can include courses as varied as budget control, office management, professional ethics, computer skills, interview techniques, setting priorities and time management. Let's face it: there's no point in having an encyclopaedic knowledge of the law if your 'desk-side manner' is lacking and your office is a shambles!

The thrust of CPD is to provide all-round professional development, and indeed CPD has revitalised many sectors of the solicitors' profession in Scotland. The variety and scope of CPD courses have been testament to its overwhelming success.

The society holds around 100 seminars a year, run at locations throughout Scotland, ranging from major two-day residential conferences in legal aid and criminal law, through to evening and lunchtime seminars.

Training roadshow

New technologies such as video-linked seminars have been used in a number of initiatives to make it even easier for solicitors in remote areas to complete their CPD requirements. Travelling roadshows have also proved popular around the country and have recently been turning the spotlight on changes in employment law and new money-laundering legislation. From 1 November, up to five hours can be undertaken by distance learning to cater for busy practitioners who prefer to undertake some of their CPD at home or in their office.

Local faculties in Scotland have embraced CPD

periodicals; for preparing and making a presentation at a seminar; for group study; and for participation in internal office seminars as well as private study. The regulations do, however, stipulate minimum hourly requirements in some areas and I urge you to give careful consideration to the regulations and the scheme of continuing professional development circulated to you recently with a letter from the president, Geraldine Clarke.

The long lead-in period and the introduction of a two-year reporting cycle were very deliberately chosen, as the society does not wish the obligation to be unduly onerous for practitioners. The scheme has been designed to try to ensure that the individual practitioner's resources are devoted to the substance of continuing professional development rather than to record-keeping and compliance. In order to be meaningful, however, practitioners will be expected to complete a record card outlining the details of the training undertaken over the two-year period and to remit it to the society when applying for renewal of a practising certificate. A percentage of record cards will be periodically inspected by the society on a random basis and failure to comply with the regulations may be regarded as misconduct.

The society does not intend to award accreditation to any course or course providers. Practitioners have the discretion to exercise their own judgement as to what training is relevant to their particular practice requirements, although obviously the society will expect such judgement to be exercised reasonably. Training may be organised by individual firms, universities, local bar associations, the Society of Young Solicitors or other organisations. Group study does not necessarily entail formal attendance at lectures; it can include study in a group of three or more practitioners, provided that it lasts for a minimum of an hour as there is an established link between the enhancement of solicitor competence and the nature of the activity undertaken. It may take place within or outside Ireland. It is not required to be in groups which comprise solicitors only, but it must be relevant to the solicitor's practice.

One particularly noteworthy feature of the scheme is the requirement to expend at least 25% of the minimal hourly requirement on management training and professional development skills. This is in recognition of the critically important role of effective practice management. Indeed, it is interesting to note that in the accompanying article written by Douglas Mill of the Law Society of Scotland (where there is a similar requirement) he notes that claims against the master insurance policy of the Law Society of Scotland have diminished substantially since the introduction of CPD.

Finally, I would like to thank all of you who have contributed and continue to contribute so generously to the society's CPD programme despite the heavy demands of your practices. I can assure you that your contribution is very much appreciated. I would also like to thank the members of the task force and the society's Law School, who have worked so hard to bring this project to a conclusion. I sincerely hope that the scheme will be as welcome now by the profession as it appeared to be in advance of its introduction, and in particular, I hope that you will find it personally and professionally fulfilling.

Donald Binchy is chairman of the Law Society's Education Committee.

after seeing the commercial benefits and many now run seminars for their members. The society helps local faculties organise their own CPD programmes by providing speakers and administrative support.

The larger firms use CPD seminars as a marketing tool – inviting clients and promoting the firm as a 'leading expert' in a particular area of the law. Indeed, the scheme has been so successful with the In-house Lawyers Group in Scotland that it has developed an annual programme, which is free to in-house lawyers.

The society regularly runs seminars in conjunction with bodies such as the Scottish Refugee Council, Institute of Chartered Accountants, the British Medical Association, the Faculty of Advocates, various charities, the Commission for Racial Equality and many other organisations, drawing together experts in their fields. Solicitors are actively encouraged to come up with ideas for new courses, enabling the society to tailor courses to their needs and ensure there is something for everyone.

The feedback to the society has been very positive, with many members noting (some with surprise) their enjoyment of the CPD programme, commenting on excellent value for money, the usefulness of the presentations, workshops and papers and the relevance of topics. One solicitor said the recent human rights conference, held in conjunction with the Faculty of Advocates and the Matrix Chambers, was 'by far the best seminar I have attended in 21 years as a solicitor'.

Such targeted seminars have been a real success story. For example, risk management courses have led to a downturn in the number of insurance claims on the master policy. Similarly, many solicitors who have attended client relations seminars have said they are equipped to respond more effectively to dissatisfied clients.

Peak professional condition

The society is continually evaluating the CPD programme. The most recent modification was a certificated course run in conjunction with the Chartered Management Institute and Perth College, which is part of the University of the Highlands and Islands. The management course is a distance learning project, supported by written, e-mail and telephone guidance, with tutorial workshops. The course fulfils a year's CPD requirements.

The evidence is clear: through its varied and flexible format and interesting, relevant topics, CPD in Scotland has proved to be a successful way for solicitors to remain in peak professional condition in all aspects of this demanding vocation. G

Douglas Mill is the chief executive of the Law Society of Scotland.

RISKY BU

As workplace deaths continue to rise, many employers remain steadfastly non-compliant or just ignorant of the health and safety legislation. These employers now face much stiffer penalties, including huge fines and even personal liability. Barrett Chapman discusses some recent landmark judgments

Last year 57 people lost their lives in workplace accidents, including three fatalities on building sites in the week before Christmas. Recently, there have been a number of high-profile health and safety prosecutions, and this article tries to explain the basis on which penalties have been imposed and the routes to court which could face a party accused of breaches of the legislation.

There is an abundance of legislation in this area, principally in the form of regulations that have been made under the *Safety, Health and Welfare at Work Act, 1989*. The 1989 act has been supplemented by statutory instruments or regulations, approved codes of practice and guidance notes issued by the Health and Safety Authority (HSA).

The principal duties imposed by the 1989 act are contained in sections 6 and 7, which extend the duty of care not only to employees but also to any other third party who may be affected by the manner in which the employer conducts his business. Also, the duties are not absolute duties; rather, they are qualified by the phrase '*so far as is reasonably practicable*'.

Summary prosecution

The 1989 act provides for both summary prosecution and prosecution on indictment. Summary prosecutions by the HSA are dealt with in the District Court. Prosecutions on indictment will be brought in the Circuit Court. The maximum fine that can be imposed by the District Court is €1,900 (£1,500).

Summary prosecutions must be brought within one year of the date of the alleged offence, but in practice many of the HSA prosecutions are initiated within days of the end of this period. The vast majority of cases prosecuted, including cases involving fatalities, are still prosecuted in the District Court.

Prosecution on indictment

Prosecutions on indictment are brought in the Circuit Court, where there are no limits on the fines that can be imposed. There are a number of different ways in which a prosecution can proceed on indictment.

First, on investigating the case, the HSA may have referred the matter to the DPP, who considers that it should be tried on indictment. The case is then investigated jointly by the gardaí and the HSA and the case is actually taken by the DPP (rather than the HSA, as in the case of summary prosecutions).

Protesting builders march on the Dáil earlier this year

Second, where a District Court judge declines jurisdiction on the grounds of the gravity of the charges, the case may be prosecuted on indictment in the Circuit Court. An example of this was *DPP v ESB*. The case arose from the investigation of a serious accident which occurred on 25 November 2000 to an employee of the ESB. While removing an old wooden ESB pole in Dungarvan, Co Waterford, the injured worker's left arm got caught up in a pole-grab mechanism which led to his arm being amputated below the elbow. The HSA originally brought the case before Dungarvan District Court on 12 September 2001. At that hearing, Judge Riordan refused to accept jurisdiction as he considered the

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MAIN POINTS

- ***Safety, Health and Welfare at Work Act, 1989***
- **Landmark fines in *Roseberry* and *O'Flynn***
- **Personal liability of management**

maximum total fine of £3,000 that he could impose (for the two separate offences before him, where the maximum fine was £1,500 each) to be an insufficient penalty to act as a deterrent to others, considering the seriousness of the injuries. Accordingly, the matter was transferred to Waterford Circuit Criminal Court, where, on 6 December 2001, the ESB pleaded guilty to both charges and was fined a total of £5,000.

As a result of the *Roseberry Construction* and *O'Flynn Construction Limited* cases (**see panel overleaf**), it seems to me that this is likely to happen on a much more regular basis because in many instances a fine of £1,000 or £1,500 simply leaves the public with a very poor perception and certainly does not act as a deterrent, especially in cases of fatalities.

The growing reluctance of the District Court to accept jurisdiction in health and safety prosecutions arising out of a fatality was highlighted in a case in January 2003, when the Dublin District Court declined jurisdiction in a prosecution brought by the HSA against *PJ Carey (Contractors) Limited* involving the death of a child on a Dublin building site.

Finally, where the defendant exercises its constitutional right to opt for trial by judge and jury a case will proceed to the Circuit Court on indictment. Given the fact that the maximum fine in the District Court is currently capped at €1,900, it is hard to imagine a case where somebody would opt for trial by judge and jury and leave himself open to potentially unlimited fines.

On indictment, pursuant to the 1989 act, there is an additional power to impose a term of imprisonment of up to two years, but this can only happen in three instances:

- Failure to obey a prohibition notice issued by a HSA inspector
- Unlawful disclosure of information obtained under the 1989 act (in effect, revealing secret trade processes or identifying individuals where this is unauthorised)
- Breaking the terms of a licence issued under the 1989 act (although no licensing arrangements yet exist under the 1989 act).

Section 39 injunction

Under section 39 of the 1989 act, the HSA can apply for an *ex parte* injunction to the High Court for an order restricting or prohibiting the use of the place of work or any part of it. The injunction can be brought by the HSA where it considers that the risk to the safety and health of people is so serious that it is justified. The court can make an interim order and the parties that are affected by the injunction can be heard at a later date. However, in the meantime, no work can take place at that place of work or part thereof. This section is rarely invoked.

It should be noted that section 39 injunctions apply to all places of work, not just construction sites, although this is where the injunctions are often sought.

Perhaps the most famous case arising out of section 39 was *Zoe Developments* (see *Irish Times*, 18 November 1997), which was heard in the High

LANDMARK CASES
ROSEBERRY CONSTRUCTION AND O'FLYNN CONSTRUCTION

A landmark decision for the Health and Safety Authority was *DPP v Roseberry Construction Limited*, a case heard in Naas Circuit Court in November 2001. The prosecutions arose from the death of two men who died when a trench in which they were working collapsed on top of them. The thrust of the prosecution argument was that supports should have been placed on the walls of the trench, if it was absolutely necessary for the two men to work within it. This was not done.

On indictment, the main contractor, Roseberry Construction Limited, was fined:

- €127,000 for breaches of various sections of the 1989 act and the *Safety, Health and Welfare at Work (Construction) Regulations 1995*
- €127,000 for failing to prepare a safety statement. This is extremely significant. Although the prosecution was one taken in the context of a fatality, the fine imposed for failure to have a safety statement stands on its own, irrespective of the death. Every employer and every self-employed person must have a safety statement. It would appear that if you, as an employer or self-employed person, don't have one, you could be liable for a fine of €127,000
- A director of Roseberry Construction Limited was personally fined €50,800 for breaches of the regulations
- The self-employed digger driver was fined €1,270 under the 1989 act
- A director of the insulation sub-contractor was fined €8,900 for breaches of the various regulations and also given an 18-month suspended sentence on a charge of reckless endangerment under the *Offences Against the Person Act*.

The next truly landmark decision for the HSA was *O'Flynn Construction Limited* on 20 February 2003. A number of youths had entered a building site one evening and started a bonfire which resulted in a nearby barrel of wood preservative exploding and killing one of the youths. The building company pleaded guilty to charges of failing to provide adequate fencing around the perimeters of the site and failing to ensure that members of the public were not exposed to risk in relation to the construction site. Cork Circuit Criminal Court imposed fines totalling €200,000 on the construction company.

Court in 1997. A prohibition order had been granted under section 39 of the 1989 act on the Charlotte Quay site which was being developed by Zoe Developments. Zoe Developments sought to have the prohibition order lifted. The prohibition order had in fact been sought following the death on the site of a worker and also the company's failure to comply with a number of HSA improvement notices. Mr Justice Kelly sought some information on the background to the company, and it transpired that this was the third death on a Zoe-managed site since 1991. Mr Justice Kelly called the managing director before him. Having asked what the company's attitude was to its extremely poor safety record, the managing director stated that, as an indication of its regret, the company would donate £100,000 to the charity box – which he then did. The case was then further adjourned to assess whether suitable improvements were being put in place at the site before the prohibition order would be lifted. Subsequently, the HSA confirmed that appropriate remedial measures had in fact been put in place and the judge lifted the prohibition order. (It is perhaps worth noting that when the offences arising from the fatality itself were prosecuted on indictment, the fines imposed totalled only £15,000.)

This 1997 case attracted tremendous media attention, which was heightened by some of Mr Justice Kelly's remarks – particularly his comment that an employer is entitled to make money on the sweat of his employees but not on the blood of his employees. It is also interesting to note that Mr Justice Kelly actually criticised the HSA for not bringing more of these types of applications.

It was a section 39 application that closed down a site at Nenagh, owned by Kilkishen Homes, in November 2002. The site was closed for 28 days. Subsequently, the construction company gave an undertaking to the High Court to work in a safe manner. When a HSA inspector visited the site again, he found serious breaches of safety legislation. The High Court granted a second order closing the site down and ordered a director of the company, Jason Madden, to appear before it on Friday 24 January 2003. On that date, Mr Justice Kelly committed Mr Madden to jail for the weekend for contempt as he had broken his previous undertaking to the court.

Personal liability of officers

Section 48(19) of the 1989 act provides that where an offence under any of the relevant statutory provisions committed by a body corporate is proved to have been committed with:

'the consent or connivance of, or to have been attributable to, any neglect on the part of any director, manager, secretary or other similar officer of the body corporate or a person who is purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly'.

Section 48(19) was applied in *National Authority for Occupational Safety and Health v Noel Frisby Construction Limited and Noel Frisby* (Waterford District Court, 1998). The prosecution arose from inspection of a building site at the Ardkeen Village, Dunmore Road, where repeated contraventions of various provisions of the *Safety, Health and Welfare at Work (Construction) Regulations 1995* were noted by a HSA inspector. The company and Mr Frisby, a director, were charged with breaches of various parts of the 1989 act and the *Construction Regulations*. Both pleaded guilty to the charges. In that instance, the company was fined a total of £1,600 and Mr Frisby was fined £400 under section 48(19).

The operation of section 48(19) is not confined to directors or secretaries of companies but can also apply to other members of management, as in *National Authority for Occupational Safety and Health v F&S Property Development Ltd and Mr James Clancy*. The case arose following the investigation of a dangerous occurrence that took place at a construction site at Spiddal on 8 March 2000, when a substantial portion of a large stone retaining wall collapsed. The wall was five metres high and two

Three workers were injured and hospitalised when this scaffolding collapsed on Dublin's Waterloo Road

metres wide, and several tonnes of material were involved in the collapse. No injuries were caused by the incident, but there was a clear risk to those at work on the site and in an adjacent garage workshop. Mr Clancy was a site manager and, following a plea of guilty, was fined £2,500 for breaches of the 1989 act and the *Construction Regulations 1995*.

A number of cases in the higher courts in the UK have considered similar provisions (namely, section 37 of the UK's *Health and Safety at Work Act 1974*). One of the more recent cases was *R v Boal* ([1992] QB 591). Mr Boal was the assistant manager in a bookshop who was in day-to-day charge of the shop when the manager was not present. One day, when the manager was not present and Mr Boal was in charge, an inspection of the shop by the Fire Safety Authority found defects in the fire precautions. The owners were then prosecuted under the British *Fire Precautions Act 1971* and found guilty of an offence. Mr Boal was also prosecuted personally under an almost identical provision to that contained in section 48(19) of the 1989 act. The case against Mr Boal was dismissed on the basis that, although he was in charge on the day the premises were inspected, he had no control over the shop's policy on fire safety and so was not a 'manager' under the relevant law (although arguably he could have been charged as an employee under the equivalent provision of section 9 of our 1989 act).

On the basis of the *Boal* case, therefore, section 48(19) of the 1989 act seems only to apply to those managers and other officers who have an input into the policies surrounding the actual dangerous occurrence, such as Mr Clancy in his role as site manager.

Corporate manslaughter

Workplace-related accidents which involve fatality may also give rise to prosecutions for manslaughter against directors, as well as for specific breaches of health and safety legislation.

An example of this was *The People (DPP) v Cullagh* (unreported, Court of Criminal Appeal, 15 March 1999). The accused was the owner of a fairground and was convicted of the manslaughter of a woman who died when the chairoplane in which she was being carried broke away from the rest of the equipment. The equipment was 20 years old and had remained unused for three years before being bought by the accused. He went to considerable efforts to make the equipment useable but had not noticed that the chairoplane in question was rotten from the inside, which caused the death. The central issue for the jury in the case was whether, having regard to all of the evidence, the accused had been grossly negligent and therefore failed in the duty he owed to the woman so as to be criminally liable for her death. The jury concluded that he had and he was convicted of manslaughter. In that case, he was sentenced to a three-year suspended sentence.

In the *Roseberry Construction* case, a charge of manslaughter was brought against one of the directors. It appears that as part of a plea bargain, this charge was reduced to one of reckless endangerment for which a suspended sentence was imposed. This was the first occasion on which the HSA (through the DPP) had brought a prosecution of manslaughter against a director.

Despite a private member's bill being introduced in the Dáil in April 2001 dealing with corporate manslaughter, legislation has not yet been enacted.

Consequences of a guilty verdict

So what are the implications of being successfully prosecuted? A monetary fine (although obviously a cause of concern) is by no means the only consequence:

- Most importantly, it should be remembered that a prosecution under the health and safety legislation is a criminal prosecution and should be regarded as such. This, aside from the obvious stigma attached, may adversely affect membership of certain bodies

'An employer is entitled to make money on the sweat of his employees, but not on their blood'

or visa applications
- Conviction may also impact adversely on insurance premiums: it would be most unusual if any monetary fine or penalty was to be covered by an insurance policy. However, given that the criminal prosecution (which is usually heard prior to the civil claim being heard) will have a significant bearing on the civil claim, insurers may be willing to contribute towards defence costs of the prosecution, although they would generally not be obliged to do so under the terms of their policy. As such, any fines to be paid must be paid out of the profits of the company. Fines such as those imposed in the *Roseberry Construction* case could clearly lead to many companies facing insolvency
- The accused may have to reveal the conviction to a potential client at tender stage or if asked during pre-contract negotiations. This is particularly relevant in the construction industry, where a health and safety record may well form part of the tendering process
- Adverse publicity is obviously a major concern for many organisations. More and more frequently, even in summary prosecutions in the District Court, the media are present.

I understand that the government is considering amendments to the existing law so that fines which can be imposed on summary conviction will be significantly increased. This is an important step forward. The imposition of larger fines may result in more employers taking their obligations more seriously. At present, it seems that some consider the possible imposition of fines of up to €1,900 as simply being another expense of the business.

Also, the imposition of such fines may lead to appeals to the higher courts, which could then deliver guidance as to how to calculate the fines. At present, very few accused are likely to appeal the imposition of a €1,900 fine simply on the basis that it would not be commercially cost-effective. The discrepancies on the current imposition of fines can clearly be seen from the fine of €200,000 in the *O'Flynn Construction Limited* case and total fines of €7,500 in another recent case also heard in Cork Circuit Court.

The second case mentioned arose when a six-year-old boy died when he fell through the glass roof of a factory which formed part of a construction site. The construction company, John F Supple Limited, was fined €7,500 in total on two charges on indictment. The boy's family expressed their disappointment with the fine in light of the devastating effect which the

accident has had on the family. Although clearly the facts of each case are different, it is hard to reconcile the different levels of fines imposed in both this case and the *O'Flynn Construction Limited* case, particularly as both cases were heard by the same court and both cases involved prosecutions of very similar offences.

Employers often complain that they cannot be responsible for employees who behave improperly or carelessly. Indeed, the legislation provides that the majority of the employer's duties only extend so far as is reasonably practicable. However, it should also be borne in mind that employees also owe a duty to protect their own health and safety. It is open to the HSA to take a prosecution against not just an employer but also an employee, where the employee has not taken reasonable precautions for his own safety (for instance, failing to wear protective equipment). Although it would seem quite draconian to prosecute an injured employee (as well as possibly the employer), perhaps this too would heighten employees' consciousness of their own health and safety obligations. Clearly, this would not be applicable in all cases, but there may be instances where employees take steps which represent a risk to their own safety or that of others, even though the employer has provided a safe means of work for the particular job in hand.

In conclusion, the level of workplace accidents and fatalities should not be tolerated and every effort should be made by both employers, employees and the HSA to co-operate together to ensure that the number of people injured or killed at places of work in Ireland is reduced this year. G

Barrett Chapman is a solicitor with the Dublin law firm McCann FitzGerald.

Two beco

Most practitioners have probably considered joining forces with another law firm at one point or another. David Rowe looks at the pros and cons of mergers and the issues that need to be considered

MAIN POINTS

- Changing nature of the legal market
- Improving the odds of a successful merger
- Issues to consider before taking the leap

There are significant changes in the legal market at present, with evidence of a sharp slowdown in areas such as commercial conveyancing and commercial work in general. Allied to the on-going threat to personal injury litigation – the traditional backbone of many practices – this slowdown has many firms fearing a significant fall in turnover and profits.

Law firms are therefore facing a period of increasing uncertainty after four or five years of healthy increases in fee income and strong profits. During this period, firms have also seen significant increases in overheads, most notably in salaries and rent, and many firms fear the effect of these increases as the economy slows down.

Against this uncertain background, law firms are now beginning to review their options for the future. This review is taking place across the board, from sole practitioners to large commercial firms. While driven by a different emphasis, the objectives are much the same. Indeed, it is probably fair to say that few practitioners have not contemplated (however tentatively) a merger at some time or another.

Changing profession

Solicitors have become more specialised over the past decade. This is partly driven by the increasing breadth of knowledge that any solicitor needs to cover all practice areas, but also by client demands for better, quicker and cheaper service. Specialisation is becoming the norm, whether in a two-solicitor practice or large commercial practice with departments to cover different practice areas.

The current structure of the profession in Ireland is that 47% of practitioners are sole practitioners, while 75% are in practices of three or fewer solicitors. My view is that this size of firm is not

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sustainable in the long term. The pressures on sole practitioners and smaller firms are all too evident.

For larger firms, the key considerations are the ability to compete for larger transactions and to attract and keep key clients. This involves having sufficient breadth and depth of expertise across increasingly diverse practice areas. Consequently, I believe that considerable consolidation in the profession is inevitable and that many more large or medium-sized firms are likely to emerge over the next five years.

Identify objectives

Before taking a chance on a new opportunity, it is vital that you improve the odds that it will add value to your business.

The key steps involved are:

- Identify your short-term and long-term objectives and decide if a merger can help you attain these. Objectives may vary from a desire to enter new areas of practice to the need to employ younger professionals

WHY SHOULD YOU CONSIDER A MERGER?

Right reasons:

- To widen the range of services offered and enter new markets
- To strengthen share of existing markets
- To compete at a higher level
- To reduce the cost base by realising synergies
- To reduce competition
- To add significant clients
- To gain from enhanced marketing image.

Wrong reasons:

- To solve internal structural problems
- To overcome personality difficulties
- To get bigger
- To fill vacant space
- To replace a marketing plan
- To avoid having to sell business development.

ISSUES TO CONSIDER IN ANY POTENTIAL MERGER

1. Strategic objectives
- Shared vision of future direction
- Is there a good strategic fit?
- Do both firms have similar standards and ethos?
- Will it lead to greater momentum?

2. Market perception of merger
- How will clients view it?
- Will it lead to referrals of work?
- Perception within the profession.

3. Client issues
- Is your client base solid and loyal or price sensitive?
- Small number of large clients or a good spread?
- Are there any conflicts that could lead to a loss?
- Will it give the merged firm entry to new markets?
- Is there untapped potential in either firm?

4. Partnership issues
- Age profile of partners and solicitors
- Entry, profit sharing, retirement provisions
- Financial structure – where do partners fit in?
- Getting the partnership agreement right.

5. Financial considerations
- Current levels of profitability
- Future levels of profitability
- Growth pattern
- How is the firm financed?
- Tax and pension provisions
- Drawings/retention policy
- Ratio of partners to other fee-earners.

6. Skills and knowledge
- Are the core legal skills in place?
- What level of training or continuing professional development is needed?
- Are staff working at an appropriate level?
- Is there to be a broad based or narrow skill range?
- Commerciality/ethos of the merged firm.

7. Staffing issues
- Level of performance
- Age profile
- Ease of integration
- Staff reaction to merger
- Will all staff fit into the merged entity?
- Common promotion levels, structures and policies.

8. Culture of the firm
- Expectations from partners
- Expectations from staff
- Team structure
- Financial targets
- Approach to under-performance
- Conservative or progressive firm?
- Do both firms have similar attitudes?
- Will there be mutual respect?

9. Level of investment
- IT
- Training
- Marketing
- Future generation.

10. Regulation
- Compliance with Law Society regulations
- VAT/PAYE
- Income tax
- Professional indemnity cover level and record.

11. Operational/marketing
- New name
- Location
- Letterhead
- Synergies/potential redundancies
- Image
- New brochures.

- Having identified your own objectives, put together a profile of the ideal merger candidate
- Look at other firms. If they satisfy your criteria, assess whether you have the necessary chemistry to succeed as a combined firm
- Having decided that a particular firm fits your needs and that you can work together, the next step is to structure a deal to bring the firms together. This involves looking at a range of items, such as profit sharing, management, organisation of the enlarged firm, communications and so on
- It is also prudent to complete due diligence – for example, review historical financial performance, look at current profit performance, sources of work, dependence on key clients, the health of the respective balance sheets and capital accounts.

Clash of cultures

Perhaps the key step to a successful merger is the work done after the deal has been signed. Uniting two different cultures with different structures, clients and personalities presents a significant challenge. In too many cases, the work is presumed to be done once the deal is signed.

To gain the expected benefit from a merger, significant work is needed to ensure that the merged firm achieves its objectives, that integration is completed successfully, that key clients are informed and developed, that key members of staff are retained and that the IT aspects of the merger are planned. The main problems that occur during the merger process include:
- Having too many partners
- Loss of clients due to poor perception, conflicts of interest or changes in personnel
- Demotivation of employees
- Poor management of the merger, and
- A clash of cultures. This typically arises in areas such as professional standards, standard of client service, legal knowledge and practices, philosophy of the practice and so on.

These pitfalls should be planned for and addressed.

Many of the most successful Irish law firms have gone through mergers at some stage in their evolution. While there are many good examples of successful mergers, there are also many examples of those that have not worked or achieved their goals.

To decide whether your firm would benefit from a merger at this time of change, you need to consider all aspects of the merger, from the needs of your own practice, to identifying a suitable candidate, to planning for a successful integration. The potential benefits are significant and many of the most successful practices have achieved their market position through a coming-together of like-minded professionals sharing the same goals, ambitions and standards. G

David Rowe is the managing director of Outsource, which specialises in the financial and practice management of law firms.

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STOCKBROKERS

Blowing bubbles

The threat of SARS and international terrorism has not helped economies already hungover from the excesses of the last decade, but there is some good news, writes Neil Osbourne

Neil Osbourne: markets seem directionless at present

Markets have rallied strongly since mid-March, bringing much-welcome relief to investors after three consecutive years of decline. Many now believe that sufficient stimuli are in place to fuel on-going recovery, but several barriers must be overcome before this can happen.

Much of the decline of the past three years can be attributed to deflation of the equity bubble that rose during the late 1990s. That bubble is gone, and the global economy continues to flirt with recession and suffer a hangover from the over-investment of the last decade. The corollary is that serious structural imbalances now hamper global economic recovery.

The global economy continues to operate at a level well below its potential, and consequently we look set for a protracted period of sub-par growth. This is impairing recovery in both corporate profitability and equity valuations, which, generally speaking, tend to rise in tandem with economic growth.

Coupled with these structural imbalances is the risk of terrorism. The financial cost of the American-led drive to 'defeat' it has greatly increased the burden on the ailing US economy. The SARS virus is another, relatively recent, risk to global stock markets, though this appears to be subsiding.

Murky outlook

Global economic data suggests a murky outlook. Indeed, the latest slew of data from the United States fails to justify the recent equity market rally. Unless data suddenly becomes more positive, markets may find it difficult to sustain these levels.

America is likely to drive a world recovery, so it is important to be mindful of its main driver – the US consumer. These have powered their economy for the past decade and almost two-thirds of growth in the USA can be attributed to their ceaseless desire to borrow and spend.

Any retrenchment in consumer confidence levels must therefore be viewed with concern. The major worry is that heavily indebted US consumers may finally curb their spending. This would have drastic implications for the US economy.

The Federal Reserve is cognisant of these risks and, at its last monthly meeting, raised the spectre of further economic weakness in the American economy. Worryingly, it also warned of deflationary pressures, and, given the spiral of declining prices that has decimated the Japanese economy over the past decade, it is no surprise to see these risks being taken very seriously. But it is also keen to point out that it has ample ammunition to fight further economic weakness through both rate cuts and the purchase of long-dated treasury bonds.

The ballooning US budget deficit and recognition of the need to cut unemployment before next year's elections have prompted the US administration to unofficially promote a weaker dollar. The speed of the dollar's recent decline and the seeming lack of concern expressed by US officials leads us to believe that this weakness may continue. For the moment, at least, this reduces the attractiveness of dollar-denominated assets.

Pins and needles

The outlook for continental Europe is not particularly strong. Many of its economies seem mired in low-growth environments. High levels of debt among European companies will also act as a significant drag on profits this year.

Europe's economic woes are exacerbated as Germany continues to experience serious structural problems and deflating prices, profits and production. This spiral is accentuated by a eurozone interest rate set at a level totally unsuitable to the economic landscape of the country. The weak dollar also currently undermines the competitive position of Germany – and indeed the rest of the eurozone economies.

The prospects for growth in the Irish economy remain better than most other economies, and this is underpinned by sound fundamentals, favourable demographic patterns and a low corporate tax structure.

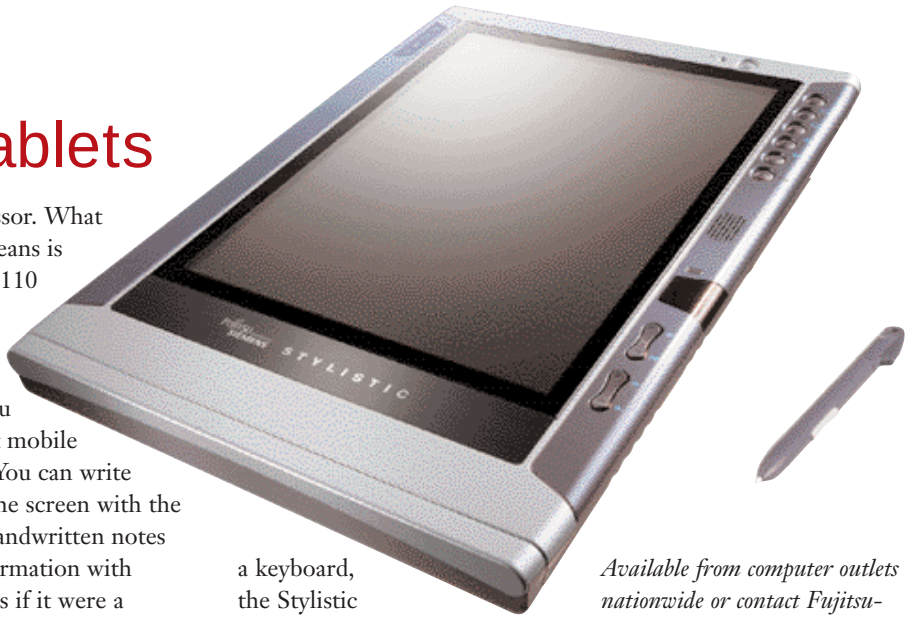
There can be little doubt that the cessation of conflict in Iraq has inspired the recent rally in stock markets. However, given the backdrop of weak economic numbers, terrorism, volatile sentiment and balance sheet stresses, valid questions are now being asked as to whether these levels can be sustained. Lacking any real catalyst, markets seem directionless at present. But even in the current environment, we continue to see value in specific stocks (see *Gazette*, May, p37).

We are less optimistic at present than most other broking houses. We believe we are now in a stockpickers' market and therefore we would not advocate the 'buy and hold' strategy that worked so well when markets were rising. While we feel the US market remains in expensive territory, we continue to see good opportunities in both the domestic and UK markets. G

Neil Osbourne works on the private clients team with Davy Stockbrokers.

Tech trends

Start taking the tablets



Fujitsu-Siemens has introduced its latest Tablet PC, the Stylistic ST4110. This is ideal if you have never fully upgraded yourself from the old pen-and-paper technology. Weighing in at around 1.4kg, the ST4110 is only 22mm deep but contains the processing power of a notebook computer. It runs Microsoft's Windows XP Tablet PC Edition operating system, based around an 800MHz ULV Intel Pentium III-M processor. What this really means is that the ST4110 is a powerful piece of hardware that gives you a real shot at mobile computing. You can write directly on the screen with the 'pen', take handwritten notes or share information with other users as if it were a normal PC. If you still can't bring yourself to sit in front of a keyboard, the Stylistic ST4110 may be the solution for you.

Available from computer outlets nationwide or contact Fujitsu-Siemens on 01 620 4100, price from €2,239.

No trouble with a Bubble

If you're in the market for a high performance portable printer, then the new Canon Bubble Jet i70 might be the one for you. At just 310mm wide, the i70 is some 40% smaller than its main rivals, but Canon says that it 'boasts the most precise and accurate print capability ever found in a portable printer'. Well, they would say that, wouldn't they? But, all the same, there's no doubt that this stylish printer does produce the goods: at 13 pages a minute in black-and-white and nine pages a minute in colour, the i70 can easily hold its own against most desktop printers. For a portable machine, the print quality is outstanding, with a high resolution of 4800 x 1200 dpi (thanks to MicroFine Droplet Technology, whatever that is). An added bonus is that if you happen to own a Canon digital camera or camcorder, you can print directly from camera, bypassing your PC entirely. *Available from computer outlets nationwide, price around €435 (including VAT).*

Keeping on top of the job in hand

Okay, so you're a lawyer. You're not a rocket scientist. There are still obscure areas of law that you may be a little hazy about. Luckily for you, Lendac Systems has brought out an updated electronic version of *Murdoch's Irish legal companion 2003*. For many people, any kind of companion is a good one, even the type you have to pay for, but *Murdoch's companion* will give you genuine executive relief. The CD-ROM includes the now indispensable *Dictionary of Irish law*, as well the full text of Irish acts and statutory instruments from 1922 to February 2003 (and the most significant pre-1922 statutes), summaries of all legislation in the pipeline, updated case law, the full text of the constitution, reports from the Law Reform Commission and the text of the various European treaties, and relevant legal articles from esteemed organs such as the one you're holding in your hand. With many other new additions, you couldn't beat it with a small riding crop.

Murdoch's Irish legal companion 2003 *(price to be announced) is available from Lendac Data Systems (tel: 01 677 6133) or* www.lendac.ie.

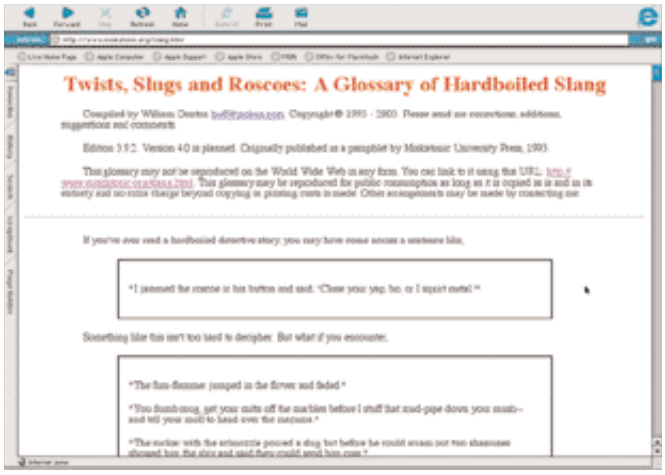
Get into the groove

Who says that war is good for nothing? The new Soundbug from Olympia is based on technology originally developed for the US military. In effect, this little device acts as a portable speaker for your Walkman or MP3 player, turning any smooth surface into a sounding board. Simply attach the Soundbug to a desk or window with its rubber suction pad and plug it into your device of choice via a mini-jack plug, and you have a clever alternative to loudspeakers or a headphone. Use two, and you have full stereo sound. The Soundbug has two volume settings, low and high – neither is particularly loud, but there's enough power to let you enjoy your music with a group of friends or just annoy the people in the next hotel room. *The Soundbug costs €55 plus P&P for a pair of speakers, and is available from* www.soundbug.biz *or through gadget retailers.*

Sites to see

Legal media group (*www.legalmediagroup.com*). This site boasts 15 years of writing on legal and corporate affairs that affect international business, and provides a wealth of information for practitioners on international deals and cases, competition and intellectual property.

Four airlines in one aircraft (*http://home.concepts-ict.nl/~rlion/laindex.htm*). The ultimate low cost airline: they've done away with all the highest cost elements – planes, staff, and even flights. Lion Air is a virtual airline that has won virtual awards. Log on to find out how 'plane sharing' can work for you.



Hardboiled slang (*www.miskatonic.org/slang.html*). Philip Marlowe, Sam Spade and Mike Hammer – it's hard to know what they're gibbering about but you generally get the message. This site gives a glossary of that gritty detective/gangster slang. Go on, ya mook!

Patronising blarney (*www.oirishtimes.com*). This site is devoted to genuine weird, funny and surreal news stories from across Ireland, including court reports you might have missed. Read how Cody the gay dog found ruff justice in Castlebar Circuit Court recently. Begorrah.

Book reviews

The *Factory Acts* in Ireland, 1802–1914

Desmond Greer and James W Nicolson. Four Courts Press (2003), 7 Malpas Street, Dublin 8, in association with the Irish Legal History Society. ISBN: 1-85182-583-5. Price: €60

This unique book on the early health and safety legislation fills a vacuum. The authors approach the subject by locating the legislation in its social and economic context. It is clearly comprehensive. In this review, it is only possible to consider briefly some of the topics examined by the authors.

The book is divided into four main sections. Chapters one to four review the growth of legislation relating to health and safety and the consequent implications for employers and employees. Until the 19th century, there was little or no statutory intervention by the legislature to afford protection to employees. However, in the early 19th century, specific limited intervention was demanded to remedy glaring injustices. One of the earliest examples of legislative intervention to stem from this clamour for reform was the act of 1802 entitled *An Act for the Preservation of the Health and Morals of Apprentices and Others Employed in Cotton and Other Mills and Cotton and Other Factories* (42 Geo III c 73).

This first act to regulate the operation of factories provided, among other things, that the rooms in mills or factories to which the act applied should be washed with quicklime and water twice a year and that care should be taken to admit fresh air. It also provided that no apprentice should be employed or compelled to work for more than 12 hours (excluding meal times) in any one day, as well as requiring that no more than two apprentices should sleep in the one bed. The authors contend that the 1802 act would have had little application in Ireland 'where there was no poor law and no parish apprentices'.

Progress continued apace with further reforming legislation which, in the main, sought to improve the safety and working conditions of employees. Major reform, so far as factories were concerned, was introduced in the *Factories and Workshop Act 1878*. This act consolidated and amended all earlier statute law governing factories and introduced additional sanitary and safety provisions. It limited the hours that might be worked by children, young people and women and it prohibited children under the age of ten years from being employed in a factory or workshop (section 20). The authors note that the 1878 act 'remained unamended for less than five years, and within two decades further legislation had once again created a somewhat intricate mosaic which called out for further consolidation'.

A minor criticism of this impressive book is in respect of the coverage afforded to the period 1878 to 1901, a period which the authors describe as being characterised by 'incremental extension rather than radical transformation'.

The 1878 act, and subsequent amending measures, were repealed by the *Factories and Workshop Act 1901*. Following the now-established practice, the 1901 act brought all previous legislation in the

area within the ambit of the one enactment. Further, it expanded both in substance and application the provisions relating to health and safety. It still, however, continued to apply only to factories and workshops. Importantly, section 79 of the 1901 act provided the home secretary with the power to make special regulations for health and safety in respect of factories, workshops, building operations, operations at docks, quays and warehouses. The authors observe that by 1914 many industrial processes had already been certified under special regulations. The importance of this special regulation procedure is evidenced from the fact that it is under this procedure that all modern health and safety regulations are introduced.

The special role of lady inspectors is considered in chapter four. The authors note that the lady inspector had to possess special qualities. One commentator summarised these qualities in the following terms: 'We need quiet, well-mannered women in this service'.

Concern as to the manner in which wages were paid brought about legislative intervention in the form of the *Truck Act 1831* and the *Truck (Amendment) Act 1887*. This legislative intervention is discussed in chapter 7. In summary, it provided that workers should be paid 'lawful money for all their lawful wages'. The regulation of men's employment is the primary focus of chapter eight.

The authors' commentary on the prosecution of offences in chapter 10 is illuminating. A breach of the provisions of the *Factory Acts* amounted to an offence punishable in the magistrates' courts. The ultimate sanction was merely the imposition of a fine. To recover against an employer, an injured employee had to prove that his employer failed to act in the same manner as a reasonable employer would have in the circumstances. He also had to demonstrate that this failure caused the loss or damage of which he complained. Further, even were he to so demonstrate, he still had to surmount the infamous triumvirate of defences created by the judiciary and relied upon by employers: *volenti non fit injuria* (voluntary assumption of risk), the doctrine of common employment and the preclusion from recovery of a finding of contributory negligence on the part of the employee. The authors describe the doctrine of common employment by

reference to the comments of legal author H Hanna:

'[By] contracting to enter into a service and do a particular kind of work, the workman impliedly takes upon himself to run such personal risks as are incidental to the nature of the employment … He is taken to know that, with the greatest possible care, machinery will go wrong or break down from latent defects, and that workmen, however carefully selected, will sometimes be careless … He must be taken to know that workmen are prone to be careless of themselves and of other people in the course of their work. Unless this were so, the master would be practically an insurer of the workman's safety'.

(H Hanna, *The Workmen's Compensation Act 1897, as applied to Ireland* (first edition, Dublin, 1898), pp10-11.)

The foregoing defences have now been considerably relaxed as a result of legislative intervention. In fact, there has been a powerful movement towards greater protection of the safety, health and welfare of employees at work. Certainly, few would disagree that we have come a long way from the 1802 act for the preservation of the health and morals of apprentices and others.

The leading question that now falls to be addressed is what duty of care will be imposed on employers in the future?

Currently, the protection afforded by statute is in excess of that presently afforded by the common law. Several provisions of the 1989 act require the high standard of reasonable practicability from employers. In the future, it is likely that individual members of management will face criminal charges arising out of deaths and injuries at work where it is possible to connect the individual failures of senior executives with the corporate body. Indeed, legislation similar to the lapsed *Corporate Manslaughter Bill, 2001* would facilitate the prosecution of company directors and render them liable for unlimited fines and imprisonment in circumstances where they are found to have neglected the health and safety of those affected by their activities.

The Factory Acts *in Ireland, 1802-1914* is an excellent book. Lawyers and non-lawyers alike will appreciate this work. It represents an outstanding and significant contribution to one of the more complicated areas of employment law. G

Geoffrey Shannon is a solicitor and the Law Society's deputy director of education. He is author of Health and safety: law and practice *(Round Hall, 2002).*

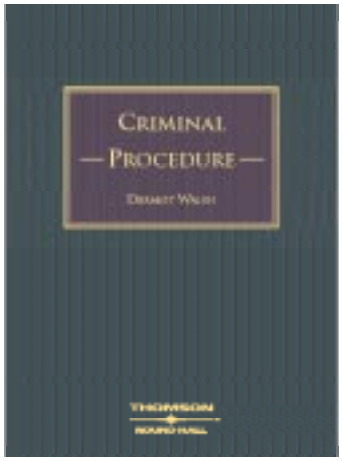
Criminal procedure

Dermot Walsh. Round Hall (2002), 43 Fitzwilliam Place, Dublin 2. ISBN: 1-85800-223-0. Price: €299

It is impossible to overestimate the changes that have occurred in criminal law and procedure in Ireland over the past 30 years. Many crimes have been abolished, such as homosexuality between consenting adults. Some legal concepts no longer exist, for instance, the difference between felonies and misdemeanours. Definitions of some crimes have changed, for example, section 4 rape and various larceny offences under the *Theft Act, 2001*. New crimes such as possession of child pornography and money laundering have been created. Civil rights and freedoms have, on the one hand, been eroded (extension of detention periods for people in custody, the severe encroachment on the right to silence), and on the other hand extended (videotaping of interviews of detainees and the recognition of the constitutional right of access to a lawyer). An active judiciary has laid down new principles in relation to every aspect of criminal procedure, for instance, search warrants, identification parades and disclosure at trials.

The criminal lawyer of even 1993 would be lost today. He could have no better roadmap, however, than *Criminal procedure* by Dermot Walsh. When asked to review this book, I decided that rather than reading the whole 1,200 pages of text, I would refer to it over a period when any difficulties or problems arose in the course of my work. I was very pleased. Professor Walsh covered every topic I looked up and covered it in a well-written, easy-to-understand manner. If he did not have the answer to my queries on every occasion, I was at least pointed in the right direction.

The difficulty for any academic author is that, by definition, he does not encounter the daily difficulties which occur in real life in criminal practices. Professor Walsh, however, must have had the benefit of some practical research or advice because most of the problems are dealt with. He could not know, however, that the attorney general's



scheme discussed and described by him in his book is in real life a farce.

His discussion of the bail laws cannot deal with the fact that many people are kept in custody for longer periods than necessary because the High Court is sometimes unable to deal with all the bail applications before it on a Monday, or that the court services are so overworked that they find it difficult to have bail orders available within a reasonable time after bail is granted. What can a solicitor do when his client, with no previous convictions, has received a three-month sentence for no insurance and where the judge has set a high bail with condition that the gardaí must be given 48 hours' notice in circumstances where the guard in court has no objection to the proposed surety?

In his excellent foreword to this book, Mr Justice Hardiman complimented the new generation of criminal lawyers who had helped change the criminal law landscape. He paid particular tribute, and correctly so, to Patrick McEntee SC. I would suggest that solicitors could do no better than to model themselves on Garrett Sheehan. But with the continuing encroachment on citizens' rights, there is plenty of room for other lawyers to join that pantheon. Anybody out there with such ambitions could do no worse than purchase and study a copy of this book. G

Michael Staines is the principal of the Dublin law firm Michael J Staines & Co.

LEGISLATION UPDATE: 15 APRIL – 19 MAY 2003

ACTS PASSED

Broadcasting (Major Events Television Coverage) (Amendment) Act, 2003

Number: 13/2003

Contents note: Regulates the broadcasting rights to events of major importance to society designated under section 2 of the *Broadcasting (Major Events Television Coverage) Act, 1999* in order to ensure that a substantial portion of the public is not deprived of the possibility of following such events live or on a deferred basis on free television services. Amends the 1999 act by introducing an arbitration mechanism where a qualifying broadcaster and an event organiser are unable to agree a price with respect to the acquisition of broadcasting rights to an event, and by providing that, in certain circumstances, a qualifying broadcaster may apply to the High Court for an order directing the event organiser to provide access to the event subject to the payment of reasonable market rates and such other terms as may be determined by the court

Date enacted: 22/4/2003

Commencement date: 22/4/2003

Central Bank and Financial Services Authority of Ireland Act, 2003

Number: 12/2003

Contents note: Amends the *Central Bank Act, 1942* for the purpose of reorganising and renaming the Central Bank of Ireland as the Central Bank and Financial Services Authority of Ireland; provides for the establishment and functions of the Irish Financial Services Regulatory Authority (IFSRA) as a constituent part of that bank; establishes the Financial Services Appeals Tribunal and amends certain other acts and regulations (set out in schedules 1 and 2 of the act) consequent on the reorganisation of the Central Bank of Ireland

Date enacted: 22/4/2003

Commencement date: Commencement order/s to be made (per s1(2) of the act): 1/5/2003 for the following provisions: ss1 to 11 and s12 (except insofar as it relates to s15(4) of the *Central Bank Act, 1942*), s13, s14 (except insofar as it relates to s19(2) to (5) of the *Central Bank Act, 1942*), ss15 to 24, 26, 27, 29 to 32, s34 (except para (a)), ss35 and 36, schedule 1 (except insofar as it relates to item 4 of part 6, and item 2 of part 9 as respects s15(5), (6) and (8) of the *Central Bank Act, 1989*), schedule 2 and schedule 3 (per SI 160/2003)

Freedom of Information (Amendment) Act, 2003

Number: 9/2003

Contents note: Amends the *Freedom of Information Act, 1997*. Makes provision for additional protection for certain sensitive government records, including the extension from five to ten years of the period before which cabinet records will be released. Includes a number of technical measures in relation to the operation of the 1997 act

Date enacted: 11/4/2003

Commencement date: 11/4/2003

Health Insurance (Amendment) Act, 2003

Number: 11/2003

Contents note: Makes provision in relation to the liability of the Health Insurance Authority in respect of the performance by it of its functions; makes provision in relation to risk equalisation schemes and in relation to limited exemptions from certain provisions of such schemes. Amends the *Health Insurance Act, 1994* and the *Defamation Act, 1961*

Date enacted: 16/4/2003

Commencement date: 16/4/2003

Local Government Act, 2003

Number: 8/2003

Contents note: Provides for the continued application of part IV of the *Local Government Act, 1946* in relation to certain bridge orders and provides for related matters

Date enacted: 10/4/2003

Commencement date: 10/4/2003

National Tourism Development Authority Act, 2003

Number: 10/2003

Contents note: Provides for the establishment of the National Tourism Development Authority to promote tourism within and to the state and the development of tourism facilities and services. Provides for the dissolution of Bord Fáilte Éireann and CERT Ltd and for the transfer of certain functions of these bodies to the National Tourism Development Authority. Repeals certain provisions of the *Tourist Traffic Acts, 1939* to *1998* and provides for related matters

Date enacted: 13/4/2003

Commencement date: 13/4/2003; establishment day order to be made (per s6 of the act); commencement order/s to be made for the repeal of enactments specified in schedule 1, columns (2) and (3) (per s5(2) of the act)

Redundancy Payments Act, 2003

Number: 14/2003

Contents note: Amends and extends the *Redundancy Payments Act, 1967*, amends the *Redundancy Payments Act, 1971*, the *Protection of Employees (Employers' Insolvency) Act, 1984*, the *Social Welfare (Consolidation) Act, 1993* and the *Employment Equality Act, 1998*, and provides for related matters

Date enacted: 15/5/2003

Commencement date: Commencement order/s to be made (per s17(2) of the act): 25/5/2003 for ss1 to 6, 8, 10, 13 to 17 (per SI 194/2003)

SELECTED STATUTORY INSTRUMENTS

Employment Regulation Order (Law Clerks Joint Labour Committee) 2003

Number: SI 154/2003

Contents note: Made by the Labour Court on the recommendation of the Law Clerks Joint Labour Committee; fixes statutory minimum rates of pay and regulates statutory conditions of employment for certain workers employed in solicitors' offices

Commencement date: 29/4/2003

European Communities (Protection of Employees on Transfer of Undertakings) (Amendment) Regulations 2003

Number: SI 131/2003

Contents note: Give effect to directive 2001/23/EC. Protect the rights of employees arising from an employment contract in the event of a transfer of a business or part of a business in which they are employed which entails a change of employer. Repeal SI 306/1980 and SI 487/2000

Commencement date: 11/4/2003

European Communities (Reorganisation and Winding-up of Insurance Undertakings) Regulations 2003

Number: SI 168/2003

Contents note: Give effect to directive 2001/17/EC, which provides that the reorganisation and winding up of an insurance undertaking should be under the control of the administrator or the liquidator appointed by the authorities of the 'home' member state and that the laws of that member state should apply, subject to certain exceptions listed in the directive. The regulations also give effect to one of the options provided in the directive, namely, that policyholders must be given priority in relation to an insurance undertaking's technical reserves. Insurance companies must also

maintain a register of assets representing the technical reserves
Commencement date: 29/4/2003

Family Support Agency Act, 2001 *(Establishment Day) Order 2003*
Number: 181/2003
Contents note: Appoints 6/5/2003 as the establishment day for the Family Support Agency

Finance Act, 2003 *(Section 104) (Commencement) Order 2003*
Number: SI 172/2003
Contents note: Appoints 1/5/2003 as the commencement date for section 104 of the *Finance Act, 2003* (amendment to s134, *Finance Act, 1992* – reliefs from vehicle registration tax)

Finance Act, 2003 *(Section 111) (Commencement) Order 2003*
Number: 173/2003
Contents note: Appoints 1/5/2003 as the commencement date for section 111 of the *Finance Act, 2003* (estimates and assessments of betting duty)

Pensions (Amendment) Act, 2002 *(Sections 29 and 37) (Commencement) Order 2003*
Number: SI 128/2003
Contents note: Appoints 1/7/2003 as the commencement date for ss29 and 37 of *the Pensions (Amendment) Act, 2002* (provisions relating to funding of pension schemes)

Planning and Development (Regional Planning Guidelines) Regulations 2003
Number: SI 175/2003
Contents note: Set out a number of procedural requirements in relation to the preparation of regional planning guidelines by regional authorities. Specify the *National spatial strategy: 2002–2020* as being of relevance to the determination of strategic planning policies
Commencement date: 1/5/2003

Prepared by the Law Society Library

PRACTICE NOTES

TAXATION OF SETTLEMENTS AND AWARDS IN EMPLOYMENT CASES

Section 123 of the *Taxes Consolidation Act, 1997* deals with the matter of taxation of employment awards and settlements.

Practitioners should note that when acting for employers in employment disputes, the client must be advised of the obligation to deduct tax from any settlement or award made to the employee in respect of termination of employment. When acting for an employee, the client should be advised that tax may be deducted from any award or settlement made. The exemption limits and formula for calculation of the tax deductible from such awards or settlements is set out in section 201 of the *Taxes Consolidation Act, 1997*. An alternative means of calculating the tax is available to employees on receipt of a termination payment – the standard capital superannuation benefit. A formula for calculation of the SCSB is provided for under the *Taxes Consolidation Act* also. There is some ambiguity as to whether the charge to tax under sections 112 and 123 of the *Taxes Consolidation Act, 1997* includes payments made by an employer in respect of an employee's legal costs in addition to the compensation payment itself. Revenue, however, has recently published a concession in terms that, if the following conditions are satisfied, it will accept that no income tax charge should be imposed on an employee in respect of the payment of legal costs where the payment:

- Is made by the former employer directly to the former employee's solicitor
- Is in full or partial discharge of the solicitor's bill of costs incurred by the employee only in connection with the termination of his/her employment, and
- Is under a specific term in the settlement agreement.

This treatment applies only to legal costs and applies to payments made either under a court order or where settlement is reached out of court.

Probate, Administration and Taxation Committee

PERSONAL INJURY ADVERTISING BY NON-SOLICITORS

Members are reminded that the restrictions on personal injury advertising contained in the *Solicitors Amendment Act, 2002* apply to non-solicitors as well as solicitors. Any advertising which is in breach of the act should be brought to the attention of the Law Society.

Solicitors should also be aware that the 2002 act provides that any direct or indirect connection, association or arrangement with a person who publishes such advertising may be regarded as misconduct, as may the acceptance of instructions to provide legal services to a third party from such a person.

Membership of a panel of solicitors maintained by an accident referral service would be regarded as *prima facie* evidence of such 'connection, association or arrangement'.

Registrar's Committee

AGREEMENTS TO RESTRICT FUTURE INSTRUCTIONS

It has become a feature of litigation in other jurisdictions that where a large corporation is expecting to be sued by many individuals, the corporation requires, as a term of any settlement it reaches with each individual, that the plaintiff's solicitor must undertake not to take instructions from any other persons against that corporation. This was highlighted in the case of *Hodgson v Imperial Tobacco* ([1998] 2 All ER).

While this issue is not a feature of litigation here, it is something about which practitioners should be aware in case it arises in the future.

Solicitors should not enter into agreements which prevent them from being able to accept future clients against the same defendant or accept any term which would in any way prevent the public's right of access to the solicitor or which would restrict the right of that solicitor to practise law. In addition, any term which prevents or restricts the availability to the public of information that the solicitor reasonably believes gives rise to a danger to public health or safety or which restricts the availability of an expert witness for future proceedings would also be unacceptable.

It is possible that such undertakings would be so restrictive as to raise the possibility of contravening competition legislation and might also raise constitutional issues in the context of any such undertakings being considered in this jurisdiction.

Where a solicitor enters into a settlement, the details of which are to be kept confidential, it is the view of the committee that the solicitor is not precluded from representing a future client against the defendant provided that the terms of the first settlement are kept confidential.

In practical terms, a solicitor can protect himself or herself from being faced with this dilemma by obtaining instructions from the client at the outset of litigation that no settlement shall incorporate any of the above restrictions.

John O'Malley, Chairman Guidance and Ethics Committee

EQUITY RELEASE SCHEMES: A FOLLOW UP

The Conveyancing Committee published a preliminary practice note on these schemes in the May 2001 issue of the *Gazette*. During the intervening period, representatives of the committee have been in negotiation with the Bank of Ireland in the hope of securing modifications in some aspects of their life loan scheme. Regrettably, little progress has been made in achieving such modifications. The committee has serious concerns about some of the requirements and provisions of the scheme, some of which appear more relevant to commercial property mortgages. The committee appreciates that this scheme is a novel one in the Irish market, but notes that it has more stringent requirements than are imposed in a similar scheme operated by a major UK lending institution.

The committee's principal concerns relate to the following aspects of the scheme:

1. a) The requirement that the borrower(s) make wills and appoint executors

   While the making of a will would normally be advisable, there are circumstances where a person may decide, on a fully informed basis, that they should not make a will. Thus, for example, a person might elect to protect the estate against a claim under section 117 of the *Succession Act* by allowing the intestacy rules to apply when he or she had good reason to anticipate a claim under that section from a child disappointed by the provision made for that child

   b) The requirement that the borrower(s) disclose the names of their chosen executors and any replacement executors to the bank and that the bank is entitled to contact such named executors and require them to enter into an agreement to co-operate with the bank and to contact them further during the term of the loan, and not just after the death(s) of the borrowers

   Apart from the basic principle that an executor has no legal status until the testator's death, this requirement involves the borrower(s) in a waiver of confidentiality which seems quite unnecessary
2. The requirement that the named executors enter into a consent to co-operate with the bank after the death(s) of the borrower(s)

   It is not clear to the committee that the bank really needs such consent, nor what real strength such consent has. The bank will, after the borrower(s)' death(s) be a mortgagee with an exercisable power of sale. The bank has indicated that its concern is to be able to sell the house speedily in order to stop the interest accruing. While this is clearly desirable, the committee believes that this object is capable of being achieved without such a requirement, which it feels is somewhat draconian. The borrower's personal representative, whether an executor or administrator, has, in any case, to swear to administer the estate and pay the deceased person's lawful debts. Any further assurance required by the bank on this point is superfluous
3. The requirement that the borrowers disclose the names of their beneficiaries and next-of-kin to the bank

   This requirement involves a further invasion of the privacy to which a person making a will is entitled, but appears, having regard to the obligation to make wills and disclose the names of executors, to be a belt-and-braces provision in case the executors don't co-operate with the bank. The committee is very concerned that the consent given to the bank to contact named beneficiaries and next of kin will in some cases create or increase pressures on the borrowers to vary the provisions of their wills, particularly if the next-of-kin is not a beneficiary. The committee is aware of a number of cases where elderly people's twilight years were blighted by wrangling between members of their family who had become aware of the provisions of a will
4. The inclusion as one of the events of default of 'the appointment of a receiver over the whole or any part of the property or any other property assets or revenue of the borrower'

   Such a provision might well be reasonably included in a mortgage where interest and/or repayments of capital is payable at regular intervals, since such events of default would cast doubt on the borrower's ability to make such payments. It is central to this scheme that interest is rolled up until the death(s) of the borrowers. The creditworthiness of the borrowers during the course of the loan should be irrelevant to the bank.

The committee's principal concerns are to ensure that solicitors acting for persons contemplating entering schemes are fully informed about the advantages and disadvantages of them, in order that they may give effective advice to their clients, and that solicitors are aware of the heavy obligations that will fall on them in advising their clients, and of the importance of maintaining adequate records of their advices, bearing in mind that any questions as to the quality of such advice are only likely to arise after the death(s) of the client(s).

The committee has in the past found it necessary to criticise mortgage packages issued by other lending institutions and will continue to offer such criticism where it believes that such packages contain excessive restrictions or provisions which are not in the interest of clients or are just not fair.

The committee has had lengthy negotiations with the bank with a view to modifying the conditions which seriously concerned it. While the bank was prepared to make some changes, the committee's concerns were not allayed because the outstanding requirements included those about which the committee had the most serious reservations.

The committee believes that equity release schemes can be a useful method of releasing 'dead capital' which is tied up in residential property. However, since all such schemes involve the elderly in disposing of some interest in their homes, it is critical that the procedures involved are fair and reasonable and that solicitors are able to advise their clients accordingly. The stringent provisions identifying 'events of default' are not in the committee's view fair, reasonable or necessary, while the obligation to inform the names of chosen executors, beneficiaries and next-of-kin involves the borrowers in waiving aspects of their privacy to which they are entitled is objectionable and quite unnecessary.

The committee wishes to emphasise that it has not agreed to the use of the certificate of title scheme forms in connection with this scheme.

Conveyancing Committee

Personal injury judgment

Employer liability – employee exposed to asbestos dust – actual knowledge of employers that asbestos dust was in the workplace – negligence of employer – High Court award – aggravated damages – employer appealed to Supreme Court – employer had not denied liability so issue of general High Court award to stand – award of aggravated damages contested – nature of aggravated damages – whether available in negligence action

CASE

***Dermot Swaine v Commissioners of Public Works in Ireland*, High Court, O'Neill J; Supreme Court, Keane CJ, Denham, Murray, Hardiman and Geoghegan JJ. Judgment of the Supreme Court delivered by Keane CJ on 6 May 2003.**

THE FACTS

Dermot Swaine was employed by the Commissioners of Public Works (OPW) as a plumber. From about the years 1981 to 1982, he worked in the Leinster House complex and, to a lesser extent, in the Department of Industry and Commerce (as it then was). During his work, he was exposed over a lengthy period of time to very large quantities of asbestos dust. In terms of his physical health, there had been no immediate consequence for him. However, he was exposed to the risk described by physician Professor Luke Clancy as 'very remote' of contracting a disease called mesothelioma. This disease is 'lethal'. As a result of becoming aware of the risk, Mr Swaine suffered from what was described as a chronic reactive anxiety neurosis. Proceedings were instituted in the High Court against his employers, the OPW.

The matter came before O'Neill J, who found that the chronic reactive anxiety neurosis had been caused by the negligence of the OPW in exposing Mr Swaine to the risk of contracting mesothelioma.

THE HIGH COURT AWARD

O'Neill J awarded Mr Swaine:

- £15,000 in respect of pain and suffering to the date of the trial
- £30,000 in respect of pain and suffering into the future

In addition, he was awarded the sum of £15,000 by way of aggravated damages.
Total: £60,000

JUDGMENT OF THE SUPREME COURT

The OPW served a notice of appeal to the Supreme Court on the grounds, among other things, that Mr Swaine was not entitled to recover any damages in respect of any physical injury, since he had suffered none, or in respect of the reactive anxiety neurosis which he had been found to be suffering from at the trial, and that he was not entitled to recover any sum by way of aggravated damages.

The matter came before the Supreme Court, comprised of Keane CJ, Denham, Murray, Hardiman and Geoghegan JJ, with the judgment of the court delivered by Keane CJ on 6 May 2003.

Having set out the facts, Keane CJ stated that the *Swaine* case was heard at the same time as four other appeals. All five cases arose out of what was admitted to be the failure of the OPW as employers to take precautions for the safety, health and welfare of the relevant employees. In each of the relevant cases, it was conceded on behalf of the OPW that the plaintiffs in question were exposed to significant quantities of asbestos dust in the course of their employment and were subject to the risk of contracting mesothelioma. Evidence had been given by psychiatrists that, as a consequence of relevant people having been informed of that risk, they subsequently suffered from a recognisable psychiatric disorder – reactive anxiety neurosis. In each case, the trial judge found that the OPW was liable to pay damages in respect of the psychiatric injury in question.

The chief justice referred to the decision of the Supreme Court in *Stephen Fletcher v The Commissioners for Public Works in Ireland*, delivered on 13 February 2003 (see *Gazette*, April issue, p42), where the Supreme Court was unanimously of the view that the law in Ireland should not be extended by the court so as to allow the recovery by a plaintiff of damages for psychiatric injury resulting from an irrational fear of contracting a disease because of negligent exposure to health risk by employers, where the risk was categorised by medical advisors as very remote.

The chief justice stated that the *Swaine* case fell into a different category from the *Fletcher* case because, either expressly or by implication, the OPW had withdrawn any plea in the defence denying liability to pay damages and therefore the case had proceeded as an assessment of damages only. In the *Fletcher* case, the denial of liability to pay any damages had never been withdrawn and the High Court

judge heard arguments as to the liability, if any, of the OPW to pay any damages. In *Swaine*, although the OPW did admit its liability to pay damages, the issue arose as to whether it was liable to pay aggravated damages. The question of aggravated damages was fully contested. The issue arose as to whether the High Court was correct in awarding aggravated damages.

Keane CJ stated that not only was the OPW seriously remiss in the *Swaine* case in not taking elementary precautions for the health, welfare and safety of employees, but it had not even 'the excuse, if excuse it would have been, of not being aware at the time of the dangers associated with asbestos dust' for people such as Mr Swaine, who had been compelled to work in areas where it was impossible to avoid inhaling the potentially-damaging fibres. The evidence before O'Neill J in the High Court indicated that the OPW had been fully aware of those risks when it employed contractors to deal with lagging. The contractors, unlike the plaintiff, had been given protective clothing and headgear. The chief justice stated that he did not think it was possible to dissent from the trial judge's finding that the OPW was guilty of 'negligence of the grossest kind'.

The issue of aggravated damages

Keane CJ then considered whether the 'negligence of the grossest kind' entitled O'Neill J in the High Court to award an additional sum of £15,000 by way of aggravated damages. The chief justice stated that the generally-accepted statement of the law in relation to the circumstances in which a court can award aggravated damages was to be found in the judgment of Finlay CJ in *Conway v Irish National Teachers Organisation* ([1991] 2 IR 305). Finlay CJ had stated that aggravated damages were compensatory damages, increased by reason of:

'a) The manner in which the wrong was committed, involving such elements as oppressiveness, arrogance or outrage, or

b) The conduct of the wrongdoer after the commission of the wrong, such as a refusal to apologise or to ameliorate the harm done or the making of threats to repeat the wrong, or

c) Conduct of the wrongdoer and/or his representatives in the defence of the claim of the wronged plaintiff up to and including the trial of the action'.

Finlay CJ noted in *Conway* that the circumstances which may properly form an aggravating feature in the measurement of compensatory damages must in many instances be in part 'a recognition of the added hurt or insult to a plaintiff who had been wronged and in part also a recognition of the cavalier or outrageous conduct of the defendant'.

Keane CJ stated that the cases in which one would expect to find awards of aggravated damages may arise in the torts of defamation and malicious prosecution, and the chief justice quoted Halsbury's *Laws of England*, fourth edition, volume 12, (1) para 1114, which stated that aggravated damages 'cannot be awarded for the tort of negligence'. Two authorities were cited for that proposition. In *Kralj v McGrath* ([1986] 1 All ER 54), Woolf J (as he then was) stated that it was his view that it would be wholly inappropriate to introduce the concept of aggravated damages into claims for breach of contract and negligence. The second authority quoted in Halsbury was *AB v SouthWest Water Services Limited* ([1993] QB 507). That was a case in which the plaintiffs suffered ill effects as a result of drinking contaminated water from the defendant water undertaker's drinking water system. The plaintiffs had claimed exemplary and/or aggravated damages, alleging the defendants had acted in an arrogant and high-handed manner in ignoring complaints made by their customers. In the Court of Appeal, it was held that the plaintiffs could not recover exemplary damages on the facts.

Keane CJ stated that it would not be appropriate for the Supreme Court in his view to hold that there are no circumstances in which, in actions for negligence or nuisance, aggravated damages may be awarded. That question can be left for a case in which it is fully argued. In the present case involving Mr Swaine, however, Keane CJ was satisfied that while the defendants were unquestionably guilty of what the trial judge described as 'the grossest negligence', that factor in itself was not sufficient to entitle Mr Swaine to aggravated damages in the absence of circumstances such as those referred to in the judgment of Finlay CJ in *Conway v Irish National Teachers Organisation* or factors of a similar nature. G

This judgment was summarised by solicitor Dr Eamonn Hall.

THE SUPREME COURT AWARD

The Supreme Court set aside the award of £15,000 for aggravated damages.

On the basis that the OPW had expressly or by implication withdrawn any plea in the defence denying liability to pay damages and that the case proceeded on assessment of damages only, the order as to £45,000 damages in the High Court was affirmed.

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CHILDREN AND YOUNG PERSONS

Custody

Application pursuant to the Hague convention for the return of children – *allegations of wrongful removal of children from England to Ireland – custody – whether English High Court had right of custody at date of children's removal – whether there was acquiescence in removal by persons having custody – exercise of discretion by court as to whether to order return – whether risk of infringement of constitutional rights of family if returned* – Child Abduction and Enforcement of Custody Orders Act, 1991 – Hague convention on civil aspects of international child abduction 1980, *articles 3, 5, 8 and 13* – Bunreacht na hÉireann, *articles 41.1, 42.2 and 42.5*

This was an application for the return to England of three minors who opposed their return thereto and who had been removed therefrom by their mother, the first respondent. The persons of the children had been in the custody of their grandmother, the third respondent, at the date of their removal. The applicant claimed that the English High Court had a right of custody of the children at the relevant time and that they could therefore pursue the claim for the return on its behalf.

Finlay Geoghegan J refused to order the return of the children to England and dismissed the application, holding that the English High Court did not have a right of custody of the children at the date of their removal from England. The third respondent was, at the date of their removal, the person having the care of the children and she had subsequently acquiesced in their removal from England. Accordingly, a defence under article 13(a) of the *Hague convention* had been made out. Even where there had been acquiescence under article 13(a) of the *Hague convention*, it was a matter of discretion for the court as to whether or not the children should be returned and the court was obliged to exercise such discretion in a manner which would uphold the constitution, particularly the rights of the family provided for under articles 41.1, 42.4 and 42.5. Accordingly, in circumstances where there exists a risk to the constitutionally-protected rights of the family by the return of the children, such discretion should be exercised against returning the children.

***London Borough of Sutton v M(R), M(J) and J(M),* High Court, Miss Justice Finlay Geoghegan, 19/12/2002** [FL7220]

COMMERCIAL

Damages, intellectual property

Injunction – adequacy of damages – balance of convenience – infringement of patent rights – whether injunction should issue – whether damages adequate remedy

The plaintiffs marketed a drug in the state known as *Sexorat*, which had properties for the treatment of depression. The plaintiffs had Irish-registered patents which related to the drug. The defendants marketed a similar drug under the name of *Mexolat*. The plaintiffs sought an injunction to prevent the marketing of the defendant's drug, claiming that it was infringing their patents. The defendants contended that the plaintiffs' patents were invalid and opposed the granting of an injunction. Related litigation had also been undertaken by both parties in other jurisdictions relating to the dispute.

Mr Justice Kelly refused to grant an injunction. If the defendants wrongfully made inroads into the plaintiffs' market, a commercial loss would be suffered by the plaintiffs which could be easily compensated by damages. There was not the slightest suggestion that the defendants would not be in a position to meet an award of damages. Directions would be given in order to ensure an early trial.

***Smithkline Beecham Plc and Others v Genthon BV and (by order) Synthon BV,* High Court, Mr Justice Kelly, 28/2/2003** [FL7231]

CONTRACT

Property

Rescission – contract for sale of property – title deeds – failure by vendor to furnish title deeds – statutory declarations offered in lieu thereof – completion notice served by vendor – whether vendor in position to make title to property in terms of contract on date notice served – whether purchaser entitled to rescind contract – deposit paid by purchaser – purported forfeiture of deposit – whether purchaser entitled to return of deposit

The defendants had entered into a contract with the plaintiff for the sale to it of a premises. The contract referred to certain documents offering the root of title to the property. The defendants then indicated that they had mislaid some of the deeds but would offer statutory declarations in lieu thereof. The plaintiff was unhappy to proceed on that basis, at which point the defendant served a completion notice on the plaintiff and declared that the plaintiff would forfeit its deposit on the property if it did not proceed with the purchase on that basis. The plaintiff, by special summons, sought declarations that the defendants were not, at the date they served the completion notice, able to complete the sale, that the purported forfeiture by the defendants of a deposit paid by the plaintiff was invalid, that the defendants had failed to make good title to the lands in question and that the plaintiff was entitled to rescind the contract and to the return of its deposit. The High Court granted the relief sought by the plaintiff. The defendants appealed that decision.

Keane CJ, delivering the judgment of the court, dismissed the appeal, holding that the defendants were not in a position to complete the contract and make title to the property in accordance with the contract. Accordingly, the plaintiff was entitled to rescind the contract in accordance with its terms and to the return of its deposit with whatever interest had accrued.

***Tyndarius Ltd v O'Mahony & Others,* Supreme Court, 3/3/2003** [FL7239]

CRIMINAL

Appeal

Leave to appeal conviction – charge to jury – duress – whether applicant acting under duress at time offence committed – whether charge to jury adequate

The applicant was sentenced to imprisonment in relation to the importation of a controlled drug by a jury at the Wexford Circuit Criminal Court. He had pleaded not guilty on the grounds of duress and gave evidence of death threats against him should he not import the drugs. Customs officers also gave evidence of their opinion that the applicant was in fear of somebody. While the applicant did not challenge the trial judge's charge to the jury in relation to the legal definition of duress, he submitted that the trial judge in his charge failed to assist the jury in how they should apply the legal principles pertaining to duress to the evidence before them.

Delivering the judgment of the court, McCracken J allowed the appeal and ordered a retrial of the applicant, holding that the charge to the jury made no reference to the evidence given, which would support the applicant's defence. Accordingly, the jury may not have fully understood what matters were to be considered by them in determining the issue of duress. As a further point, it ought to have been explained to the jury that there was a burden of proof on the prosecution to prove that the applicant was not acting under duress.

***The People (DPP) v Dickey*, Court of Criminal Appeal, 7/3/2003** [FL7195]

Case stated, jurisdiction of District Court

Practice and procedure – jurisdiction of District Court – public order offences – assault – delay – dismissal of charges – case stated – whether District Court judge dismissed charges in error – Summary Jurisdiction Act 1857 – Criminal Justice (Public Order) Act, 1994 – Non-Fatal Offences Against the Person Act, 1997

Both the accused had been charged with assault and public order offences arising out of the same incidents. Due to a failure to make the complaints within the requisite time period, the prosecutions in respect of the assault charges (which were summary offences) pursuant to the *Non-Fatal Offences Against the Person Act, 1997* had been dismissed. Objections arose when the director of public prosecutions thereafter attempted to proceed with public order offences pursuant to the *Criminal Justice (Public Order) Act, 1994*. A number of hearings were held by the District Court judge and submissions were made as whether the prosecutions should proceed. The District Court judge, referring to the case of *Eviston v DPP*, dismissed the prosecutions in respect of the public order offences and stated a case for the opinion of the High Court as to whether he was correct in doing so.

In answering the case stated, Caoimh J held that at all times it was the intention of the DPP to charge the accused with the offences in question. In error, the prosecutions in respect of the summary offences (the assault charges) had not been initiated in time. However, the District Court judge was in error when he purported to rely on the decision in *Eviston v DPP* when dismissing the charges in respect of the public order offences. The prosecutions in the District Court would therefore proceed.

***DPP v Hurson and McDonagh*, High Court, Mr Justice Ó Caoimh, 27/1/2003** [FL7111]

Contempt

Contempt of court – sub judice – *whether publication of prejudicial material relating to matters* sub judice – *whether contempt of court to publish material prejudicial to accused when charges imminent but not yet proffered*

The first, third and fifth respondents published prejudicial material in respect of charges against the notice parties which were at the time of publication pending in the District Court. They also, along with the eighth respondent, published prejudicial material prior to the charging of the notice parties on other charges. The applicant sought to argue that publication of the prejudicial material prior to the proffering of the charges in question, that is, when the charges were imminent as opposed to pending, amounted to a contempt of court.

Kelly J found the first, third and fifth respondents guilty of contempt of court in respect of their publication of prejudicial material relating to charges against the notice parties which were at the time of publication pending, but acquitted all of the respondents of contempt in respect of publication of prejudicial material relating to other charges which at the time of publication were imminent rather than pending against the notice parties. He held that there was no such thing in the common law as 'contingent contempt' and therefore the harmful consequences of a publication made before proceedings are commenced was not punishable by summary procedure as a contempt.

***DPP v Independent Newspapers Ltd*, High Court, Kelly J, 7/3/2003** [FL7148]

Delay, evidence

Judicial review – evidence – duty to preserve evidence – fair procedures – delay – whether applicant could receive fair trial – whether unfair to applicant to permit trial to proceed – whether applicant's defence prejudiced

Both cases involved matters relating to the preservation of evidence. In the case of *Bowes*, the applicant had been stopped while driving a car and a quantity of drugs had been found. The car was seized and when the applicant sought to have the car technically assessed, he was informed that the car had already been scrapped. The Garda Síochána had carried out forensic tests on the car which had elicited evidence. The applicant initiated judicial review proceedings and contended that the gardaí in the interests of justice and fair procedures were obliged to inform an accused person of any intention to destroy evidence. In the High Court, Ó Caoimh J refused the relief sought on the basis that it was clear that the car the applicant was driving was the one which was forensically examined by the gardaí. While the car should not have been disposed of without reference to the gardaí handling the file, it was fortuitous that a forensic analysis had been carried out. There was no obligation on the gardaí to retain the vehicle indefinitely. In the case of *McGrath*, the applicant had been charged with dangerous driving as a result of an accident in which a motorcyclist died. When the applicant sought to examine the motorbike, she was informed that it had been broken up for parts.

The Supreme Court (Hardiman J delivering judgment; Keane CJ, Murray J, McGuinness J, and Geoghegan J agreeing) delivered the following judgment. A major point of contrast in the two cases was the time of the request for access to the vehicles, which in the case of *Bowes* was a few days prior to the trial and in the case of *McGrath* was within days of the service of the book of evidence. In the *Bowes* case, there was no dispute that the applicant was in the car. There was a quantity of heroin found in the car. It could not be said that there existed a real loss of opportunity to rebut the prosecution's case and the relief sought would be refused. However, in the *McGrath* case there was no question of tardiness; her solicitor had indicated that an examination of the vehicle might be required but no step was taken by the gardaí to preserve it. The applicant had suffered the loss of a reasonable prospect of obtaining evidence to rebut the case against her and the further prosecution of the applicant would be restrained. Both cases illustrat-

ed the need for a more cohesive practice among the gardaí regarding the preservation of pre-trial evidence.

***Bowes v DPP*, Supreme Court, 6/2/2003** [FL7119]

Evidence

Appeal – evidence – admissibility – whether court had erred in law in admitting evidence – whether evidence obtained in breach of applicant's constitutional rights

The applicant was convicted by the Special Criminal Court of being in possession of information of such a nature that it was likely to be useful in the commission of a serious offence by members of an unlawful organisation. The sole ground of appeal was that the ruling of the trial court – that the document found as a result of the search of the applicant's wallet by a garda was admissible – was erroneous in point of law.

The Court of Criminal Appeal (Keane CJ, Finnegan P and Kelly J) treated the application for leave to appeal as the appeal and allowed it, substituting for the order of the Special Criminal Court an order quashing the conviction, holding that the evidence was obtained in breach of the applicant's constitutional rights. Since this was the only evidence on which the conviction was founded, it followed inevitably that it must be quashed.

***DPP v McFadden*, Court of Criminal Appeal, 3/3/2003** [FL7094]

Fair procedures, practice and procedure

Assertion that possibility of fair trial precluded by delay – appropriate remedy – appellant's motion to quash indictment refused by Central Criminal Court – whether trial judge has jurisdiction to quash indictment where no fault in indictment alleged

The appellant was charged on indictment with certain offences and returned for trial in the Central Criminal Court. After an aborted initial trial, during which the appellant did not complain of any delay in the prosecution of the case, he made an application to the trial judge after the second jury had been sworn to quash the indictment on the ground that he would not be able to get a fair trial owing to excessive delay. The trial judge refused the application on the ground that he had no jurisdiction to entertain that application. The appellant appealed to the Court of Criminal Appeal.

Delivering the judgment of the court and dismissing the appeal, McCracken J held that the trial judge had no jurisdiction to quash the indictment where the complaint was one of prejudice to the appellant by excessive delay in the prosecution of the case, as a motion to quash the indictment had to be based on some fault in the indictment itself and the jurisdiction to quash an indictment did not extend to cover cases where a trial should not proceed where fair procedures which have nothing to do with the indictment had not been followed. Moreover, had the appropriate procedure been followed, the court would have refused relief on the ground of the appellant's own delay in making the application. *Obiter dictum*: in such cases, the appropriate relief would be an injunction restraining the director of public prosecutions from prosecuting.

***People (DPP) v PO'C*, Court of Criminal Appeal, 7/4/2003** [FL7091]

Proceeds of crime, *res judicata*

Revenue – proceeds of crime – whether Proceeds of Crime Act, 1996 *applies to crimes committed outside jurisdiction – delay* – res judicata – *whether act creates offences retrospectively – whether claim statute-barred* – Statute of Limitations, 1957, *section 11(7)(b)* – Proceeds of Crime Act, 1996, *section 3* – Bunreacht na hÉireann, *article 15.5*

The plaintiff applied for an order pursuant to section 3 of the *Proceeds of Crime Act*, *1996* confiscating some of the defendant's property as representing the proceeds of crime. A number of legal objections to the making of the order were raised by the defendant including: 1) that the act applied only to crimes committed within the jurisdiction; 2) that it was not in the interests of justice to make the order having regard to the delay in making the application; 3) that the issue of the confiscation of the defendant's property was *res judicata*, having regard to the fact that he had previously served a prison sentence in England in default of payment of a confiscation order for drugs offences; 4) that section 3 was unconstitutional in that it infringed article 15.5 of the constitution as having retrospective effect; and 5) that the plaintiff's claim was statute-barred under section 11(7)(b) of the *Statute of Limitations*, *1957*.

Finnegan J made the order sought pursuant to section 3 of the *Proceeds of Crime Act*, *1996*, holding that: 1) the act of 1996 does not apply only to crimes committed within the jurisdiction; 2) there was no delay on the part of the plaintiff either in instituting or prosecuting the proceedings; 3) *res judicata* could only apply if the plaintiff in the two relevant actions was the same. As the plaintiff in the UK proceedings was the Crown and not the plaintiff in the present proceedings, *res judicata* could not apply; 4) the acquisition of assets deriving from crime was not a legal activity before the passing of the act of 1996 and did not become an illegal activity because of that act; 5) section 11(7)(b) of the *Statute of Limitations*, *1957* has no application to actions taken under the *Proceeds of Crime Act*, *1996*.

***McK v D*, High Court, Mr Justice Finnegan, 31/7/2002** [FL7125]

Rehabilitation of accused

Sentencing – sexual offences – lapse of time – rehabilitation – whether trial judge erred in sentence imposed – whether sentences imposed excessive – Criminal Law Act, 1997 – Sex Offenders Act, 2001

The applicant had been convicted of two counts of unlawful carnal knowledge and was sentenced to four and five years' imprisonment, both sentences to run concurrently. The applicant sought leave to appeal against the sentences imposed. It was contended that the trial judge had failed to take into account any mitigating factors and the sentences were excessive. It was submitted that no pattern of behaviour was alleged and no regard was given to the lapse of time between the date of the offences and the date of the trial.

The Court of Criminal Appeal (Denham J delivering judgment, Murphy J and McKechnie J agreeing) quashed the original sentences and imposed reduced sentences. The trial judge had failed to consider all the mitigating factors and had failed to consider the extent to which the applicant had redeemed and rehabilitated himself into society. The appropriate sentences were three and four years' imprisonment to run concurrently, with a portion of the sentences suspended.

***DPP v B(R)*, Court of Criminal Appeal, 8/4/2003** [FL7216]

LAND LAW

Injunction, property

Interlocutory injunction – property – plaintiff seeking to restrain county council from taking steps in relation to plaintiff's land until trial of action – test to be applied – whether fair issue to be tried – constitutional right to property – limitation of property rights – whether exigencies of common good requires limitation of property rights – Roads Act, 1993, *sections 18*, *78* – Bunreacht na hÉireann, *articles 40.3 and 43*

The first defendant obtained a warrant pursuant to section 78

of the *Roads Act, 1993, ex parte*, in the District Court requiring the plaintiff to allow it onto her lands for the purposes of carrying out surveys in relation to a road-building project. The plaintiff applied for an interlocutory injunction restraining the first defendant from taking any further steps in relation to her lands on foot of that warrant, pending the trial of the action. The substantive reliefs claimed by the plaintiff in the statement of claim were a declaration that the defendants were not entitled to enter onto her land until they had lawful authority to do so and a declaration that she was entitled to quiet enjoyment of lands without disturbance from the defendants or any one or more of them.

In refusing the application, Peart J held that in deciding whether there was a fair issue to be tried the court had to consider the substantive reliefs claimed. Contrary to the submissions of the plaintiff, the powers contained in section 78 of the *Roads Act, 1993* are not inoperative until the provisions of section 18, requiring the minister to prepare a draft national roads plan, have been complied with. That being so, section 78 gave the first defendant lawful authority to enter the plaintiff's land for the purposes set out in that section. In relation to the second relief sought, the constitution provides a limitation of property rights where the exigencies of the common good so demand. The second relief sought was subject to any limitation of that right which section 78 of the act of 1993 entails. As the claim in the circumstances could not succeed, there was no fair issue to be tried.

***Finlay v Laois County Council*, High Court, Mr Justice Michael Peart, 20/12/2002** [FL7173]

TRIBUNALS OF INQUIRY

Appeal, compensation

Tribunals of inquiry – appeal – whether act gave rise to a statutory time limit of one month for making of appeal – whether acceptance of award excluded appeal to High Court - whether the tribunal had locus standi – Hepatitis Compensation Tribunal Act, 1997 – Hepatitis Compensation Act, 1997

The respondents appealed the High Court's decision that section 5(9)(a) of the *Hepatitis C Compensation Tribunal Act, 1997* did not give rise to a statutory time limit of one month for the making of an appeal to the High Court and that the acceptance of an award of the tribunal did not exclude an appeal to the High Court under the act. There was also the question as to whether the tribunal had *locus standi*.

In allowing the appeal, the Supreme Court (Denham, Murray, McGuinness, Hardiman and Geoghegan JJ) held that B was precluded from appealing once he accepted the award and, in any event, any appeal had to be brought within the statutory time limit. The tribunal did have *locus standi*.

***B(D) v Minister for Health and Children*, Supreme Court, 26/3/2003** [FL7130] 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

Fixed-term workers

Council directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work is the next general employment directive due to be implemented in the state. It may already apply to employers and employees in the public sector. Employees in the private sector may also have rights under the directive prior to its implementation.

Definitions

Article 1 of the directive states that its purpose is to put into effect the framework agreement on fixed-term contracts concluded on 18 March 1999 between the general cross-industry organisations. The framework agreement is annexed to the directive. Clause 1 of the framework agreement sets out its purpose as to:

'a) Improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination

b) Establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships'.

Clause 2 of the agreement defines its scope, and at paragraph 1 of clause 2 states:

'This agreement applies to fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each member state'.

It provides that certain employment relationships can be excluded (these concern training and apprenticeship).

Clause 3 of the agreement sets out definitions and defines a fixed-term worker as:

'A person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task or the occurrence of specific event'.

Paragraph 2 of the definition clause states that a 'comparable permanent worker' means:

'A worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills'.

Clause 4 of the agreement provides, at paragraph 1:

'In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relationship unless different treatment is justified on objective grounds'.

Paragraph 4 of clause 3 provides that:

'Periods of service qualifications relating to particular conditions of employment shall be the same for fixed-term workers as for permanent workers except where different length of service qualifications are justified on objective grounds'.

Clause 6 of the framework agreement governs information and employment opportunities. It provides as follows:

'1) Employers shall inform fixed-term workers about vacancies which become available in the undertaking or establishment to ensure that they have the same opportunity to secure permanent positions as other workers. Such information may be provided by way of a general announcement at a suitable place in the undertaking or establishment

2) As far as possible, employers should facilitate access by fixed-term workers to appropriate training opportunities to enhance their skills, career development and occupational mobility'.

Clause 5 of the framework agreement contains measures to prevent abuse. It provides that, to prevent abuse arising from the use of successive fixed-term employment contracts or relationships, following consultation member states shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes into account of the needs of specific sectors and/or categories of workers one or more of the following measures:

'a) Objective reasons justifying the renewal of such contracts and relationships

b) The maximum total duration of successive fixed-term employment contracts and relationships

c) The number of renewals of such contracts and relationships'.

Paragraph 2 of that clause provides that, after consultation, member states shall where appropriate determine under what conditions fixed-term employment contracts or relationships:

'a) Shall be regarded as "successive"

b) Shall be deemed to be contracts or relationships of indefinite duration'.

(This is what is referred to as 'permanent employment' – employment that can only end by way of a fair dismissal, a redundancy, a voluntary resignation or retirement.)

The Irish state has not yet introduced measures to prevent abuse expressly on foot of the directive. It is evident that successive fixed-term contracts are generally contrary to the spirit of the framework agreement, which is to be put into effect by the directive.

The *Unfair Dismissals Act, 1977* provides that the legislation shall not apply on the expiry of a fixed-term contract or the cesser of the purpose of a specified purpose contract, provided the following conditions are adhered to: 1) the contract is in writing; 2) the contract specifies that the act will not apply on the ending of the period or the cesser of the purpose; and 3) the contract is signed by the parties.

Continuity of service

Many employers have taken it as automatic that if they draw up a fixed-term or specified-purpose contract and comply with the above-mentioned conditions the employee has no right to claim unfair dismissal when the contract comes to an end. That may not be the case even on basis of the current legislation. If, on the ending of such a contract, an employee claims unfair dismissal, the Employment Appeals Tribunal will determine whether the contract was genuinely a fixed-term or specified-purpose contract or was in reality an open-ended employment dressed up as

being for a fixed term or specified purpose. The *Unfair Dismissals (Amendment) Act, 1993* is relevant in so far as it refers to fixed-term contracts. It does not in any way affect the tribunal's interpretation referred to above or the status of fixed-term or specified-purpose contracts; it merely deals with continuity of service between successive fixed-term or specified-purpose contracts. It is an attempt to prevent employers getting around the provisions of the legislation by employing people on what may appear to be genuine contracts and terminating, allowing a break to develop and then re-employing such persons. The break in continuity would mean that until at least one year of the renewed period has elapsed, the employee would not have unfair dismissal protection. What the 1993 act does is confirm continuity where the gap is three months or less between successive contracts, apparently no matter what the employee was doing in that three-months gap, provided that the two contracts are similar. This may constitute a measure to prevent abuse in compliance with the directive.

Article 2 of the directive provides that member states shall bring into force the laws, regulations and administrative provisions necessary to comply with the directive by 10 July 1999 or shall ensure that such measures have been introduced by agreement by that date. It provides that member states may have a maximum of one more year if necessary, and following consultation with management and labour, to take account of special difficulties or implementation by a collective agreement. Member states were to inform the commission forthwith in such circumstances. A *corrigendum* to the directive extended the date for its implementation to 10 July 2001. The Irish state has not sought an extension and has not yet prepared draft legislation to implement the directive. The government is expected to introduce legislation during the year. I understand that the definitions used in the bill/act will mirror those in the *Protection of Employees (Part-Time Work) Act, 2001*, which implemented the directive in respect of part-time workers.

It is therefore likely that the implementing legislation will be more onerous on employers than the directive requires: for example, a comparable full-time worker for the *Part-Time Work Act* can be a worker in another establishment to that where the employee works. The directive does not require this.

Under pressure

The government is coming under pressure from the European Commission to implement the directive and has been warned that it has failed to comply with the appropriate time limit for so doing. It is therefore likely that legislation will appear very shortly. The *Part-Time Work Act* was very quickly enacted just before Christmas 2001. Again, that time limit for implementing that directive passed well in advance of its implementation.

Agreements with trade unions about remuneration or qualifications are superseded by the provisions of the directive, due to the supremacy of EU law. It is therefore no defence for an employer to say that all the recognised trade unions are in agreement with the rates of remuneration or qualifications set. Public bodies, which are emanations of the state, must comply with the directive despite any such agreements.

The issue of what is an objective justification is not very clearly defined. It is a matter for a national court whether a discriminatory requirement is justified.

The European Court of Justice (ECJ) considered the issue in a 1998 case against the Irish Revenue Commissioners. In that case, *Hill & Stapleton v Revenue Commissioners*, the ECJ refused to accept the Irish government's defence that less favourable treatment of job-sharing employees was an established practice in the civil service. This was held to be no more than a general assertion unsupported by objective criteria. The ECJ also rejected justification solely on the ground of increased cost.

In a case brought by SIPTU against Packard Electric (Ireland) Limited in 1991, the Labour Court considered the issue of objective justification for a change in the salary payments system which resulted in a bonus for full-time staff, and none for part-time employees. The different treatment was indirectly discriminatory. The company's defence was that full-time staff were changing from cash to non-cash pay, but part-time staff had always received non-cash pay. It said that the company's objective was security. This was accepted by the Labour Court, which held that non-payment of bonuses to part-time staff was a necessary and appropriate means towards the aim of security and was unrelated to sex. This approach differs from that in the Revenue Commissioners case and suggests that economic or financial factors can justify indirect discrimination against part-time workers, and therefore fixed-term/temporary workers.

European directives are binding as to the result to be achieved for each member state, but leave to the national authorities the choice of form and method. On first consideration, their effect appears to be conditional on implementation by the member state. This issue has been considered by the ECJ in a number of cases. In a 1970 case, the court implicitly accepted that directives were capable of direct effect. A directive was first clearly given direct effect in a 1974 case, where the ECJ held that directives were capable of creating direct effect and were capable of conferring rights on individuals, which they could invoke against member states in actions before the national courts. The ECJ held that it would be inequitable to allow a state to put forward its own delay in implementation as a defence against individuals who might suffer loss because they stood to benefit from a directive.

A directive cannot become directly effective before the expiry of the time limit for its implementation. In the case of the *Directive on fixed-term work*, this date was 10 July 2001. As stated above, I consider that the *Directive on fixed-term work* is sufficiently precise in its provisions on no less favourable treatment for fixed-term workers to be directly effective. These provisions are likely to be held to be directly effective from 10 July 2001 as a result of the expiry of the date by which the directive was required to be commenced, without any extension of time for it.

A question that has repeatedly been considered by the ECJ is whether or not directives give rise to horizontal direct effect – that is, whether or not directives that have not been implemented can be relied on between individuals as opposed to member states. In a 1984 case, an advocate general to the ECJ said that directives were addressed to states and not individuals, and therefore direct effect should be limited to the state. The applicant in that case succeeded in challenging a breach of the *Equal treatment directive* because her employer was a public body, Southampton Health Authority, and not a private institution. Application of a directive to a public body is vertical, not horizontal, direct effect. In a later case, from 1994, the ECJ held that the terms of a directive could not be relied upon in litigation between citizens where the directive had not been transposed into national law. Again, these terms can be relied upon in litigation brought by citizens of a state against the state or its emanations.

In a 1990 case, the ECJ held that a member state includes 'emanations of the state'. This includes every body that is controlled or owned by the state. It is

a vague definition. In that case, it was found that employees of British Gas were employees of an emanation of the state. In a case against the RUC, the ECJ held that a directive could be relied on against a chief constable if he is responsible for the police service, and the police authority is charged by the state with the maintenance of public order and safety. Local and regional authorities have been held to be public bodies, as have tax authorities. The most relevant case was one where our High Court applied this concept in a personal injury case against Waterford County Council in 1996. The court found that Waterford County Council was an emanation of the state and therefore an individual was entitled to sue the council on foot of a directive which was not properly implemented.

In the 1990 case of *Francovich*, the ECJ held for the first time that a member state could be sued for damages by individuals in their national courts in particular circumstances. There were three criteria to be satisfied:

a) Did the directive aim to create rights for individuals?
b) Could the content of such rights be ascertained from the directive's provisions?
c) Was there a causal link between the state's failure to implement the directive and the damage that resulted?

If an individual can satisfy these conditions, that individual has the right under European law to sue a member state for damages in a national court where the state's failure to implement a directive was the cause of loss on the part of the individual. Again, these terms can be relied upon in litigation brought by citizens of a state against the state or its emanations.

In a case brought against the Minister for Social Welfare in 1995, the ECJ held that Ireland was liable to compensate a large group of individual litigants who suffered loss as a result of the state's failure to implement an *Equal treatment directive*.

European directives that have direct effect or have been implemented supersede national law. I therefore consider that qualifications or requirements that have been set by an employer, and which are contrary to the fixed-term work directive, should be set aside on the basis of the provisions of the directive, and that persons can be appointed who do not have the qualification or requirement in question.

Fixed-term worker complaints

I consider that a public employee who is employed on a fixed-term contract and therefore not eligible for a promotional post or for equal treatment/remuneration to that given to comparable permanent colleagues has two options if he decides to pursue a legal route:

a) Bring legal action against a public body employer in the Irish courts on foot of the fixed-term work directive, contending that the employer is an emanation of the state, that the directive is capable of being directly effective against the employer and that it is failing to comply with the provisions of the directive.
b) Bring a *Francovich* legal action against the Irish state in the Irish courts, contending that the three criteria in the 1990 case of *Francovich* referred to above are satisfied.

An employee on a fixed-term contract with a private employer has option (b) only if he wishes to rely on the directive prior to its implementation in Ireland.

As the directive was due to be implemented over a year ago, I consider that the state and public body employers face legal liability for less favourable treatment of fixed-term workers compared to permanent workers *without any objective justification for it.* G

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

Recent developments in European law

COMMERCIAL LAW

Choice of law

Ennstone Building Products Ltd v Stanger Ltd ([2002] EWCA Civ 916). The claimant had supplied sandstone for use in the construction of a building in Edinburgh. The sandstone was stained. The defendant provides a testing and consultancy service. It was retained in 1995 to investigate the cause of the staining. It was to test the stone and report on remedial action to be taken. It published a report suggesting that the stone should be cleaned with oxalic acid. Cleaning took place in January 1996 but more staining became apparent in April. A new adviser was retained who advised that the treatment had exacerbated the staining problem. Ennstone started proceedings in the English court, arguing the Stanger was liable for damages for breach of contract or liable in tort for breach of a duty of care. A number of preliminary issues had to be decided, one of which was the applicable law in contract and in tort. At first instance, Judge Kirkham ruled that the English courts had jurisdiction but that the applicable law was Scottish. There was no express choice of law clause in the contract so the matter fell to be determined by article 4 of the *Rome convention*. This provides that the applicable law is that of the country with which the contract is most closely connected. Article 4(2) applies a presumption that this country is the place of residence of the party who is to effect the performance or, if the contract is entered into in the course of that party's trade or profession, the country in which the principal place of business is situated or where the performance of the contract is to be effected. This presumption can be ousted if it appears from the circumstances that the contract is more closely connected with another country. The Scottish office of Stanger had carried out the work. Judge Kirkham held that the characteristic performance was that of Stanger and that as the services were provided in Scotland, the presumption pointed towards Scottish law. She discounted the fact that the reports were to be sent to Ennstone in England. This judgment was appealed to the English Court of Appeal. Both parties accepted that the characteristic performance was that of Stanger and that the contract had been entered into in the course of its trade or business. The key issue was whether the characteristic performance was to be effected though the Glasgow office of Stanger. The court held that article 4(2) should be interpreted narrowly. Keene LJ held that the article must be interpreted as meaning that the country where the party's principal place of business is located is the most closely connected country unless the contract specifies that performance is to be effected through some place of business of that company. He commended this approach as achieving certainty as to the applicable law. He was prepared to accept an implied term as sufficing for this purpose. However, on these facts, there was no express term requiring performance though Stanger's office in Scotland and there was no basis for an implied term. The court then examined whether the presumption could be disregarded, as there was a closer connection with another country. Keene LJ held that the presumption could be disregarded only where circumstances clearly demonstrated the existence of connecting factors justifying such disregard. The links with Scotland in this case were seen as too weak to justify the ousting of the presumption. Thus, English law was applicable to the contract. The court then considered the choice of law for tort. It concluded that in a case of misrepresentation, the tort was committed in the jurisdiction where the representation was received and acted upon. The same principle applied to the giving of negligent advice: the tort is committed where the advice is received – in this case, England.

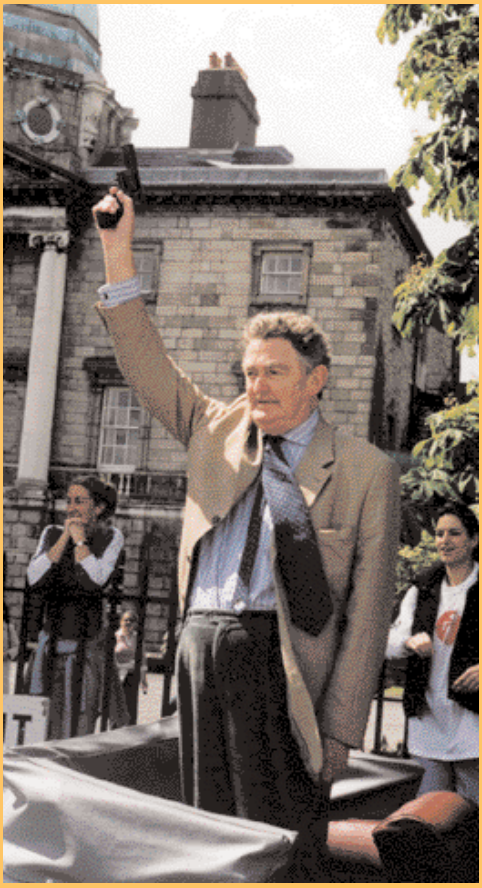
ESTABLISHMENT

Case C-351/01 *Commission of the European Communities v French Republic*, 26 September 2002. The commission brought enforcement proceedings against France as it had failed to implement the *Establishment directive for lawyers* (98/5/EC). The French government had not introduced any legislation to implement the directive. The procedure for implementation was on-going at the time the case was heard. A number of French bar associations had already begun to apply the provisions of the directive. The ECJ held that, in failing to implement the directive, the French government fell short of its obligations under the directive.

INTELLECTUAL PROPERTY

Case C-206/01 *Arsenal Football Club v Matthew Reed*, 12 November 2002. In 1989, Arsenal Football Club registered the words *Arsenal* and *Arsenal Gunners* and the cannon and shield emblems as trademarks for a wide class of goods. The club derives significant income from the sale of its own products. Some of these products are designed and sold by the club, while a network of approved resellers manufactures others. Matthew Reed had sold football souvenirs and memorabilia from stalls outside the Arsenal FC stadium. Almost all of these products are marked with Arsenal FC signs. Notices on his stalls indicated that his products are not official products. Arsenal FC brought proceedings against Matthew Reed in tort and for infringement of its trademark. The English High Court dismissed the tort claim on the basis of a lack of evidence of confusion between official merchandise and that sold by Mr Reed. It referred two questions to the ECJ on an interpretation of EC trademark law. The first concerned the right of a proprietor of a validly-registered mark to prevent use of the mark by a third party trading in identical products but where the use does not involve any indication of the products' origin. The second question was the effect on the proprietor's rights of the fact that the public could see use of the mark as a badge of support for or loyalty or affiliation to the proprietor of the mark. The ECJ held that the essential function of a trademark is to guarantee to consumers the real origin of goods or services by enabling them to distinguish them from those of different origin. The guarantee of origin can only be ensured if the trademark is protected against competitors wishing to take unfair advantage of its status and reputation by selling goods that are not originals. However, this protection is limited to cases where the use of a sign by a third party affects or is liable to affect the functions of the trademark. In relation to the products sold by Mr Reed, there is a risk of confusion in the minds of supporters as to the origins of the products. The notices on the stalls do not guarantee that there will be no confusion. When the unofficial products have left the stall, they may be interpreted by some consumers as official Arsenal FC products. Consequently, Arsenal FC was entitled to prevent the use of its trademark on goods identical to those for which it is used. It is immaterial that the sign is perceived by the public as a badge of support or loyalty to the proprietor. G

Calcutta Run 2003



Chief Justice Ronan Keane triggers the start

The fifth Calcutta Run, the annual charity 10k fun run/walk organised by a group of solicitors and supported by the Law Society, took place on Saturday 17 May. Over 1,350 runners and walkers took a route through the Phoenix Park, starting and finishing in the grounds of the Law Society at Blackhall Place.

It was followed by a monster BBQ and was great fun, despite broken weather.

It looks like the the fund-raising target of €225,000 will almost be reached. The benefiting charities are Fr Peter McVerry's Arrupe Society, which battles homelessness in Dublin, and GOAL's orphanages for homeless children in Calcutta. The winners were Ian O'Riordain and Annette Keeley.

Cards on the table

Pictured at a workshop held for panel members of the Guidance and Ethics Committee (which helps solicitors when complaints are made about them to the Law Society) are: *(standing, from left)* Berchmans Gannon, Maura Derivan, Deirdre O'Connor (Athy), Mary Hayes and Sean Sexton; *(sitting, from left)* Deirdre O'Connor (Galway), Mary O'Connor, committee chairman John O'Malley, Mary Dorgan, and secretary Therese Clarke

Welcome back

Mary B Cremin recruitment has announced the return to Dublin of Roisín Moriarty, who will again head its specialist legal division

Meeting of the Law Society Coun

The May meeting of the Law Society Council was both rare and historic – the first outside of Dublin in five years, and the first ever held in Sligo. Aidan O'Reilly reports

On Friday 9 May, for the first time in its history, a Law Society Council meeting was held in Sligo town. The meeting took place in Sligo courthouse, which was made available to the Law Society by kind permission of the Courts Service Board and the county registrar Kieran McDermot. The tireless assistance of Sligo bar association president Michele O'Boyle was also crucial to the success of the event. Delegations from the Sligo, Roscommon, Leitrim and Mayo bar associations attended as observers.

On the previous evening, the President of the Law Society, Geraldine Clarke, hosted a reception in the courthouse which was attended by Sligo Lord Mayor Tommy Cummins, members of the local judiciary, Sligo solicitors and elected representatives of the surrounding bar associations.

The holding of the meeting in Sligo forms part of an initiative by the president to have contact and consultation with as many members of the profession as possible. The president took advantage of the occasion to highlight the dilapidated state of many of the country's courthouses. Acknowledging the excellent work of the Courts Service Board in refurbishing Sligo courthouse, she lamented the fact that many courthouses around the country were in extremely poor condition and 'owed more to Dickens than Dúchas'. She also expressed concern about on-going delays in family law cases and called for the immediate and urgent appointment of additional suitably trained judges to sit in the worst affected areas of the country, or the establishment of a panel of judges to travel the court circuits and to begin to make inroads into the horrendous backlog of family law cases.

Law Society president Geraldine Clarke speaks out about dilapidated courthouses and family law delays

Mel Bourke, David Gallagher, Sligo Lord Mayor Tommy Cummins, Feargal Kelly and Kieran Liddy

Ita Lyster, Valerie Kearns, Law Society president Geraldine Clarke, Niamh McDermott, Leonie Hogge and Áine Kilfeather

cil at Sligo Courthouse May 2003

Council of the Law Society in session

Perfect harmony
Mr Justice Peter Kelly and Law Society president Geraldine Clarke

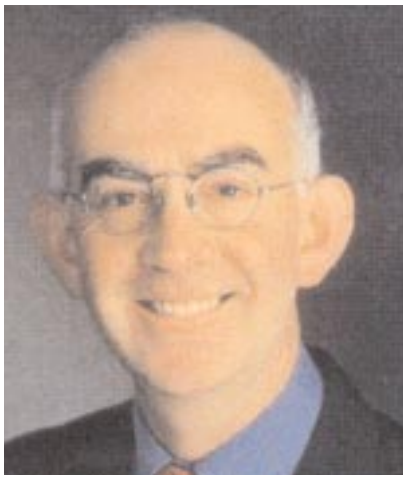
Law Society director general Ken Murphy, Dervilla O'Boyle, president Geraldine Clarke and Sligo bar association president Michele O'Boyle

Michael Quinlan, Sligo bar association president Michele O'Boyle, Law Society director general Ken Murphy and Judge Miriam Buckley-Reynolds

Mr Justice Henry Abbot, Law Society president Geraldine Clarke and Mr Justice Peter Kelly

Gerard McCanny, Thomas Martyn and state solicitor Hugh Sheridan

Eamonn O'Connor: an appreciation



The death of Eamonn O'Connor, solicitor and tax consultant, who died suddenly at home on 29 April 2002 at the age of 52 years, has left a void in the lives of his family, friends and many acquaintances. Born in Dublin, he was the son of Jerry and Eileen O'Connor. In the mid-1960s, Eamonn was diagnosed with Bright's Disease, a chronic inflammation of the kidneys which eventually led to kidney failure. Throughout regular hospital confinements, Eamonn bore his illness with great courage. In 1981, he was fortunate to receive a kidney transplant which radically transformed the quality of his life.

Despite his illness, Eamonn pursued a normal career path from secondary school at Terenure College and Westland Row to Butler & Briscoe, government stockbrokers (now Dolmen Butler Briscoe), where he developed his life-long interest in stock exchange investments. In the early 1980s, Eamonn's career moved into the area of taxation and he passed his final examinations in 1984 for membership of the Institute of Taxation. Eamonn's particular interest was in capital acquisitions tax and he contributed articles on this area to the *Irish tax review* and *Law Society Gazette*. He lectured extensively on all aspects of taxation and was a member of the Law Society's Taxation Committee from 1994 to 1998.

Eamonn realised a further ambition when he was admitted as a solicitor in 1993 while at Reeve's Solicitors, which then merged with Orpen Franks. He was an active member of the Law Society's Law Reform Committee 1997/98, particularly the sub-committee set up to propose changes in adoption law.

Eamonn was a keen sports fan, enjoying soccer and golf, and he was a member of Landsdowne Tennis Club, though his favourite recreation was horse racing. His love of animals was reflected in his support of the Kildare Animal Foundation, which treats and cares for abandoned animals.

Eamonn was a remarkable person of many exceptional qualities and it was his determination, integrity, honesty and strength of character that enabled him to cope with the many setbacks and knocks he experienced. It was these qualities that stood to him when his health deteriorated in the months prior to his death. Fortunately for Eamonn, it was at this time that he was able to draw on the love and unwavering support of his family and friends, without whom Eamonn's last months would have been even more difficult. Eamonn was looking forward to the future with optimism, but sadly did not live to realise his many heartfelt desires and aspirations.

His family and friends have lost a deeply caring son and brother, and trusted confidant. He is deeply missed by his mother, sister, many long-standing close friends and colleagues, who will never forget him.

Knowing and loving him has enriched our lives. G

Anne Herrieven

OBITUARY

Thomas F O'Higgins 1916 – 2003

Few will have had the privilege of serving their country as a lawyer of significance, member of the Oireachtas, deputy leader of the opposition, minister of the government, presidential candidate, judge of the Supreme Court, president of that court as chief justice and judge of the European Court of Justice – all in a single lifetime. Thomas F O'Higgins who died on 25 February 2003, aged 86, did so with remarkable style.

Tom O'Higgins (as he was known to many) was born in Cork on 23 July 1916 (a year of some significance) and was the son of medical doctor, Thomas F O'Higgins, a TD from 1929 to 1954 and minister for defence from 1948 to 1951. His great-grandfather, politician and poet TD Sullivan, had been a nationalist member of parliament in the late 1800s. His uncle was Kevin O'Higgins (vice-president of the Executive Council of the Free State), whose own father was shot dead in 1923 and who himself was assassinated on his way to Mass in 1927. Tom O'Higgins inherited politics in his bloodline.

When the O'Higgins family moved from Cork to Dublin, the future politician and chief justice received his education at St Mary's College, Rathmines, Dublin, Clongowes Wood College, County Kildare, and subsequently at University College Dublin, where in 1937 he was awarded first class honours in legal and political science. Subsequently, he took first place at King's Inns in the final examinations. Called to the bar in 1938, the inner bar in 1954, he was elected a bencher in 1957.

Elected a member of Dáil Éireann for the constituency of Laois-Offaly in 1948, he was re-elected in 1951, 1954 and 1957, 1961 and in 1965. He was elected as a member for South County Dublin in 1969. Appointed minister for health in Mr Costello's second government, he introduced the voluntary health insurance scheme and initiated the dispensary system of general medical services with a scheme based on choice of doctor.

Prevailed upon in 1966 to stand as a presidential candidate for Fine Gael against the 83-year-old Eamon de Valera, O'Higgins ran an energetic campaign emphasising the concept of change and the role of the young in Irish society. He almost became president of Ireland, failing by only one-half of one percent of the vote. He subsequently became deputy leader of Fine Gael in the late 1960s and early 1970s. In the 1973 general election, he agreed not to stand for the Dáil so as to concentrate on the impending presidential election, which was won handsomely by Erskine Childers.

The presidential defeat of 1973 heralded the end of Tom O'Higgins's political career: he returned to the bar. On 12 December 1973, he was appointed to the High Court. Following the death in office of Chief Justice William O'Brien FitzGerald on 17 October 1974, Tom O'Higgins was appointed chief justice on 23 October 1974. When he took his seat in the Supreme Court for the first time, he said that his aim, with God's help, would be to ensure that a free, independent and fearless judiciary would continue to protect the rights and liberties of all citizens and provide at all times for the rule of law in our land.

Graciously, O'Higgins CJ stated on his first day in court that he was particularly conscious of all that was expected from the holder of the office of chief justice and of the high standards of wisdom, strength and fearless integrity set by each of his predecessors. He concluded: 'I am humbled by the knowledge of the talent and experience which is shared amongst my colleagues on this bench. I know that I will be helped by that fact'. Walsh, Budd, Henchy and Griffin JJ were the other members of the Supreme Court. Declan Costello SC was the attorney general at the time. Incidentally, one of his first duties on his first day as chief justice was to preside at the swearing in of the new High Court judge, Mr Justice Liam Hamilton, who formally subscribed to his oath of office.

The new chief justice took his oath of office with the utmost seriousness. He had subscribed to the declaration 'in the presence of Almighty God' that he would to the best of his knowledge and power execute the office of chief justice 'without fear or favour, affection or ill will towards any man'. He was always conscious of the role of a judge and the place of the judiciary in a democracy. He said in *Judging the world: law and politics in the world's leading courts* (1988), in the context of law and politics, that 'a sort of judicial curtain falls down when you become a judge and it is respected by former friends and associates'. He said that he 'never heard of any kind of out-of-court approach to a judge. Nor would it be tolerated for one moment'.

Tom O'Higgins had a direct and attractive style of communicating which may be illustrated in the important judgment of *McGlinchey v Wren* ([1982] IR 154), a case concerning extradition and the nature of a political offence. The extradition of Dominic McGlinchey had been sought by the Northern Irish authorities on a charge of murder. O'Higgins CJ noted from material exhibited in McGlinchy's affidavit that the victim of murder was 'an elderly grandmother'. The chief justice stated starkly: 'She was riddled with bullets in the early hours of the morning, when her house was attacked front and rear, by a gang firing armalite rifles from a moving car'. He commented with sadness: 'This revolting and cowardly crime is one which should readily shock the conscience of any normal person and which assuredly dishonours any cause that might have been espoused by its perpetrators'. He concluded that the 'excusing *per se* of murder

and of offences involving violence, and the infliction of human suffering by, or at the behest of, self-ordained arbiters, are the very antitheses of the Christianity and civilisation and of the basic requirements of political activity'.

The *dicta* of O'Higgins CJ and the eventual extradition of McGlinchey were significant in the context of the interpretation of a political offence in the context of extradition where violence was used. (McGlinchey was, in fact, subsequently acquitted on appeal of the murder in question but was later extradited to this state from Northern Ireland, arising out of a shoot-out at Ennis, County Clare.)

In other judgments of the Supreme Court, O'Higgins CJ left his mark. In *(State) Healy v Donoghue* ([1976] IR 325), the right to justice and fair procedures was identified as an unspecified right protected by article 40.3 of the constitution and, in particular, in certain circumstances, the absence of legal aid was recognised as a violation of that right. O'Higgins CJ was clearly influenced by the preamble to the constitution which records the people 'seeking to promote the common good, with due observance of prudence, justice and charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored and concord established with other nations'. He noted that this preamble made it clear that rights given by the constitution must be considered in accordance with concepts of prudence, justice and charity, which may gradually change or develop as society changes and develops and which fall to be interpreted from time to time in accordance with prevailing ideas. He noted that the constitution did not seek to impose for all time the ideas prevalent or accepted with regards to these virtues at the time of its enactment.

In *State (Abenglen Properties Ltd) v Dublin Corporation* ([1984] IR 381), in the context of administrative law remedies, O'Higgins CJ defined the scope of *certiorari* as 'the great remedy available to citizens, on application to the High Court, when any body or tribunal (be it court or otherwise) having legal authority to affect their rights and having a duty to act judicially in accordance with the law and the constitution acts in excess of legal authority or contrary to its duty'. He noted that *certiorari* was not available to correct errors or to review decisions or to make the High Court a court of appeal from the decisions complained of. He emphasised that *certiorari* remained a discretionary remedy. This constituted an authoritative statement of the law, based undoubtedly on precedent, but was a succinct and helpful re-affirmation that has stood the test of time.

O'Higgins CJ will also be remembered for his *dicta* in the very controversial *Norris* case ([1984] IR36). His *dicta* that the deliberate practice of homosexuality had always been condemned in Christian teaching as being morally wrong, damaging to the health both of individuals and the public, and potentially harmful to the institution of marriage, reflected his deeply Christian and Roman Catholic convictions. His judgment was criticised by many. The dissenting judgments of Henchy and McCarthy JJ in *Norris* were to reflect the law as subsequently enunciated by the European Court of Human Rights.

Appointed to the Court of Justice of the European Communities in 1985, he did initially find participation among that judicial priesthood 'a little bit strange' – his own words. This may have been so because of the specialist nature of Community law and because the language of the court was French, but he was held in high esteem by members of that court.

On a personal note, I had the privilege of getting to know the judge in his capacity as chairman and founder member of the Irish Centre for European Law based in Trinity College, Dublin. He was chairman of the board from its inception in 1988 until 9 May 1997. He was a genial chairman, allowing board members full opportunity of expressing opinions in the deliberative process and finding diplomatically a consensus on contentious issues. He was a good facilitator.

Tom O'Higgins was the very antithesis of a pompous man; there was a twinkle of the most benevolent kind in his eye. He bore his many achievements modestly. He exuded great charm and possessed the genius of friendship.

The presidency of Ireland eluded Tom O'Higgins, a position he would have enormously enjoyed and for which he was eminently suitable. But he gave generously of himself in the (ultimate) solemn business of the solid government of our land as a member of the legislative, executive and judicial arms of the state.

In 1948, Tom O'Higgins married Therese Keane, who survives him together with five sons and two daughters. G

Eamonn G Hall

SADSI
Solicitors Apprentices Debating Society of Ireland

Survey: trainee working conditions

As predicted, May has been an exceptionally busy month for the SADSI team. The PPC II 'welcome back' party set the ball rolling at the end of April, and we haven't stopped since, with the maiden speakers' debate and the Achill trip within two weeks of each other.

We have also been progressing work on SADSI's welfare role. Nessa Barry, Sonya Heney and Cormac O'Regan have been busy preparing the student survey while juggling ethics exams and finishing up in their offices. Their work complete, the survey was distributed in the last week in May, and SADSI received a surprisingly swift and detailed response. With this data, we hope to get as clear a picture as possible of the situation facing our trainees. Armed with this information, we can better represent you.

The four-page survey poses questions that range from the very general 'How did you finance PPC I/PPC II?' to the specific 'Indicate the number of hours that you work on average per week and your holiday entitlements'. Questions also cover the individual trainee's outlay, dependants and qualifications.

We designed these questions to examine the major aspects of the training period, but if you, the trainee, feel that we have missed something important, then please contact your committee either at Blackhall Place directly or at *sadsi_committee@campus.ie*. You can be assured that we will give serious consideration to any suggestions that you may have.

Regarding feedback from the survey, we acknowledge that while it is a relatively straightforward matter for those trainees currently on PPC II to return the forms, it takes a lot more effort to compile the data on PPC I and pre-PPC trainees. SADSI has organised a mail-drop for those not currently attending Blackhall Place. Once you have your survey, please return the completed form to SADSI as promptly as possible.

As we said before, your committee needs as much and as detailed information as possible if we are to press ahead with reforms to trainees' working conditions. Once we have the information collated, we will highlight the key issues in a future *Gazette* article and will post the full data on our website (*www.sadsi.ie*).

As to future events, besides the increasing impetus regarding wages and conditions, your committee is currently laying the groundwork for the annual careers day to be held during the summer period, and some preliminary work has also been done on the SADSI ball, which takes place in the autumn. Any comments or suggestions you may have on either of these events are most welcome.

Des Barry, Auditor

Log on to *www.sadsi.ie* for more information

Maiden speakers' debate

The recent maidens' debate was held on Thursday 15 May. It highlighted the increasing difficulty that successive SADSI committees have had in recruiting speakers for internal competition. Although a wine reception and prizes were laid on for every volunteer, the attendance was below expectations.

Such a conservative turnout cannot be attributed simply to the timing of law school assessments, and the committee is determined to reverse this situation before it gets any worse.

The committee firmly believes that the only way to guarantee quality debating by the society is to involve as many people as possible. Central to this is the acceptance of new concepts and fresh approaches, particularly from those newcomers to our ranks. If you have an interest in debating, then we urge you to contact your SADSI committee and make your contribution.

SADSI is planning a joint PPC I/PPC II debate in the coming months. The event will be held in the evening, allowing those currently in the office to get down to Blackhall Place. The committee will seek significant funding for what should be a landmark event. There will be a range of topics, and we are hoping to create a relatively informal (if competitive) atmosphere. SADSI has a fine tradition of debating and we are determined that this will continue.

SOUTHERN REGION

On Friday 11 April, SADSI held a social evening for the southern trainees. The event started in the Oven's Bar on Oliver Plunkett Street, then moved on to the Savoy nightclub, where we stayed to the early hours. Some 30 trainees attended, and SADSI extends particular congratulations to those on the PPC I course who came out so soon after their return to the office.

Plans are afoot for a further event in Cork over the next six to eight weeks – more details when we have them. Meanwhile, as I am currently attending Blackhall Place, any queries should be directed to Alex Phegan, who has very kindly offered to co-ordinate SADSI social events in the southern region. Alex can be contacted at GJ Maloney, Solicitors, in Cork.

Cormac O'Regan, southern rep

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 6 June 2003)

Regd owner: James Doyle (deceased); folio: 8653F; lands: lands of Kernanstown; **Co Carlow**

Regd owner: John Patrick McKiernan, Mullyambly, Corlismore, County Cavan; folio: 12658; lands: Kiltrasna (part); area: 0.8346 hectares; **Co Cavan**

Regd owner: Margaret Mulleary, Cavan Road, Virginia, Co Cavan; folio: 9619F; lands: (1) Greaghclogh, (2) Greaghclogh; area: (1) 8.660 hectares, (2) 1.897 hectares; **Co Cavan**

Regd owner: Thomas J O'Brien, Galbolie, Bailieborough, Co Cavan; folio: 2679; lands: Galbolie (parish of Bailieborough); area: 4.2694 hectares; **Co Cavan**

Regd owner: John Flanagan, Ballyvroughan, Carrahan, Tulla, Co Clare; folio: 7001F; lands: (1) townland of Ballyvergin and barony of Bunratty Upper and (2) Ballyvergin and barony of Bunratty Upper; area: (1) 0.6345 hectares and (2) 3.0626 hectares; **Co Clare**

Regd owners: Michael and Bernardette Darby, Lacken, Kilmihill, Co Clare; folio: 4921; lands: townland Lacken and barony of Clonderalaw; **Co Clare**

Regd owners: Patrick and Margaret Hehir; folio: 1593; lands: townland of Cullenagh and barony of Clonderalaw; area: 12.2746 hectares; **Co Clare**

Regd owner: Denis Hogan, Glenbonniv, Feakle, Co Clare; folio: 15719; lands: (1) townland of Glenbonniv and Tulla Upper, (2) townland of Glenbonniv and barony of Tulla Upper, (3) townland of Glenbonniv and barony of Tulla Upper; area: (1) 27 acres, 1 rood, 26 perches, (2) 3 roods, 29 perches, (3) 3 roods, 36 perches; **Co Clare**

Regd owners: Michael Joseph Hegarty, John Patrick Hegarty and Frank O'Flynn; folio: 27144; lands: townland of Dough and barony of Corcomroe; area: 36 perches; **Co Clare**

Regd owner: Martin Quinn, folio: 12023; lands: townland of Carrownaglogh and barony of Corcomroe; area: 33 acres 25 roods 1 perch; **Co Clare**

Regd owner: John Caplice (deceased) folio: 57884; lands: known as the townland of Duntahane situate in the barony of Clondons and Clangibbon and the County of Cork; **Co Cork**

Regd owner: Denis Hickey; folio: 5864; lands: a plot of ground being part of the townland of Knockyhena and barony of Duhallow and County of Cork; **Co Cork**

Regd owner: John Francis Madden; folio: 16558; lands: a plot of ground being part of the townland of Knockawaddra and barony of Muskerry East; **Co Cork**

Regd owner: Minister for Lands of Government Buildings, Dublin; folio: 4798; lands: known as the townland of Carrigduff situate in the barony of Barretts and the County of Cork; **Co Cork**

Regd owners: David and Mary O'Regan; folio: 25565; lands: part of the townland of Ballinaspigmore in the barony of Cork known as no 63 Halldene Drive in the City of Cork shown as Plan 63 edged red on the Registry Map OS A2 to OS 74/13; **Co Cork**

Regd owner: The County Council of the County of Cork; folio: 31912; lands: situate in the townland of Brooklodge and barony of Barrymore in the County of Cork; **Co Cork**

Regd owner: The Lord Mayor Aldermen and Burgesses of Cork; folio: 25241; lands: situate in the townland of Killeenreendowney and barony of Cork in the County of Cork; **Co Cork**

Regd owner: John O'Leary (deceased); folio: 23413; lands: a plot of ground being part of the townland of Ballinscurloge and barony of Kuinatalloon; **Co Cork**

Regd owner: The Lord Mayor Aldermen and Burgesses of Cork; folio: 3058; lands: a plot of ground being part of the townland of Deanrock and barony of Cork; **Co Cork**

Regd owners: Kevin O'Sullivan and Mary Peters; folio: 38137F; lands: situate in the townland of Lotamore and barony of Cork in the County of Cork; **Co Cork**

Regd owner: Nora O'Neill; folio: 55649, 10801F; lands: situate in the townland of Ballynadrideen and barony of Orrery and Kilmore in the County of Cork; **Co Cork**

Regd owner: Francis Henery, Ballintra, Arranmore, Co Donegal; folio: 2820; lands: Ballintra; area: 1.6769 hectares; **Co Donegal**

Regd owner: Stephen McLoughlin and Irene McLoughlin; folio: DN91001F; lands: property situate in the townland of Castleknock and barony of Castleknock. Property known as no 101 The Pines; **Co Dublin**

Regd owner: The right honourable the Lord Mayor Aldermen and Burgesses of Dublin (local authority); folio: DN30980F; lands: the property known as 20 Valeview Gardens situate in the parish of Finglas and district of Finglas; **Co Dublin**

Regd owner: Patricia Webb; folio: DN58281L; lands: property situate in the townland of Butterfield and barony of Rathdown known as No 26 Owendore Crescent, situate in the parish of Rathfarnham and district of Rathfarnham; **Co Dublin**

Regd owner: The Agricultural Credit Corporation Limited; folio: DN19316; lands: property situate in the townland of Rush and barony of Balrotherty east; **Co Dublin**

Regd owner: The Agricultural Credit Corporation Limited; folio: DN5956; lands: property situate in the townland of Rush and barony of Balrotherty east; **Co Dublin**

Regd owner: James Farrell; folio: DN5199; lands: property situate in the townland of Ballustree and barony of Balrothery east; **Co Dublin**

Regd owner: Thomas Conroy; folio: 286; lands: (1) townland of Illaunmore and barony of Moycullen, (2) townland of Illaunagappal and barony of Moycullen; area: (1) 5.294 hectares, (2) 1.459 hectares; **Co Galway**

Regd owner: Patrick Kinsella, Corananatabeg, Castleffrench, Ballinasloe, Co Galway; folio: 44479; lands: (1) Corananta Beg and barony of Killian, (2) Corananta Beg and barony of Killian, (3) Castle Ffrench East and barony of Killian, (4) Castle Ffrench East and barony of Killian, (5) Castle Ffrench East and barony of Killian, (6) Castle Ffrench West and barony of Kilconnell, (7) Castle Ffrench and barony of Kilconnell, (8) Cornananta Beg and barony of Killian; area: (1) 10 acres, 2roods, 28 perches, (2) 3 acres, 22 perches,(3) 7 acres, 34 perches, (4) 1 acre, 3 roods, 37 perches, (5) 1 acre, 3 roods, 3 perches, (6) 4 acres, 1 rood, 10 perches, (7) 5 acres, 1 rood, 9 perches, (8) 1 acre, 1 rood, 28 perches; **Co Galway**

Regd owner: Thomas Murphy, High Street, Tuam, Co Galway; folio: 46407; lands: townland of Corralea West and barony of Clare; area: 0.0581 hectares; **Co Galway**

Regd owner: Maureen O'Halloran, 5 St Bridget's Terrace, Tuam, Co Galway; folio: 24147; lands: townland of Townparks and barony of Clane; area: 103/4 perches; **Co Galway**

Regd owner: Maureen Vaughan, Roundstone House Hotel; folio: 46689; lands: townland of Roundstone and barony of Ballynahinch; area: 1.7654 hectares; **Co Galway**

Regd owner: Patrick Herlihy; folio: 9590; lands: townland of Banard and barony of Magunihy; **Co Kerry**

Regd owner: Doris Coe; folio: 6856; lands: townland of Cowpasture and barony of Offaly west; **Co Kildare**

Regd owners: Alan and Sinead Crowley; folio: 31033F; lands: townland of Newtown and barony of North Salt; **Co Kildare**

Regd owner: Michael Pollard, Co Kilkenny; folio: 771; lands: Clincaun and barony of Kells; **Co Kilkenny**

Regd owners: Michael Doran snr and Michael Doran jnr; folio: 17789; lands: lands of Clonad, Portlaoise, Co Laois; **Co Laois**

Regd owners: Richard and Mary Moloney; folio: 6266; lands: townland of Bruff and barony of Coshma; **Co Limerick**

Regd owner: John McMahon; folio: 16653F; lands: townland of Reboge and barony of Clanwilliam; **Co Limerick**

Regd owner: Breda Butterly, Duddestown, Togher, Drogheda, Co Louth; folio: 12101; lands: Togher and Ardballan; **Co Louth**

Regd owner: Michael Walsh, Chancery, Turlough; folio: 10968F; lands: townland of Toormore west and barony of Carra; area: 0.1370 hectares; **Co Mayo**

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

Regd owner: Thomas Cuffe, Fairymount, Kilrooskey, Co Roscommon; folio: 189F; lands: (1) townland of Fairymount and barony of Ballintober South, (2) townland of Cloonbony and

barony of Ballintober South, (3) townland of Derrycanan and barony of Ballintober South, (4) townland of Carroward and barony of Ballintober South, (5) townland of Fairymount and barony of Ballintober South, (6) townland of Cloonbony and barony of Ballintober South, (7) townland of Derrycanan and barony of Ballintober South; area: (1) 2.5773 hectares, (2) 0.8498 hectares, (3) 0.1542 hectares, (4) 8.4427 hectares, (5) 3.0553 hectares, (6) 0.4578 hectares, (7) 0.6778 hectares; **Co Roscommon**

Regd owner: Owen Joseph Hester, Clooncagh, Castlerea, Co Roscommon; folio: 2844; lands: townland of Clooncagh and barony of Castlereagh; area: 5.2103 hectares; **Co Roscommon**

Regd owner: Paul and Ursula Moylan; folio: 16247F; lands: townland of Grange and barony of Roscommon; area: 1.176 hectares; **Co Roscommon**

Regd owner: Bernard Martin, Ardsallagh, Boyle, Co Roscommon; folio: 9065F; (1) lands: townland of Lecarrow and barony of Boyle; area: 7.448 hectares, (2) lands: townland of Ardmore and barony of Boyle; area: 3.920 hectares, (3) lands: townland of Derrymaquirk and barony of Boyle; area: 1.148 hectares; **Co Roscommon**

Regd owner: Bridget Bulfin; folio: 33274; lands: townland of Raheens and barony of Ikerrin; **Co Tipperary**

Regd owners: Barry and Catherine Gothard; folio: 3624; lands: townland of Kilenaule and barony of Slievardagh; **Co Tipperary**

Regd owner: Mary Gould; folio: 28726; lands: townland of Ballinvilla and barony of Ormond Lower; **Co Tipperary**

Regd owners: Eamonn and Patricia Coffey; folio: 29131 Co Tipperary; lands: townland of Cragg and Annaholty and barony of Owney and Arra; **Co Tipperary**

Regd owners: Sean Walsh and Deirdre Catherine Walsh; folio: 2114L; lands: situate to the north east of Grange Road Upper in the parish of Saint John's Without in the County Borough of Waterford; **Co Waterford**

Regd owner: David Flanagan; folio: 18280F; lands: a plot of ground known as 96 Roanmore Park in the Parish of Trinity without division E1 and in the County Borough of Waterford; **Co Waterford**

Regd owner: Brian Murphy; folio: 13809F; lands: townland and barony of Talbotstown upper; **Co Wicklow**

WILLS

Healy, Michael Joseph (deceased), late of Toor, Hollywood, Co Wicklow. Would any person having any knowledge of a will made by the above named deceased who died on 5 May 2003 at Toor, Hollywood, Co Wicklow, please contact Charles E Coonan, Solicitor, 55 South Main Street, Naas, Co Kildare

Hughes, John Edward (deceased), late of The Chalet, Aille, Barna, Co Galway. Would any person having knowledge of a will made by the above named deceased who died on 3 March 2003, please contact Helena Boylan & Co, Solicitors, High Street, Westport, Co Mayo, tel: 098 29835, fax: 098 29855, e-mail: haboylan@eircom.net

O'Mahony, Michael (deceased), late of Clonhaussey, Edgesworthstown, Co Longford and formerly of 93 Lower Richmond Road, Putney, London SW 15 England. Would any person having knowledge of a will made by the above named deceased who died on 21 April 2002 at Blackrock Clinic, Dublin, please contact JA Shaw & Co, Solicitors, Mullingar (Ref: ST/C/38) tel: 044 48721, fax: 044 40361, e-mail: seamus@jashaw.ie

Preston, Madeleine Emily, late of Swainstown, Kilmessan, Co Meath. Would any person having knowledge of a will executed by the above named deceased who died on 26 March 2002, please contact Susan Bryson of A&L Goodbody

EMPLOYMENT

Apprentice solicitor available, a bright, enthusiastic and diligent law graduate available for immediate start. Computer literate with ability to work as part of a team or on own initiative with appropriate support and supervision. Any area considered and salary negotiable. Reply to **box no 53**

Branigan & Matthews, Drogheda, require a solicitor with a minimum of three years' PQE for general practice. Salary negotiable. tel: 041 9838726 or e-mail: kevinbyrne@braniganmatthews.com

Experienced solicitor in all areas of practice available for employment. Short term or long term. Munster area preferred. Reply to **box no 54**

Locum solicitors required for three months: Legal Aid Board, Dublin (Gardiner St) and Athlone. Contact Human Resources Section, Legal Aid Board, tel: 066 947 1000, fax: 066 947 1036

Locum solicitor required from 28 July 2003 to 15 August 2003 inclusive. Conveyancing and litigation experience required for a Dublin city centre office. Please apply to **box no 52**

Locum or part-time position in general practice required by solicitor retired from the public service. Dublin area. Holds current practising certificate. Computer literate. Tel: 01 6686901

Solicitor required for south-west practice, experience in litigation and conveyancing essential. Must have computer skills and be technology-aware. Please reply to **box no 51**

MISCELLANEOUS

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

Northern Ireland agents for all contentious and non-contentious matters. Consultation in Dublin if required. 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. 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

Office to let: Monkstown – excellent refurbished stylish mews building in village. Adjacent to Dart. Suit image-conscious professional practice. 87sq m. €27,500 pa. Alarm, electric heat-

ing, carpets, blinds etc. Furnished/unfurnished as required. North's, tel: 01 433 2222

For sale or merger: solicitor's sole practice in Dublin 2. Genuine enquiries from principals only to F Lafferty, Accountant, 7 Herbert Street, Dublin 2

Established general practice for sale in east Donegal. Solicitor retiring from practice. Replies to **box no 50**

Offices to let: Great location in Smithfield adj Four Courts and proposed LUAS. Excel mod. building 389 sqm, one car space, first letting, ready for fit out. North's, tel: 01 433 2222

TITLE DEEDS

In the matter of the *Landlord and Tenant Acts, 1967-1987* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978*: an application by Vincent O'Connell
Take notice that any person having any interest in the freehold estate of the following property:

All that and those the premises formerly known as No 1 Eglington Terrace and now known as No 48 Ranelagh Road, Ranelagh, Dublin 6.

Take notice that Vincent O'Connell 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 any party asserting that they hold a superior interest in the aforesaid premises (or any of them) are called upon to furnish evidence of title to the aforementioned premises to the below-named within 21 days from the date of this notice.

In default of any such notice being received Vincent O'Connell intends to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the county of 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 each of the aforesaid premises are unknown or unascertained.
Date: 12 May 2003
Signed: Margaret McElrean, Maguire McErlean, Solicitors, 78/80 Upper Drumcondra Rd, Dublin 9

In the matter of the *Landlord and Tenant Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rent) (No 2) Act, 1978*: An application by Trimderry Properties Limited
Take notice that any person having any interest in the following property: All that and those 9A Mount Brown, Dublin 8.

Take notice that Trimderry Properties intends to submit an application the county registrar for the County/City of Dublin.

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

In default of any such notice being received Trimderry Properties Limited intends to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the County of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in each of the aforesaid premises are unknown or unascertained.
Dated: 16 May 2003
Signed: Dermot P Coyne, Solicitors, Little Bridge House, 1 Main Street, Lucan, Co Dublin

In the matter of the *Landlord and Tenant Acts, 1967-1994*. And in the matter of the *Landlord and Tenant (Ground Rent) (No 2) Act, 1978*: An application by Trimderry Properties Limited
Take notice that any person having any interest in the following property: All that and those 8 Mount Brown, Dublin 8.

Take notice that Trimderry Properties intends to submit an application to the county registrar for the County/City of Dublin.

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

In default of any such notice being received Trimderry Properties Limited intends to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the County of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in each of the aforesaid premises are unknown or unasscertained.
Dated: 16 May 2003
Signed: Dermot P Coyne, Solicitors, Liffey Bridge House, 1 Main Street, Lucan, Co Dublin

In the matter of the *Landlord and Tenant Acts, 1967-1994* and in the matter of sections 9 and 10 of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978* and in the matter of sections 8 and 17 of the *Landlord and Tenant (Ground Rents) Act, 1967*. Michael Golden as intended proposed personal representative of the estate of the late Patrick J Golden (applicant). And the unknown person(s) (respondents)
Application was made on 16 April 2003 to Fintan J Murphy the County Registrar for the County of Mayo at Westport courthouse in the County of Mayo by the representatives of the late Patrick J Golden a person entitled under the above legislation to purchase the fee simple interest in 'all that piece or plot of ground situate on the North side of James Street in the town of Westport with the building erected on said plot situate in the parish of Aughavale barony of Murrisk and County of Mayo'.

This property was held by the deceased under a lease made on 13 July 1904 between John Palmer Brabazon and Patrick Grady for a term of 99 years from 1 July 1904 at the yearly rent of £9.10.

The applicant has been unable to ascertain who is entitled to the fee simple interest in the said property and the county registrar has directed that this advertisement be placed in the solicitors' *Gazette* to enable persons who may be entitled to the fee simple interest in reversion to forward documentary evidence of such entitlement to James Hanley & Company, Solicitors, The Mall, Westport, Co Mayo, within one month of the date thereof.
Date: 14 May 2003
Signed: James Hanley & Company, Solicitors, The Mall, Westport, Co Mayo

In the matter of the *Landlord and Tenant Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) Act, 1978* and in the

matter of the *Landlord and Tenant Act, 1984*. An application by Gael Linn, Teoranta, 35 Dame Street, Dublin 2 in the city of Dublin 2.

Take notice that any person having any interest in the freehold estate of the following property:

All that and those the hereditaments and premises known as the Star Cinema, Crumlin now known as Crumlin Superbowl situate at Crumlin Road and Kildare Road in the parish of Crumlin barony of Uppercross and the City of Dublin more particularly described in an indenture of lease dated 31 December 1947 Daniel McAllister to Crumlin Cinemas Limited for a term of 989 years from the 31 December 1946 subject to the yearly rent of IR£125.00 and to the covenants and conditions therein contained.

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

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

Date: 20 May 2003

Signed: Young and Company (solicitors for the applicant), 2 Charleston Road, Dublin 6

In the matter of the *Landlord and Tenant Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) Act, 1978* and in the matter of the *Landlord and Tenant Act, 1984*. An application by Gael Linn Teoranta, 35 Dame Street in the city of Dublin.

Take notice that any person having any interest in the freehold estate of the following property:

All that and those the hereditaments and premises known as Cabra Cinema situate at Quarry Road in the parish of Crumlin barony of Uppercross and the city of Dublin more particularly described in an indenture of lease dated 2 May 1949 Cabra Grand Cinema Limited to Irish Cinemas Limited for a term of 495 years from the 16 April 1949 subject to the yearly rent of IR£450.00 and to the covenants and conditions therein contained.

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

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

Dated: 20 May 2003

Signed: Young and Company (solicitors for the applicant), 2 Charleston Road, Dublin 6

Locks, stocks and a pint of porter

'Ask somebody else to do the work and keep asking them if it's finished yet'

Paul Farrell is the registrar of companies and a principal officer in the Department of Enterprise, Trade and Employment. Prior to his appointment as registrar of companies in 1997, he served as industry attaché to the EU from 1993, before which he served ten years as manager at the Companies Registration Office.

Which living person do you most admire, and why?
Peter McVerry, for being such a determined force in the Irish conscience for so many years.

What's the best piece of advice you ever got?
Measure twice – cut once.

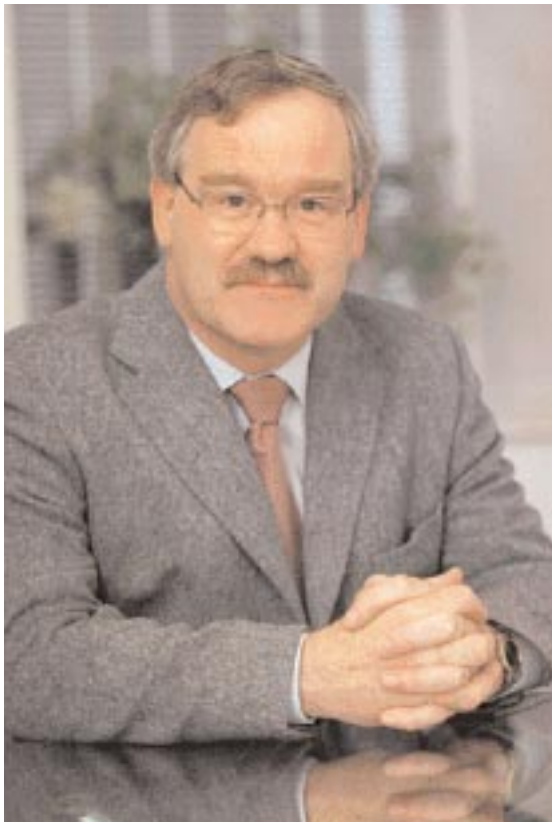
Favourite restaurant?
Locks in Portobello for the oh-hell-we-might-as-well night out. Good food and friendly staff who respect their own work. Near where we live so no car, and maybe I will have a port, thanks.

Best decision you ever made?
Resisting pressure from 1987 to 1990 to put in a microfilm-based document system in the CRO. The paper-based system was up the creek, but I knew that eventually computerised scanning systems would be implemented and scaled to deal with our volumes. We put in a scanning system in 1991 and the file retrieval issues – at least – disappeared within months.

Worst decision you ever made?
Publishing a printed directory of Irish companies. The work was done through a government fixed-rate contract and cost way more than original – informal – estimations. The cover price was fixed in accordance with non-modifiable rules, as the total printing cost divided by the number printed. That worked out at £100 a copy. I'd say we sold 20.

Beer or wine?
Wine, please, except in a pub, where a Guinness will do the trick.

How do you cope with stress
Self-delusion backed up by over-eating.



Paul Farrell: 'oh hell, we might as well'

What car do you drive?
1996 Volvo 850.

Time management tips?
Ask somebody else to do the work and keep asking them if it's finished yet.

If you could make one change to company law, what would it be?
Electronic filing will be compulsory from 1 January 2005.

Pet hate?
TV (particularly when I keep watching it).

Arsenal or Man Utd?
I know I have heard the names somewhere – what sport is that again? G