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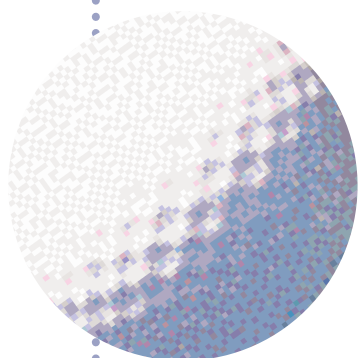
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SOCIETY DEMANDS FINUCANE INQUIRY

The shocking revelations of the recently-published *Stevens' report* on collusion between British security forces and loyalist paramilitaries in Northern Ireland has caused the Law Society to reiterate its call for a public judicial inquiry into the murder in 1989 of Belfast solicitor Pat Finucane. The Law Society Council passed a resolution in 1999 calling for such an inquiry. On the day that the *Stevens' report* was published, Pat Finucane's son, Michael, who is also a solicitor and who qualified with the Law Society of Ireland, was interviewed on *Newstalk 106* along with director general Ken Murphy.

Murphy said: 'The murder of a solicitor simply for doing his duty and defending his clients is an attack on the rule of law and the rights of every citizen in a democracy. The trail should be followed, wherever it leads, to ensure that every-one responsible, directly or indirectly, for this despicable crime is brought to justice'.

Lawyers to aid Cork law school fundraising

A number of high profile practitioners have joined a committee set up to help University College Cork (UCC) raise the estimated €10 million it needs to develop a proposed new law school.

The committee members include Vincent Power of A&L Goodbody, Pádraig O'Riordain of Arthur Cox, Cormac O'Hanlon of Cork firm JW O'Donovan, Michael Jackson of Matheson Ormsby Prentice, and Gerry Healy SC, who was recently seen at Moriarty tribunal hearings.

According to UCC law faculty's Maeve McDonagh, the proposed development will be located at a site on the city's North Mall, close to St Vincent's foot bridge and just across the river from the college's National Micro-electronics Research Centre.



To date, the faculty has raised €3 million of an estimated total of €13 million. The 2,500 square foot building will include a law library, lecture theatres, study and tutorial rooms, a moot courtroom and postgraduate research rooms.

UCC's faculty of law is embarking on the plan as it

estimates that it has only 18% of the space it currently requires, while demand for its courses continues to grow. Over the last four years, the number of applicants to the college nominating law as their first choice has grown by 25%.

The college has recently applied for planning permission for the project and a firm of architects is finalising a proposed design for the building. McDonagh said this month that the project was still at a very early stage.

RETIREMENT TRUST SCHEME

Unit prices: 1 April 2003
Managed fund: 357.679c
All-equity fund: 79.104c
Cash fund: 249.643c
Long bond fund: 107.128c

ONE TO WATCH: NEW LEGISLATION

Data Protection (Amendment) Act, 2003

President McAleese signed the *Data Protection (Amendment) Act, 2003* on 10 April 2003. The Department of Justice, Equality and Law Reform is drafting an order commencing most of the provisions of the act from 1 July 2003. It is understood that the provisions relating to registration (section 16 of the act) will take effect following a consultation process. The provision relating to enforced subject access (section 4(13)) will take effect from a time when the vetting unit of An Garda Síochána is in a position to properly handle requests for vetting. The data commissioner has published a compendium of the principal and amending acts, which is available from the office's website at www.dataprivacy.ie under *what's new*.

The implications of the act for solicitors were the subject of an article by Paul Lavery of McCann FitzGerald in the December 2002 issue of the *Gazette*. The following is a summary prepared by Kilroys Solicitors (and reproduced with their kind permission) of the factors to be considered when preparing a data privacy policy.

Registration with the Office of the Data Protection Commissioner

- Mandatory (unless exempted)
- Include all processing purposes
- Unregistered – not authorised without express consent
- Unrelated purpose(s) – separate registration(s)
- Sensitive personal data – appropriate security
- Annual renewal
- Amendment
- Failure to register is a criminal offence

- www.dataprivacy.ie

Data protection principles

- Obtain and process fairly and lawfully
- Keep accurate, complete and up-to-date
- Obtain and process – explicit and lawful purpose(s)
- Inconsistent processing – unlawful
- Adequate, relevant and not excessive
- Keep no longer than necessary
- Keep secure

Legitimate processing rules for non-sensitive data

- Comply with data protection principles, plus one of the following rules:
- Explicit consent, or
 - Contract with data subject, or
 - Necessary pre-contract step, or

- Comply with non-contractual obligation binding on the data controller, or
- Administration of justice/public function, or
- Protect legitimate interests of data controller/third parties (previously identified), unless unwarranted

Sensitive personal data

- Racial/ethnic origin
- Political opinion
- Religious/philosophical belief
- Membership of a trade union
- Physical/mental health
- Sexual life
- Offence (alleged or otherwise)
- Proceedings/outcome (alleged or otherwise)

Legitimate processing rules for sensitive personal data

Comply with data protection principles, plus one non-sensitive

Confusion over legal privilege follows UK court ruling

A recent English ruling limiting the grounds for claiming legal advice privilege when dealing with clients makes interesting reading for Irish solicitors, even though Irish courts may not follow the UK judgment.

The English Court of Appeal's recent ruling in *Three Rivers District Council and Ors v The Governor and Company of the Bank of England* ([2003] EWCA Civ 474) has plunged that jurisdiction's law governing legal advice privilege into uncertainty.

The court, headed by master of the rolls, Lord Phillips, found that documents and internal memoranda prepared by the Bank of England's employees and forwarded to its solicitors had the same status as information from independent agents and third parties. As a result, they were not protected

by legal advice privilege.

According to Law Society Litigation Committee chairman Roddy Bourke, if the decision were applied in this country, it would limit the privilege to the actual communications between the client and lawyer. Any material supporting a request from an organisation for legal advice would not be covered. This would be a marked departure from the current position.

'Most Irish lawyers would consider with some degree of confidence that a document created for the purpose of seeking legal advice, and not just simply the actual written communications between the client and lawyer, is protected by legal advice privilege', he said.

He warned that pending clarification of the English law or an Irish decision on the



Roddy Bourke: ruling likely to be rolled back

point, lawyers and their clients should assume there is a question mark over the issue. 'They may decide to try to set out briefing information in the body of their letters and other written communications with their lawyers, rather than as separate attachments', he said. 'The practical problem remains, though, that if the English decision is "right", any

background notes or papers written by employees for the purpose of preparing the letter may not be protected'.

Bourke told the *Gazette* that Irish lawyers were concerned by the judgment and pointed out that it had chaotic consequences in England. However, he added that most English practitioners believed that it would be successfully appealed.

'It is going to be appealed, and they (English lawyers) are pretty confident that it will be pulled back', he said, adding that it was unlikely that Irish courts would follow suit.

'I think our courts would be loath to do the same thing', he said. 'The rules have to be practical, and this would not be very practical to implement'. He added that it would effectively make it difficult for organisations to take legal advice.

processing rule plus one of the following rules:

- Explicit consent, or
- Perform employment law right/obligation, or
- Prevent injury/damage to the person or vital interests of data subject, or
- Non-profit making body:
 - political/philosophical/religious/trade union purpose, and
 - members only
- Medical purpose (subject to professional secrecy), or
- Statistical purposes (*Statistics Act, 1993*), or
- Political opinions – electoral purposes, or
- Substantial public interest (for example, taxes, state benefits, pension or allowances)

Direct marketing: additional rules

- If requested – 40 days to cease

processing and erase

- Inform data subject in writing
- Notify any non-marketing purposes in writing
- On collection – notify the purpose and right to object

Transfer of personal data abroad

Within EEA:

- DP principles
- Legitimate processing rules
- Fundamental freedoms

Outside EEA:

- Adequate level of protection – privacy and fundamental rights, unless:
 - necessary to perform/facilitate contract
 - public interest
 - legal proceedings
 - protection of vital interests
 - authorised by ODPC
 - adequate contractual protection

Security of personal data:

- Required = appropriate security, to prevent unauthorised access, alteration, damage, accidental loss, having regard to:
 - level of risk
 - nature of data
 - consequence of loss or damage
 - available technical means
 - costs involved

Rights of the data subject

- Access (within 40 days)
 - confirmation, description, purpose, recipients, copy, source
- Rectification/erasure (within 40 days)
- Object, unless:
 - explicit consent, or
 - contract/pre-contract step, or
 - compliance with non-contractual obligation imposed on data controller, or
 - protect vital interests of the

data subject, or

- electoral activities/ministerial regulation
- Automated decision-taking – unlawful
- Unless the decision is:
 - required to consider contract with the data subject (with a view to concluding contract), or
 - taken in course of contract performance, or
 - authorised/required by law with notification to data subject
- And either:
 - the effect is to grant request, or
 - protect legitimate interest/consent of data subject. **G**

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

Cavan solicitors honour retired county registrar

Cavan solicitors are planning a formal farewell for Tommy Owens, the well-known county registrar, who recently retired after 30 years.

Cavan Solicitors' Association and the local branch of the Courts Service are planning to hold a formal retirement function for Owens at the Cavan Crystal Hotel, Cavan, on Friday 4 July.

Practitioners, the bench, the Courts Service and the gardaí queued up to pay tribute to Owens when he sat for the last



Owens: exceptional ability

time in Cavan Circuit Court. Marian O'Donovan Mackey,

president of Cavan Solicitors' Association, described him as a man of extraordinary academic ability who always strove for excellence. She wished him and his wife Margo a long and happy retirement.

Cavan Circuit Court judge, Matthew Deery, said Owens' departure marked the end of an era. 'I personally owe him a debt of gratitude', he said. 'I look on him as a very wise man, a very courteous man and a very approachable man'.

Owens himself told the gathering that his office was now handling a hugely increased workload with the same number of people it had 25 years ago. He said this was largely down to workers' dedication and willingness to adapt to modern technology.

In his 30 years in the job, Owens served with circuit judges Noel Ryan, Herbert McWilliam, Frank Roe, David Sheehy and, for the last nine years, Matthew Deery.

Legal execs win litigation and practice rights

Legal executives in Britain are to win the right to conduct litigation and practise in their own right, under plans recently unveiled by the Institute of Legal Executives (ILEX).

Under the English *Access to Justice Act 1999*, ILEX has the power to grant rights to conduct litigation to suitably-qualified legal executives. Recently, the institute's president, Mary Dowson, said the organisation was developing a scheme of education and training for members who want to take up such rights.

The training will focus on civil and family law, but will not be a general right to

conduct litigation, according to reports in the English legal press. The scheme is not designed for executives who plan to continue working

under the supervision of solicitors, she said.

The ILEX scheme would allow legal executives to consider independent practice,

either as the owner of a legal practice or as head of a legal team in commerce, industry or local or central government, added Dowson.

Brits launch young lawyers' scheme

Anyone who thinks British culture is limited to lager, football and pork scratchings should check out the British Council's *European young lawyers' scheme* 2003/4. The council is a non-profit organisation dedicated to spreading the good word about British culture in 254 countries worldwide, and law is one of the fields in which it does this.

The scheme is being offered

in Ireland for the first time and is open to practitioners under 36 with some years' work experience. Successful applicants will have the option of taking up a place in either the College of Law in London, where they will learn about the law of England and Wales, or at the Faculty of Law in Edinburgh, where they can learn about the Scottish legal system.

After exams and a written

assignment, participants get placements with solicitors and barristers in London, or solicitors and advocates in Edinburgh.

Anyone interested can obtain application forms from the council's website (www.britishcouncil.org) or by contacting the council at Newmount House, 22/24 Lower Mount Street, Dublin 2, tel: 01 676 6943. All forms must be returned by Wednesday 14 May.



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Law Society
Gazette

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Society rejects taoiseach's 'profiteering' charge

No allegation of profiteering could realistically be levelled at the solicitors' profession in this country, Law Society director general Ken Murphy said this month. Responding to taoiseach Bertie Ahern's recent threat to 'call a halt to profiteering professions', Murphy pointed out that the speech contained just vague allegations and did not single out any profession, solicitors or otherwise.

The taoiseach relied on the recent report into the professions carried out by consultancy firm Indecon for the Competition Authority. But Murphy said the solicitors' profession was just one of eight which the consultants studied.

'The other professions can speak for themselves but, to whatever extent the taoiseach

intended to refer to the solicitors' profession, I would point out that no allegation of "profiteering" is in fact made by the Indecon report. Nor would one be justified', he said in a response to the taoiseach published in the *Irish Times*.

'In reality, although this may not suit the preconceived notions and agendas of some media commentators, Indecon found few restrictions of any real significance on competition in the solicitors' profession in Ireland. Indeed, many of the recommendations for change are welcomed by the Law Society or, if implemented, would be very likely to prove very minor in their effects'.

The taoiseach made his remarks during a speech to the Irish Management Institute conference in



Taoiseach Bertie Ahern: 'profiteering professions'

Killarney last month. He blamed 'learned professions, local monopolists and middle men' for driving inflation to its current high levels. He singled out professions that he claimed had been shielded from the pressures of international competition. The taoiseach later told reporters that he hoped the Competition Authority would 'push the profiteering issue very hard'.

However, he did not at any

stage in his speech name any profession, nor did he cite any independent authorities to support his claims.

In his response, Murphy pointed out that the profession had broadly welcomed the Indecon report. 'There is much in the Indecon report with which the society would wholeheartedly agree', he said, 'not least the extremely positive assessment made by Indecon of the society's regulatory and education systems'.

He stressed that the Law Society believes both in competition and in protecting the public interest. But he warned that there were a number of areas where the consultants had got the balance between these two interests wrong.

Murphy said the profession was ready to participate in the second phase of the process. 'The society looks forward to the next stage of this study', he said. 'Solicitors have nothing to hide on this issue or any other'.

Nice work if you can get it

A circular was put up in the Law Library a few weeks ago, as reported in the *Irish Times*, seeking junior counsel to work for €1,270 a day. However, the Commission to Enquire into Child Abuse, the newspaper report continued, has found it very difficult to recruit barristers on this basis.

Law Society director general Ken Murphy has no doubt that a great many solicitors would be well capable of performing the legal tasks required by the commission and would be happy to take on the work at €1,270 a day or even for less. He has now written to the commission to say so. Echoing the views of numerous

solicitors who contacted him on spotting the newspaper report, he has also asked the commission why these positions do not appear to be open to solicitors as well as barristers, given that, since last year, equality of opportunity in state appointments for lawyers has been accepted, even for the appointment of judges of the High and Supreme Courts.

'In the Law Society's view, it would be in the public interest that the positions in question should now be re-advertised as positions for which barristers and solicitors are both eligible', he said in his letter to the commission. A reply is awaited.

Briefing the politicians

'The cost of insurance is far too high. On that, everyone is agreed. But why it has reached its current level and what can be done about it are subjects on which there is less than universal agreement'.

These are the opening lines of a detailed submission which the Law Society has made to the Oireachtas Joint Committee on Enterprise and Small Business, setting out its views and proposals for reforms. The committee invited submissions

on 'government reform of the insurance market' and the society hopes that its representatives will shortly have the opportunity to meet with the committee.

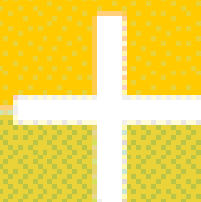
In addition, the society has sought and been promised an early meeting with the cabinet sub-committee on insurance reform which is chaired by the tánaiste Mary Harney, and includes ministers Michael McDowell and Séamus Brennan.

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Letters

War memorial protestors under fire

*From: Susan Martin, solicitor,
Dublin 13*

As a serving officer in the reserve defence forces and a newly-qualified solicitor (though speaking from my own perspective), I read with interest the letters over the past two months in the *Gazette* relating to the new memorial in the Four Courts dedicated to the memory of those solicitors and apprentices who died in the Great War.

I admit, I am mystified by the

protest of your correspondents. What is causing them such offence? Like it or not, 50,000 volunteers joined the British Army in 1914 to secure home rule for Ireland. Some went to secure, as they saw it, the rights of small nations.

Whether their actions may be judged as misguided nearly 100 years later is beside the point. These were, for the most part, ordinary people who, with no obligation whatsoever to so

do (remember, there was no conscription in Ireland), joined up, fought for and in some cases died for a cause they believed in. How horrified would they be to learn that a memorial to them would cause such offence?

In an era when people are more interested in themselves, it is only right to remind others of the sacrifice and principled beliefs of a generation of Irish people long since passed. As regards the colonial past

referred to in last month's letter, let's face it – we were a colony. From the security of our republican present, let us acknowledge the past and let it go.

The Council are to be congratulated for the erection of the memorial, and if it has not already taken place, an appropriate ceremony should be held to dedicate the same memorial. The protests belong to an earlier age.

No belly for litigation in the olden days

*From: Barry M O'Meara & Son,
Solicitors, Cork*

I found the enclosed correspondence in my office recently and thought it might be of interest.

You will note the initial letter written by solicitor John F O'Riordan on behalf of Patrick Green, and Mr O'Riordan's subsequent letter to this office (which then traded under the name of Wynne & Wynne) abandoning his threat of proceedings.

How Cork, and more particularly the solicitors that practice here today, have changed. Clearly, John F O'Riordan, solicitor, had no belly for litigation. I suspect it was a dirty word. I think Patrick Green would have got a lot more support from his solicitor today.

25 September 1902

Sirs,

Mr Patrick Green of Windsor Cottages in this city informs me that on 16 August last, while in your employment at the Chalet Restaurant, Cork International Exhibition, through the gross carelessness of another of your employees, a heavy copper

saucepan fell on my client's head, inflicting severe injuries and causing him to be laid up for several weeks.

Would you kindly let me know as soon as possible whether or not you are inclined to give my client reasonable compensation for the injuries sustained by him.

*Yours faithfully,
John F O'Riordan*

7 October 1902

Dear sirs,

My client, Mr Patrick Green, has decided on abandoning all proceedings with reference to injuries received by him at the Chalet Restaraunt, and instructs me to say that he is willing to leave the case entirely in the hands of Mr Daly, trusting to

his generosity, hoping and believing that he will take into account all the suffering he has already endured and give him some compensation, a sum sufficient to support his wife and children for a short time until my client is able to get employment.

*Yours faithfully,
John F O'Riordan*

Another blast from the past

*From: John P Carrigan ,
Glengarrif, Thurles, Co
Tipperary*

I have long since retired from practice, but in rummaging through some old files recently, I discovered this.

It was sent to me by my brother, who was then on the London stock exchange. For obvious reasons, I have withheld the names of the firms concerned, but the sender was a Manchester firm and the recipient a London one.

I never discerned the final result – negative I should think, if they were relying upon human possibility.

26 July 1972

Dear Sirs,

We acknowledge receipt of your letter regarding our sale to you on 8 January 1971 of 1,000 Silvermines Lead & Zinc Limited ordinary shares, and have taken note of its contents.

Our client, for whom we sold the shares, has lost the certificate and we obtained a letter of indemnity, but she also lost that. Another indemnity was obtained but the whereabouts of the lady was then rather mysterious, reportedly residing in Italy. The partner of our firm who dealt with the lady's investments left to go to

another stockbroker. We have been in contact with the other broker on numerous occasions and, on 11 July 1972, they informed us that they had received a signed letter of indemnity, but the lady has married, divorced, remarried, divorced again and married since the original purchase of the shares. One of the marriages was in an American state that uses the maiden name only on the certificate, whereas marriages in Britain use the most recent married name.

We will endeavour to deliver the shares as soon as it is humanly possible.

PHOTO: JAMES FRASER/REX FEATURES



Golf and the law

TIGER

Bunkers aren't the only hazards on a golf course. Henry Murdoch (golf handicap: 20) takes a slightly serious look at some of the legal implications in playing this popular game

MAIN POINTS

- Origins of the game
- Duty of care to spectators
- Duty of players to players

There can be no doubt about the increasing popularity of the game of golf. Although its detractors may describe it as 'how to ruin a good walk', it is a sport that provides great pleasure, good exercise, fantastic exhilaration and frequently no small measure of frustration. It is played by young and old and is said to keep the old young and the young sane.

With the improvement in golf equipment, both clubs and balls, golfers are now able to hit the ball further. The manufacturers claim that their equipment improves accuracy, but tell that to the average golfer and you will be told that their old bad habits of slicing, hooking and 'topping' – and even 'sockets' and 'fresh airs' – tend to return with a great deal of regularity. If you are not a golfer, you do not need to know what these terms mean, other than that the ball does not travel in the direction or for the distance intended.

All of this means that on a golf course there are increasing risks of being hit by a golf ball travelling at over 100 miles an hour. This raises issues as to the duty owed by golf clubs to players and to spectators, and by players to other players. It also raises the issue as to the importance of course design and of warnings (such as shouting 'fore!').

The rules of golf are quite specific when it comes to safety and consideration for other players. Section 1 (on golfing etiquette) states that:

- *'No player should play until the players in front are out of range'*





LAND



PHOTO: CURTIS MYERS/REX FEATURES

- *'Prior to playing a stroke or making a practice swing, the player should ensure that no-one is standing close by or in a position to be hit by the club, the ball or any stones, pebbles, twigs or the like which may be moved by the stroke or swing'.*

To comply with this rule, the player has to know his range, which, for the average golfer, can be quite variable, both in distance and direction. Difficulty can arise when the player hits a 'miracle' shot. However, it is usually not the players directly in front who are potentially in danger; it is the players on adjoining fairways or on adjoining greens. For these to be hit might require a slice or a hook. And what player on the tee anticipates such a result? And should he? And what about course design: should there be a ban on adjoining tees and greens?

Wayward shots

There is no provision in the rules of golf governing what is supposed to happen when things go wrong. However, the practice is that when a wayward shot looks like it might hit someone, or even land near another golfer, the player shouts *Fore!* Usually, in practice, the louder the shout the greater is the danger, with the player's partners joining the chorus when potentially particularly dangerous. Shouting *fore* originated in the 19th century, probably derived from the word 'before', as it tended to be used by a player *about* to play a shot. It now tends to be used *after* a wayward shot – although it has also been used in modern times to hurry up a slow fourball ahead!

In designing its course or in altering the layout of greens and tees, a golf club would be wise to employ professional golf course designers. Many golf clubs are legally structured as unincorporated associations, with no legal persona apart from that derived from all the members. Consequently, such clubs cannot incur liability from wrongs at the suit of a member (see *Murphy v Roche* [1987] IR 106).

ORIGINS OF GOLF



It is generally agreed that golf owes its origins to Scotland. Both football and golf became so popular in the 15th century in Scotland that a statute of the Parliament of King James II in 1457 decreed that both 'Fute-ball and Golfe be utterly cryed downe'. This was because both of these sports were interfering with the practice of archery, which was deemed necessary for the defence of the realm.

A further decree in 1491 in the reign of James IV indicted golf and football as '*unprofitable sportis*'.

However, James IV subsequently took up golf and

naturally became addicted to it, like most golfers today. The King's Lord High Treasurer's accounts early in the 16th century include payments for the King's equipment – '*golf clubbis and ballis*'. He appointed an Edinburgh bow-maker in 1603 to be the royal club-maker for life and, when he succeeded to the English throne as James I, he took his clubs south with him to England.

It is not surprising that the oldest club with documentary proof of its origins is the Company of Gentlemen Golfers founded in 1744, now the Honourable Company of Edinburgh Golfers, whose modern home is in Muirfield in East Lothian, Scotland. A second club, the Society of St Andrews, now the Royal and Ancient Golf Club of St Andrews, was formed in 1754. These two clubs played a major role in the development of golf and the R and A became, by common consent, the oracle of the rules of golf, which it now shares with the US Golf Association.

The oldest golf club in Ireland is the Curragh Golf Club, which was founded in 1884, a full ten years before Portmarnock Golf Club in 1894. The Golfing Union of Ireland is the oldest golfing union in the world, having been founded in 1891. There are now 408 golf clubs affiliated to the GUI, with over 250,000 members, nearly double the figure in 1986. Also, some 220,000 overseas golfing visitors come to Ireland every year, contributing in excess of €180 million a year to the national economy.

However, a golf club as the occupier of premises has a duty to entrants as regards a danger, and this depends on whether the entrant is a visitor, a recreational user or a trespasser (see the *Occupiers' Liability Act, 1995*). *Danger* means a danger due to the state of the premises (in other words, not the way in which it is used), and a *premises* includes land, water and any fixed or moveable structures, including vehicles (section 1(1) of the 1995 act).

Visitors are present by permission, by agreement or by right, and the occupier must take reasonable care of their safety under the circumstances. Recreational users and trespassers merely have a right not to be injured intentionally or by the occupier's reckless disregard for their safety. Recreational users, who are on the land for certain defined purposes, have a further protection not given to trespassers: if any 'structures' are provided on the land for their use, the occupier must keep them in a safe condition.

A person paying a green fee to a golf club is a visitor, as is a spectator paying a charge to watch a golf match. The same applies to a golfer visiting another club to play a match against that club (see *Heaves v Westmeath Co Council* [2002 CC], as reported in the May 2002 issue of the *Gazette*, page 38).

A golf club owes a duty of care towards such a person (section 3 of the 1995 act). The common duty of care means a duty to take such care as is reasonable in all the circumstances to ensure that the visitor to the premises does not suffer injury or damage by reason of any danger existing thereon (section 3(2) of the 1995 act). The duty of care has to have regard to the care which a visitor may reasonably be expected to take for his own safety and the extent of supervision and control an accompanying person may reasonably be expected to exercise over the visitor's activities (section 3(2) of the act). This is an important provision as to the duty to children or people with disabilities.

Where eagles dare

A non-member who enters a golf club without charge or invitation – for example, to follow around a golf match – is arguably a recreational user if watching golf is a recreational activity. In this case, the golf club owes a duty to this non-member in respect of a danger existing on the premises (a) not to injure the person or damage his property intentionally, and (b) not to act with reckless disregard for the person or his property (section 4(1)). In determining whether the club acted in reckless disregard, all the circumstances of the case must be taken into account (section 4(2)). A list of factors are provided, including: whether the club knew or had reasonable grounds for believing that a danger existed; the care which the person might reasonably be expected to take for his safety having regard to his knowledge thereof; and the extent of supervision and control that an accompanying person might be expected to exercise (section 4(2) of the 1995 act).

In a landmark Northern Ireland case in 1939, the Court of Appeal held that a golf course need not be constructed so that greens and tees are not close to one another for safety reasons; such a rule would impose serious limitations on where golf could be played (*Potter v Carlisle & Cliftonville Golf Club Ltd* [1939] NI 114 CA). In this case, a golfer, while putting on a green, was struck by a ball driven by a player from an adjoining tee and lost the sight of an eye. The court held that when the plaintiff paid his green fee and received his ticket, he impliedly agreed to take the course as he found it, provided it was free from unusual dangers or traps, and to accept the risks of the game as between himself and the club, and that the injury he received was due to a risk of the game and not to any negligent design or construction of the course. The court held that 'if the (defendants) are guilty of actionable negligence, then all the well-known clubs such as St Andrews are also guilty of actionable negligence'.

In another case, the court held that a person who goes on to a golf course, just as a person who crosses the street, takes certain risks inherent to the place where he is (*Cleghorn v Oldham*, 43 TLR 465). However, in the Circuit Court in 1999, a golfer who was struck on the head by a ball after a 'viciously



PHOTO: CHARLES KNIGHT/REX FEATURES

hooking' shot was awarded £5,250 (€6,666) damages on the basis that a net or fence would have protected him from injury and the golf club was in fault in not erecting such a fence (*Gray v Leopardstown Golf Centre* [1999], *Irish Times*, 21 July 1999).

Bogies on the horizon

The duty of golfers to each other is governed by the rules of golf and the general law of negligence. Apart from the rules, which require a player not to play until the players in front are out of range and to ensure that no-one is standing close enough to be hit, golfers are bound by the general law of negligence. That general law provides that negligence is the doing by a person of some act which a reasonable and prudent man would not have done in the circumstances of the case in question, or the omission to do something which would be expected of such a man under such circumstances.

Under the general law of negligence, there must be (a) a duty of care between the parties, (b) a failure to observe the required duty of care, and (c) reasonably foreseeable damage suffered. Clearly, hitting a ball which was obviously within range of

other players directly in front would be a negligent act, as would be the failure to shout 'fore' when it was obvious that a wayward ball was on a potential collision course with other players.

The courts seem to take a very pragmatic view, looking at each case on its own merits, including imputing a duty on a player who is hit, and also having regard to the skill of the player who hits the ball. For example, in one case the plaintiff struck a golf ball onto the wrong fairway and, in recovering it, was stuck by a ball driven by another golfer from the tee of that fairway. It was held that had the other golfer seen the plaintiff, the plaintiff would have been 25% contributory negligent for failing to check on the actions of golfers on that tee (*Feeny v Lyall* [1991] SLT 156; [1991] CLY 5298).

In another case, the defendant, a 24-handicap golfer, mis-hit a ball from the tee and struck the plaintiff on an adjacent green. It was held that the defendant was liable as all he had to do was wait for the plaintiff to finish putting. The risk of a golfer of the defendant's level of skill mis-hitting the ball was not so small that a reasonable man would disregard it. There was no basis for a plea of *volenti non fit*

DUTY OF CARE TO SPECTATORS

Where the spectator has paid a charge for entry, the spectator is regarded in law as a visitor and the duty of care owed is to take such care as is reasonable in all the circumstances to ensure that the visitor to the premises does not suffer injury or damage by reason of any danger existing thereon.

In *Donaldson v Irish Motor Racing Club & Thompson* (Supreme Court, 1 February 1957), Kingsley Moore J observed that:

'It corresponds to common-sense and reality to suppose that the spectators appreciate and take the risk of certain accidents inherent in the nature of the game or sport. If it were pointed out to the ordinary spectator at a point-to-point or a motor race that a horse or car might get out of control and run into him, causing him serious injuries, he would probably reply "*I know that, but the chances are so small that I am willing to risk it*"; and if a spectator on the touch line at a hockey match or round the green at a golf championship were reminded that it was by no

means an improbability that he could be hit by a ball, he would say "*Yes, but the chances of any serious injury resulting are so remote that I am prepared to disregard them*". Where the liability of the promoter rests on contract (as where the spectator pays) effect can be given to these considerations by implying a term to accept such risks; and, where it lies in tort, the same result can be arrived at by applying the doctrine of *volenti non fit injuria*'.

This doctrine (that to which a man consents cannot be considered an injury) is the defence in an action in tort that the plaintiff, with full knowledge and appreciation of the danger, voluntarily accepted the risk and exposed himself to the danger. In the Circuit Court in 1992, a golf spectator at the 1990 Irish Open Golf Championship who was struck on the head by a golf ball had her action dismissed, the judge finding that the defendants did not have a duty to provide against improbable or unlikely happenings (*Dalton v Portmarnock Golf Club and PJ Carroll & Co plc* [1992]).

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INNUENDO AND CHOCOLATES

Whatever you do as an amateur golfer, do not go around the golf course with a bar of chocolate sticking out of your pocket. You might have your photo taken and used in a promotion for the chocolate and make legal history. Think of the amateur golfer Tolley in the 1930s, who was responsible for showing that a defamatory innuendo may be drawn from the circumstances of a publication rather than from the published words (*Tolley v JS Fry and Sons Ltd* [1931] AC 333).

In this case, Fry, a firm of chocolate manufacturers, depicted Tolley, a well-known amateur golfer, without his knowledge or consent in a caricature in an advertisement for their chocolates. Tolley was shown in golfing costume, with a caddie, as just having completed a drive. He had a packet of Fry's chocolates protruding from his pocket.

Below the caricature was the following limerick:

'The caddie to Tolley said, Oh, Sir,
Good shot, Sir! That ball, see it go, Sir,
My word how it flies,
Like a cartet of Fry's,
They're handy, they're good, and priced low, Sir'.

Tolley claimed that the advertisement could be understood to mean that he had agreed or permitted his likeness to be exhibited for reward or notoriety and that he had thereby prostituted his reputation as an amateur golfer. The House of Lords held that the caricature was capable of bearing the meaning alleged in the legal innuendo.

injuria ('that to which a man consents cannot be considered an injury'): *Lewis v Blackpool Golf Club* [1993] SLT (Sh Ct) 43; [1992] CLY 6076.

Sing when you're swinging

Generally in negligence, an adult standard of care is not usually imputed to a child. However, in the USA, it has been held that where an infant participates with adults in a sport ordinarily played by adults, on a course or field used by adults for that sport, and commits a primary tortious act, the child should be held to the same standard of care as the adult participants (*Neumann v Sblansky* [1971] 318 NYS 2d 925; 312 NYS 2d at 951). In this case, the plaintiff was struck by a golf ball driven by the defendant (an 11-year-old boy), who had shouted 'fore' but had not been heard by the plaintiff. The defendant had been playing a par three hole of about 170 yards and the plaintiff was within 150 to 160 yards of him and was leaving the green of the hole when he was struck. In that case, Marbac J considered that the analogy with driving a car was sufficiently strong to apply the same increased standard of care:

'Just as a motor vehicle or other power-driven vehicle is dangerous, so is a golf ball hit with a club. Driving a car, an aeroplane or powerboat has been referred to as adult activity even though actively engaged in by infants ... Likewise, golf can easily be determined to be an adult activity, engaged in by infants. Both involve dangerous instruments ... No matter what the age of a driver of a car or a driver of a golf ball, if he fails to exercise due care serious injury may result. Driving a car, it is true, is not a game as golf may be. However, golf is not a game in the same way that football, baseball, basketball or tennis is a game. It is a game played by an individual which, in order to be played well, demands an abundance of skill and personal discipline, not to mention constant practice and dedication. Custom, rules and etiquette play an important role in this game. Foremost among these is the fact ... that one does not hit a ball when it is likely that the ball could or will hit someone else for the obvious reason that someone could get hurt'.

A golf club should employ a professional course designer for any alterations to its course. It should have a risk-management system in place to ensure that reports of players being hit by wayward shots are investigated to see if a course realignment or the

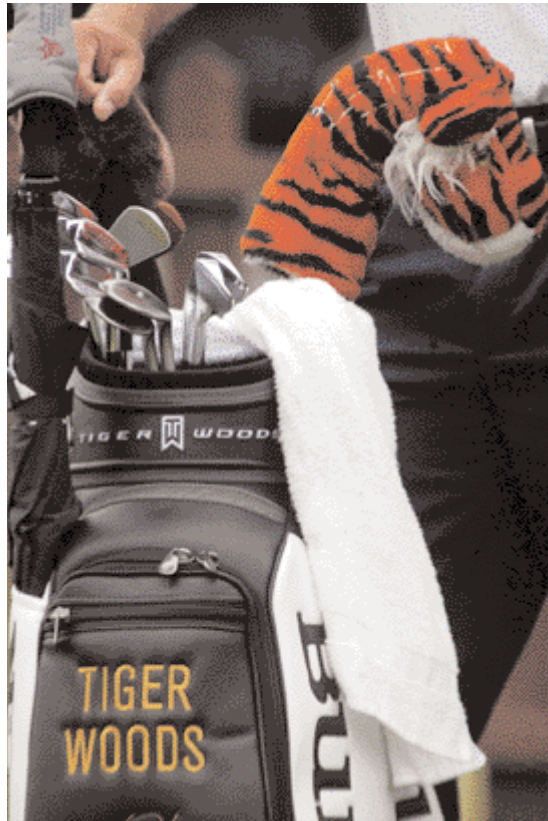


PHOTO: JAMES FRASER/REX FEATURES

provision of nets or fences would help solve the problem. A golf club should not relax in the knowledge that it cannot be sued by its own members; there are many more entrants to its golf course who may be in a position to sue. Golfers should be ever mindful that their next shot could be that 'miracle' shot, but it could also be a slice or a hook. Golfers should not hesitate about shouting 'fore' for that wayward shot and should have golf insurance in place, for themselves and for their children.

When lining up a shot, the last thing a golfer should be thinking about is the law. There are too many factors that can turn an otherwise perfect swing into a disastrous trajectory of the ball! **G**

Henry Murdoch is a barrister and author of Murdoch's Irish legal companion 2003 on CD-ROM and on-line. He is a member of Dun Laoghaire Golf Club (founded 1910) and president of the Mayo Golf Society.



WE SHALL

Lisbon played host to this year's annual conference. The *Gazette* reports on the business session, where the theme was the *ECHR: its implications for lawyers*



Top left: Attorney general Rory Brady (centre), with the presidents of the law societies of (from left): Scotland, David Preston; Northern Ireland, Joe Donnelly; Ireland, Geraldine Clarke; and England and Wales, Carolyn Kirby

Opposite page, top right: Speakers and guests at the business session: Geraldine Clarke, Law Society president; Brendan Murphy, Osborne Recruitment; Patrick Howett, Jardine Insurances; Maurice Manning, president of the Human Rights Commission; guest speaker Dr Antonio Maria Pereira; and attorney general Rory Brady

Torture may have been banned under the *European Convention on Human Rights*, but delegates at the Law Society's annual conference in Lisbon were subjected to cruel and inhuman punishment at the business session on Friday morning. Just when they thought they could relax and let their minds drift to higher things, such as the *ECHR: its implications for lawyers*, along comes Patrick Howett, managing director of Jardine Insurances, to lash them over 'compo culture' and the high cost of insurance in Ireland. Trapped and terrorised, many delegates would have signed blank statements there and then, confessing that the legal profession was at the root of all Ireland's woes.

Luckily, Dr Antonio Maria Pereira was on hand to apply salve to their aching backs. Portugal, he explained, had endured 50 years of dictatorship until the democratic revolution of 1974. 'It is only when you are deprived of human rights that you can really appreciate them', he said. Pereira himself had been arrested without a warrant and held as a political prisoner for two months. Waves of empathy emanated from the delegates, still sensitive after their recent ordeal at the hands of Jardine Insurances.

Unchain my heart

A chorus of 'We shall overcome' was interrupted by the next speaker, Senator Maurice Manning, president of the Human Rights Commission. 'The commission expects to be in conflict with the government', said Manning, 'otherwise it would not be doing its job. However, it will not engage in

conflict for conflict's sake and will try, as far as possible, not to duplicate the work of other agencies. It will intervene when other avenues have been exhausted and where intervention will add value'.

He added that the commission would be seeking the appointment of a police ombudsman 'with the purpose of ensuring satisfaction with complaints handling and restoring public confidence'. Other areas that the commission would focus on were the prisons and 'the provision of facilities for distressed adolescents prior to court cases', he said.

Turning to the thorny subject of 'second generation rights', such as an individual's right to a certain standard of living or access to social services, Manning said it was a matter of debate as to whether these rights were 'justiciable or merely aspirational'. The current minister for justice, he noted, believes that the courts should not have the power to adjudicate on social and economic rights, but added: 'While I have some sympathy with the minister's view that social and economic rights should be established and maintained through the parliamentary process, in many instances this is not done. Indeed, the parliamentary process often defends the rights of the stronger, rather than the more vulnerable, parties in society. The commission's job is to observe and to seek to ensure that the government does, in fact, protect those rights'.

The Human Rights Commission was not there to express outrage and to make instant responses, said Manning, but to consider issues and express views with a strong sense of authority. 'The success or



OVERCOME

otherwise of the commission will be judged by how it chooses its issues and whether it makes a difference in the enforcement of human rights in Ireland', he concluded.

Old Man River

The final speaker at the business session was attorney general Rory Brady, who raised the spirits by noting in passing that 'It now seems apparent that the third secret of Fatima is the day when insurers will reduce their premiums'.

Brady warned delegates not to overestimate the impact of the *European convention* on Irish law. Ireland, he said, 'has had an activist judiciary and judicial review for many decades, guaranteed by the constitution. In 1950, Ireland had signed up to the *European convention* and, by 1953, only Sweden and Ireland allowed direct petition to the court in Strasbourg'. But he added that the Human Rights Commission 'does introduce a new dynamic'.

'The Irish judiciary will look at the rights contained in the convention and will look at the jurisprudence developed under the convention', said Brady. 'However, the base line is where Ireland stands today and what is its native jurisprudence. The Irish judiciary has always been an interventionist judiciary'.

Brady defended the method of incorporating the convention into Irish law, and asked his audience to consider the alternative. 'This would involve incorporating the convention into the constitution and, thereby, replacing constitutional rights with convention rights. However, in some circumstances, Ireland's constitutional rights are stronger than the convention rights. What effect would this have on the decades of Irish jurisprudence in relation to constitutional rights?'.



Law Society president Geraldine Clarke

He also predicted that the Convention on the Future of Europe would have 'a dramatic impact' on Irish sovereignty.

On that note, the delegates unchained themselves from the railings and went forth to exercise their democratic right of exploring the best that Lisbon had to offer. **G**



Senator Maurice Manning



Rory Brady SC

New resolution

Alternative dispute resolution has never quite caught the imagination of litigants and lawyers in the way its supporters believed it should. But this could change if ADR becomes mandatory in commercial disputes.

William Aylmer explains

MAIN POINTS

- ADR in England and Wales
- New commercial court planned
- Training for litigation lawyers

It can reasonably be argued from a commercial perspective that the resolution of disputes is a service provided to the business community. Traditionally, in both common law and in civil law jurisdictions, the state has provided a dispute resolution service through the administration of civil justice systems. This has certainly been the case in Ireland and the UK, where court proceedings have been the weapon of choice in business disputes (except in specific industries such as construction, where arbitration is the norm).

This is not to say that business people have found this approach to be either efficient or cost effective. On the contrary, the most common complaint received by solicitors from their commercial clients is still that litigation is slow, frustrating and expensive. Such complaints are not necessarily a reflection on the quality of the service provided by the courts or by lawyers, but rather on the systems of administration of civil justice as we know and understand them. These systems are often incapable of providing the service that businesses require and yet they have continued to choose litigation, despite the availability of effective alternatives.

It seems reasonable to suppose that one important reason is that there has been no compulsion on parties to a dispute to resort to alternative dispute resolution (ADR) rather than going to court. More recently, the description has been changing to 'appropriate' dispute resolution, because ADR was never intended to substitute or replace access to the courts.

Our colleagues in England and Wales operate in a different environment. One of the consequences of the recent changes in civil procedure in England and Wales is the growth of ADR, and commercial mediation in particular. It has been said that the main reasons for the surge in commercial mediation in that jurisdiction have been the following:

- The advent of judicial case management
- The requirement to attempt ADR before trial in certain circumstances



- The government pledge that ADR will be available where claimants request it
- The requirement to exchange pre-trial witness statements, and most importantly
- The imposition of severe costs penalties by the courts for failing or refusing to engage in ADR before proceeding to trial.

It appears that of all the EU jurisdictions, England and Wales has made the most dramatic and effective progress in promoting meaningful alternatives to litigation. That is not to say that others have not tried. The European Commission launched a process of consultation in the whole area, published in its green paper *ADR in civil and commercial law* on 19 April 2002. This was prompted by an EU-wide recognition that the civil justice systems in all member states are unable to cope effectively with the volume and



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MEDIATOR TRAINING FOR IRISH LAWYERS

One of the most exciting and important developments in recent times has come from a quarter from which it was perhaps least expected. A group of professionals and business representatives, including a significant number of highly-respected Irish commercial litigation solicitors, have completed the acclaimed Centre for European Dispute Resolution (CEDR) mediator skills training course. They want to create, for the first time in Ireland, a group of suitably trained and qualified commercial mediators available to accept appointments to mediate commercial disputes.

In addition, this group has formed the Irish Commercial Mediation Association (ICMA), which will shortly be formally incorporated and launched. Its mandate will be to actively promote the concept of mediation in the commercial world as the effective alternative to litigation in appropriate commercial disputes, and to represent the interests of commercial mediation to government, professional bodies, business organisations and the public in general.

The Courts Service has announced that a pilot commercial court will be created by way of a commercial list in the High Court, probably next October. Rules for the commercial list are now being drafted. It is believed that these will embrace the concept of ADR as a pre-requisite to the listing of cases for trial and may go as far as to impose costs sanctions for failing to attempt ADR.

There are at least two public schemes of voluntary mediation available in Ireland. One is in a large local authority for disposing of internal employee claims. The other, administered by the Department of the Environment and Local Government, deals with disputes between private landlords and their tenants. There are also long-established schemes of family mediation and of labour relations conciliation, which have been very successful here. One of the main banks administers a scheme to settle disputes with its customers.

It seems clear that another reason why mediation has not been widely adopted as an alternative to litigation in Ireland and elsewhere is because parties to commercial disputes do not properly understand its role. Clearly, it is not appropriate in all disputes, but when properly understood and applied, the mediation process has huge potential for the resolution of commercial disputes generally. This has been accepted for a long time in the USA, New Zealand, Australia, Canada, the UK and elsewhere.

There is likely to be considerable initial resistance to any widespread introduction of mandatory ADR into our civil procedure, not least from the legal profession itself. But to those who have examined where ADR fits into the overall framework of dispute resolution, and who understand the potential benefits to clients, it seems clear that its introduction into our civil procedure on a more formal footing can only benefit our clients and the legal profession itself. **G**

complexity of the commercial disputes that they face. The Attorney General's Office helped to co-ordinate the Irish response to this consultation, the results of which are eagerly anticipated in many quarters.

Ireland has not had the changes in civil procedure seen in England and Wales that have ensured an increase in ADR there. Not surprisingly, therefore, we have not seen parties to commercial disputes clamouring to appoint commercial mediators instead of issuing proceedings. But the Irish *status quo* is unlikely to remain indefinitely. There are many indications that real change is near. Our current government is on record in its published *Programme for government* as being committed to introduce 'a scheme of mandatory mediation' into civil procedure. Although this may be due largely to political pressures, it is also motivated by real interest in improving the administration of civil justice.

William Aylmer is an associate in litigation and ADR with the Dublin law firm Eugene F Collins. He is a CEDR-trained mediator and member of the interim council of the ICMA.

VAT AND *leasehold*

Section 4(3A) of the *VAT Act, 1972* has been a cause of concern in property transactions, but now it has been amended by section 113 of the *Finance Act, 2003* (enacted on 28 March 2003) in a way that is likely to cause further concern to taxpayers and their legal advisers. Michael O'Connor considers how this amended subsection applies to VAT and leasehold interests

MAIN POINTS

- VAT economic value test
- Practical examples of the problem
- Sub-letting, part-assignments and part-surrenders

It is assumed for the purposes of this article that the reader is familiar with the general principles applying to VAT on property and with the Revenue Commissioners' publication *VAT and property transactions* (downloadable from www.revenue.ie).

VAT economic value test

While disposals of freehold property are not affected by section 4(3A), the VAT economic value and the adjusted VAT economic value of a property are concepts which property owners and their advisers dealing in leasehold property must understand. The VAT economic value of a property is the cost for VAT purposes of the acquisition and development of the property and, following on the enactment of the *Finance Act, 2003*, any other costs incurred by the owner associated with the acquisition of the property. (In brief, the value in respect of which VAT was accounted for on the property.)

Under section 4(3A), if a property owner makes a taxable supply of an interest in a property by granting a lease for a term of ten years or more or by assigning or surrendering such a lease, where the value for VAT purposes of the supply of the property is less than its VAT 'economic value', that supply will be treated as a VAT-exempt letting except where the Revenue accepts that there has been an unforeseen change in the market conditions (see **overleaf**) affecting the value of the property since acquisition.

Where a property owner has made an exempt letting, he must repay all VAT reclaimed on costs of the acquisition, development and other input costs incurred in respect of the property. He cannot waive his exemption in respect of such an exempt supply



old interests



as is the case with short-term lettings

It is therefore critical that the economic value test is carefully considered for all leases, surrenders and assignments as a large payment of VAT could arise if the test is breached.

Unforeseen change in circumstances

If a property owner wishing to sell his property by way of lease, assignment of lease or surrender of lease finds that the value of the property for VAT purposes is less than its VAT economic value, then provided he can show to the satisfaction of the Revenue Commissioners that the reason is due to 'an unforeseen change in market conditions affecting the value' of the property, the Revenue Commissioners may accept that the supply at the selling price is to operate and the other provisions of section 4(3A) may be disregarded.

It is understood that the Revenue Commissioners will accept that if the multiplier is lowered due to a new issue of government stock, such an event will constitute an unforeseen change in economic circumstances.

Impact of development

Where development has taken place in relation to a property, it is not possible to use the formula for reducing the VAT economic value. There seems to be no good reason for this as the same formula which applies in relation to the capitalised value on the acquisition of the property could also be used in respect of the development cost. The 2002 Revenue booklet *VAT and property transactions* states as follows:

'In determining whether or not a property was developed after 31 October 1972, or subsequent to its acquisition after that date, relatively small outlay on additions or alterations may be ignored notwithstanding that a tax credit or deduction may have been claimed in relation to such outlay. In practical terms, outlay on alterations may be ignored if it is reasonably clear that its costs did not exceed 10% of the total amount on which tax would be chargeable if the work in question were treated as development, or €100,000, whichever is the lesser.'

It has frequently been pointed out that the limit of €100,000 does not take the scale of a property into consideration.

Once development has occurred, the formula to

EXAMPLE 1

In January 2002, Gregory purchases a serviced vacant site for €100,000 plus VAT and subsequently in 2002 for €288,000 (not including VAT) builds a unit with planning permission for retail/office use on it. He reclaims the VAT on the site purchase and construction costs at €48,500. His intention is to let the unit on a long lease in respect of which he will be paid rental income. Unless he can let the unit at a capitalised value for VAT purposes of €388,000 or more, he will be treated as having made an exempt letting and will be obliged to repay the €48,500 VAT claimed on the development of the unit.

The best tenant at the best available rent that Gregory can locate to lease the unit is Richard.

Richard decides to set up a picture-framing business and to this end he takes a lease of the unit from Gregory on 1 November 2002 for a term of 25 years from 1 November 2002 at a rent of €20,000 a year subject to five-yearly reviews. The capitalised value of the lease is calculated pursuant to regulation 19 of statutory instrument no 63 of 1979 as any of the following:

$\frac{3}{4}$ annual rent x term: $\frac{3}{4} \times €20,000 \times 25 =$	€375,000
Rent x multiplier: $€20,000 \times 19.45 =$	€389,000
Likely value by competent valuer:	€350,000

As consideration for granting the lease, Gregory obliges Richard to account for VAT on the lease under section 4A at a value of €389,000 (the highest of the three above valuations), because, if the supply is made at a value which is less than €388,000, Gregory would have an exempt supply problem under section 4(3A) (because the sale value for VAT purposes would be below the VAT economic value).

Because Richard is registered for VAT, the section 4A procedure is availed of to shelter him against a reclaimable VAT liability of €389,000 x $12\frac{1}{2}\%$ = €48,625.

From 1 January 2003, the rate of VAT on property increased from 12.5% to 13.5%.

In January 2003, Richard, realising that the location of the unit is not as suitable for his business as he thought, is forced to offer the unit at a premium of only €1 to Damien who proposes to use it as offices and a reception in connection with Damien's management consultancy business. Richard must achieve a selling price for VAT purposes on the supply of the unit to Damien which is equal to or in excess of the VAT economic value of the unit, otherwise Richard will:

- Have to pay the Revenue the €48,625 which he reclaimed in respect of the unit, and
- Be obliged to treat the supply as an exempt supply.

Under regulation 19, the capitalised value of the unit on the assignment by Richard on 31 January 2003 is calculated using one of the following three methods:

• $\frac{3}{4} \times €20,000$ (annual rent) x 24 (number of full years remaining):	€360,000
• Rent x multiplier: $€20,000 \times 19.45 =$	€389,000
• Likely value by competent valuer:	€350,000

By virtue of the fact that Richard has not developed the property and less of the term remains than existed on the day the lease was granted, Richard will be allowed to apply the formula under section 4(3A)(d) to reduce the VAT economic value of the unit. The formula for the *adjusted VAT economic value* is:

$$\text{VAT value on original acquisition} \times \frac{\text{Full years of the term remaining}}{\text{Full years of the term}}$$

Applied in Richard's situation, this produces the following:

$$389,000 \times \frac{24}{25} = €373,440$$

If Damien buys the lease and under section 4(8) accounts for VAT at a value of at least €373,440 (which is Richard's adjusted VAT economic

establish an adjusted VAT economic value may not be used. This can sometimes lead to harsh results (see **example 2**).

Contemplating development

A property owner holding property on a rack rental lease who proposes to carry out construction work which amounts to development in respect of that property ought to consider first what his long-term plans are. Development will mean the loss of the use of the formula for reducing the VAT economic value on his property should he choose to dispose of it in the future. Ultimately, whether self-supply would

arise depends on the amount of the premium payable on the future disposal.

Sub-letting, assignments and surrenders

Where a VATable property has been acquired under a lease or assignment and that property is sub-let without there being any development, then the same formula for reducing the VAT economic value may be used, provided however that the adjusted VAT economic value produced by the formula cannot be less than 75% of the original VAT economic value on the property.

The legislation does not assist in the calculation of the VAT economic value where the sub-letting comprises only part of the original property which was let.

In such circumstances, it seems that the taxpayer and his advisers must attribute VAT economic values to the part of the property retained and the part of the property sub-let based on the relative values of the relevant parts. Where an assignment or surrender of part of a let property occurs, an apportionment of the VAT economic value will also be necessary. The legislation offers no clarification on such issues and no guidelines are provided.

EXAMPLE 2

On 1 April 2001, Mortimer takes a 25-year lease of a factory and a small landscaped area in the front of the factory with a capital value for VAT purposes at €1 million. In December 2002, having obtained planning permission, he develops the landscaped area for carparking spaces at a cost of €120,000. On 1 March 2003, he decides to sell his lease. Because the property has been developed, Mortimer will not be able to use the formula for adjusting the VAT economic value of the property and must add the expenditure on the carpark to the capital value for VAT purposes of the acquisition of the lease. This will mean that on disposing of the factory, he may have a harder time convincing a purchaser to accept a disposal price for VAT purposes which is equal to or greater than the VAT economic value.

value in respect of the lease), Richard will be spared the obligation to repay VAT on his acquisition costs. Although this value of €373,440 is not produced strictly in accordance with regulation 19, as it is within the range of values produced by regulation 19 it is difficult to see how the Revenue could object to it.

Damien decides to accept Richard's offer. The date the deal is completed is 31 January 2003 and Damien agrees to account for VAT under section 4(8) on the supply of the unit using a capitalised value of €373,440. By accounting for VAT on a value of €373,440 in respect of the unit, subject to the reduction formula if applicable, Damien has committed himself to that figure as a basis for calculating the VAT economic value when Damien disposes of the unit. If Damien had been prepared to purchase the unit but was only willing to account for VAT on a lower amount (say, the lowest of the three values suggested above) to protect himself from a possible clawback of VAT in a future sale, and had Richard sold at the lower value, Richard would have been obliged to refund to the Revenue all VAT claimed in respect of the unit. As well as engaging a solicitor to negotiate the terms of the purchase of the unit, Damien also employs an architect to provide a report on the structure of the unit and how it can best be adapted internally to suit his particular business. The total amount of the professional fees paid to the solicitor and the architect for these purposes amounts to €6,000 plus VAT. (It is understood that the Revenue Commissioners will shortly publish a guideline stating that on the assignment or surrender of a lease a reasonable level of professional fees may be disregarded when calculating the VAT economic value.)

In April 2003, Damien suffers a mild heart attack and is forced to sell the unit at a consideration of €1 to Christopher, a dentist.

In connection with the sale to Christopher, the VAT economic value of Damien's interest in the lease on 1 May 2003 is calculated as follows:

- Capitalised value for VAT purposes on acquisition: €373,440
- Legal and architects' fees, which are subject to VAT: €6,000
- €379,440

Christopher's business as a dentist is an exempt business for VAT purposes. He cannot reclaim VAT on his input costs. The calculation of the capitalised value on the assignment is as set out above for the January 2003 transaction. He initially makes it clear to Damien that he will pay VAT arising on the lowest capitalised value available under regulation 19, being the market value by a competent valuer of €350,000, as he is not prepared to suffer more than €47,250 in VAT which he cannot recover. This is too low for Damien to meet the VAT economic value test. After much negotiation, it is agreed that Damien will suffer an exempt supply whereby he will have to repay to the Revenue €51,224.40, being the VAT Damien claimed in respect of the unit ($€379,440 \times 13.5\%$). As a partial contribution towards Damien's costs, Christopher is prepared to pay a premium on the transfer of the lease equal to the amount of the VAT which he would have paid based on market value by a competent valuer of $€350,000 \times 13.5\% = €47,250$. After completion, Damien must account to the Revenue for this VAT and Christopher takes the unit which will thenceforth (unless it is subsequently developed) be outside the VAT net. The receipt of the premium may be subject to income tax/capital gains tax. Damien should consider himself extremely fortunate because if he were obliged to sell to a purchaser who is a taxable person who would not assume an obligation to account for VAT at €379,441 or more then Damien would be obliged to repay the entire €51,224.40 to the Revenue by 19 July 2003 (the date of submitting his VAT return for May-June 2003) without the contribution Christopher made towards this cost.


(Although it probably would not assist him in the circumstances in which he finds himself, if Damien had waited until after 31 October 2003 to sell the unit to Christopher, Damien would have been allowed to use the formula provided in section 4(3A)(d) with a discount for a further year and this would have produced a lower adjusted VAT economic value.)

With regard to Christopher, he takes the unit free of VAT.



Economic value and economic reality

Where a business person acquires a lease of business property let on commercial terms, almost invariably there is little or no equity value in the lease. If, on disposing of the lease, he is unfortunate enough to fail the VAT economic value test, he stands to be severely penalised. Section 4(3A) appears to have an anti-avoidance purpose. The impact on the business community, especially small businesses, is likely to be oppressive. Many taxpayers who find themselves in difficulties under section 4(3A) may be unable to afford the expert professional assistance which is necessary to deal with the obligations under this section, particularly where sub-lettings and part-assignments and part-surrenders occur. The result which is likely to arise in many cases is that VAT problems under section 4(3A) will be without a viable solution.




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TEMPORARY EXECUTIVE SOLICITOR

Essential Requirements:-

Candidates shall:

- Have been admitted and enrolled as a Solicitor in the State
- Have on the latest date for receipt of completed application forms for the office, at least five years satisfactory experience as a solicitor, including adequate experience of court work, after admission and enrolment as a solicitor, and
- Possess a high standard of professional training and experience.

SALARY: €37,903 - €39,333 - €40,767 - €42,200 - €43,634 - €45,067 - €46,498 - €47,927 - €49,367 - €50,797 - €52,443 (following three years service on the maximum) - €54,094 (following six years service on the maximum).

TEMPORARY ASSISTANT SOLICITOR

Essential Requirements:-

Candidates shall:

- Have been admitted and enrolled as a Solicitor in the State,
- Have on the latest date for receipt of completed application forms for the office, at least two years satisfactory experience as a solicitor, including adequate experience of court work, after admission and enrolment as a solicitor.

SALARY: €32,878 - €34,311 - €35,733 - €37,160 - €38,591 - €40,016 - €41,439 - €42,868 - €44,302 - €45,768 (following three years service on the maximum) - €47,233 (following six years service on the maximum).

Applicants may be shortlisted on the basis of the information supplied on the application form.

Application forms and full particulars may be obtained from the **Reception Desk, Cork City Council, City Hall, Cork** or alternatively, may be downloaded from Cork City Council's web site at: <http://www.corkcity.ie/personnel.html>

Completed application forms must be returned to the above address **not later than 5.00 p.m. on Friday, 23rd May 2003.**

Candidates should note that interviews may be arranged within a very short time of the closing date.

Cork City Council complies with the provisions of employment equality legislation.

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CHECKLIST OF SOME OF THE MAIN VAT ISSUES IN LEASE TRANSACTIONS

(It is assumed for the purposes of this checklist that in all cases the lease being granted, surrendered or assigned is for a term of in excess of ten years.)

1) If you are a property owner proposing to lease VATable property

- a) Calculate the VAT economic value of the property based on the capitalised value or acquisition and development costs. Remember to include incidental costs relating to the property, such as legal fees and architects' fees
- b) If you have established that the value for VAT purposes on the supply is equal to or greater than the VAT economic value of the property, determine whether the proposed lessee is:
 - registered for VAT with full recovery (in which case you may have the option of using the section 4A procedure), or
 - has no right to recover VAT or has only a partial right to recover VAT (in which case you must invoice for VAT).

For the convenience of all, where section 4A procedure is available, it is wise to use it

- c) If you are granting a lease, and find that the value for VAT purposes on the supply is less than the VAT economic value or if applicable, the adjusted VAT economic value, then you cannot charge VAT to the lessee which he can reclaim as part of his input costs or apply section 4A. You must treat the letting as an exempt letting and refund to the Revenue all VAT claimed in respect of the acquisition and development of the property
- d) Settle the conditions of sale or agreement for lease to provide how VAT is to be dealt with.

2) If you are a property owner proposing to assign/surrender VATable leasehold property

- a) Calculate the VAT economic value or the adjusted VAT economic value of the property based on the capitalised value on acquisition and development costs. Remember to include incidental costs relating to the property, such as legal fees and architects' fees
- b) If you have established that the value for VAT purposes of the supply is equal to or greater than the VAT economic value, the property remains in the net and you are entitled to charge VAT to the assignee/surrenderer or more usually they self-account for it (see (c) below)
- c) Determine whether the assignee/surrenderer is in a position to operate section 4(8) of the VAT Act, 1972 (self-account for VAT on the supply). If so, adjust the contract to provide that the assignee/surrenderer must account for VAT on this basis, and will account for VAT at a VAT value which is not less than your VAT economic value (to protect you from creating an exempt supply). Remember there are a rare class of purchasers who are not entitled to operate section 4(8). In such a situation, you will be accountable for the VAT and therefore must raise a VAT invoice and recover it from the assignee/surrenderer

- d) If the selling price is less than the VAT economic value, you must account for VAT on the lease as if you had made an exempt supply – you cannot oblige the purchaser to pay VAT on the basis that he can reclaim it
- e) Amend the conditions of sale to provide how VAT is to be dealt with.

3) If you are a lessee registered for VAT proposing to lease a VATable property

- a) Establish that the lessor is entitled to charge VAT. If you are registered for VAT, ask the lessor to warrant to you that VAT is legally reclaimable if charged to you on the sale
- b) If the lessor is entitled to charge VAT on the supply and you are registered for VAT with the ability to fully recover VAT on input costs, insist, if you can, that the section 4A procedures are followed
- c) If you are not entitled to full recovery and you are satisfied by reasonable evidence that the lessor is entitled to charge VAT on the supply, then you may agree to accept the charge to VAT. Obtain a warranty from the lessor that VAT is chargeable, if this is appropriate
- d) If the lessor cannot demonstrate that VAT charged to you is reclaimable, you should not accept any liability for VAT
- e) Avoid accepting a value for VAT purposes which is unrealistically high and which may cause you difficulty on a future disposal
- f) Consider the VAT clause in the agreement for lease and redraft it if necessary to provide how VAT is to be dealt with.

4) If you are an assignee/surrenderer registered for VAT taking VATable property

- a) Insist that the VAT status of the sale is clear. The assignor/surrenderer should tell you precisely how VAT is to be dealt with and this should be reflected in the contract
- b) Make sure that the assignor/surrenderer has given you evidence to confirm that you will be entitled to reclaim VAT charged to you. Obtain a warranty to this effect from the assignor/surrenderer
- c) As a VAT-registered assignee/surrenderer, the correct procedure for accounting for VAT is that you shall apply section 4(8). If this is the case, it is not correct for you to pay any VAT to the assignor/surrenderer and you will not obtain a VAT deduction in respect of any such VAT paid
- d) Do not accept a value for VAT purposes which is oppressive and may cause you a problem if you wish to sell
- e) Be very careful regarding oppressive VAT clauses, inappropriate standard clauses on VAT and indemnities against VAT which the assignor/surrenderer may seek to impose
- f) If the assignor/surrenderer cannot show that VAT applies on the transaction and you accept responsibility for VAT, you will not be in a position to reclaim VAT paid
- g) Carefully consider the VAT condition in the agreement to provide how VAT is to be dealt with.

In attempting to close gaps where there is a potential loss of VAT on property acquisitions and development, it appears that the state is creating a serious new obstacle to genuine business activity. It could easily be argued that the enactment of section 4(3A) is likely to result in lower VAT income to the exchequer than otherwise would be the case had it not been enacted.

This article illustrates some of the issues that arise under section 4(3A). The checklist above contains a

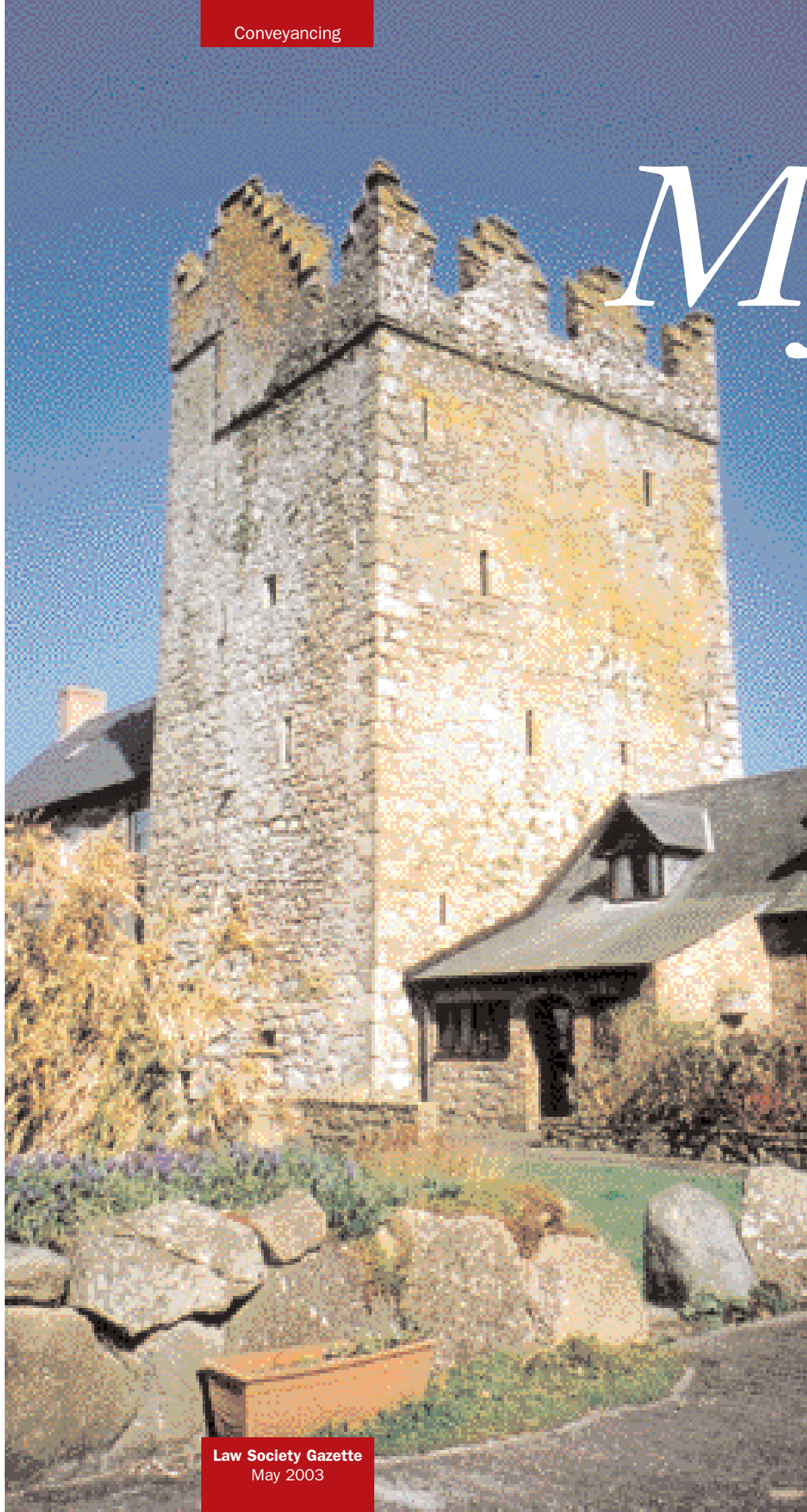
list of some of the basic VAT issues to be considered when disposing of or acquiring VATable leasehold property. Neither this paper nor the checklist purport to be comprehensive. **G**

Michael O'Connor is a partner in the Dublin law firm William Fry, vice-chairman of the Law Society's Probate, Administration and Taxation Committee and a committee member of the Society of Trust and Estate Practitioners (Irish Branch).

M.

MAIN POINTS

- *Planning and Development Act, 2000*
- New duties imposed on owners of listed buildings
- Huge cost implications



My home is my castle

Legislation designed to protect the country's architectural heritage offers lots of sticks to local authorities, but has no carrots for owners or occupiers, writes James Cahill

Thousands of property owners are at risk of having their rights severely restricted under new legislation without even being made aware of it. Local authorities are finalising their lists of protected properties which, when complete, will restrict the freedom of the owners concerned in what happens to their property, and possibly leave them at the mercy of red tape for the rest of their lives.

Sections 51 to 80, part 4 of the *Planning and Development Act, 2000*, set out a regime for protecting structures in county development plans. Part 4 of the *Planning and Development Act, 2000* incorporates all of the *Planning and Development Act, 1999* with a few minor amendments. Section 51 requires local authorities to prepare a list of properties that should be protected. Local authorities have, without the knowledge or consent of the owners, prepared surveys of their properties, photographed their properties and, in some cases, published extracts from the surveys and photographs on the Internet and on CD.

Lists and guidelines

Local authorities have to inform the owners and occupiers of a building in writing that they intend including it on a list of protected structures in its draft development plan. If you own or occupy a protected structure, otherwise known as a listed building, there are a number of consequences. The protection covers the entire structure, external and internal, its curtilage and all structures within the curtilage, even if they were just recently built.

Local authorities have apparently received guidelines from the minister for the environment and local government and are using these guidelines for the selection of properties needing protection. The guidelines had not been published by March.

Draft development plans come into effect when adopted by a statutory meeting of councillors. Before that, the councillors can be lobbied to remove a property from the draft plan. Once the property has been added to the list, it can only be removed by a decision of councillors in a review of the development plan. A two-thirds majority of councillors is required to review a development plan, all of which are intended to last six years.

Section 56 authorises the local authority to register with the Land Registry the fact that the property is protected. Registration places a burden on the owner's title. It can be registered without the owner's knowledge or consent. A local authority also has the power to compulsorily acquire a protected property if it considers that the owner is not protecting it.

Once your property is listed, you must, at your own expense, obtain planning permission to make changes, improvements or otherwise to your property, either internal or external, unless it is considered that the work you carry out does not affect its character. Under section 57(3) of the act, the local authority can be requested to issue a declaration as to what work would not materially affect the character of the protected property, thereby authorising you to carry out certain work without the need to obtain planning permission.

Under section 58 of the act, it is a prosecutable offence for the owner or occupier not to protect his property from danger. Section 58 imposes a positive duty on owners and occupiers to preserve their property from danger. So what happens if the owner's listed property is burnt down, suffers from severe flooding or storm damage and it is either not insured or not adequately insured?

Catch 22 situation

According to conservationist group the Georgian Society, there was a recent case where the owner sought a mortgage to renovate his protected property. The insurance company quoted a prohibitive premium because, in the event of its destruction, it would have to have been rebuilt with original materials. The bank wouldn't give the loan and so part 4 of the *Planning Act, 2000* placed the property owner in a 'catch 22' position – and he wanted to look after his property.

In another case, an elderly person had a small house containing a few flats. His neighbour applied to the planning authority for permission to carry out major reconstruction work and possibly to demolish his house, which he inherited in a very poor state of repair. Following a Dúchas inspection, the local authority issued a notice to the elderly person informing him that his house is to be listed as a protected structure. From the date the householder received the notice, all the provisions of the act applied. On enquiring, the owner was led to believe that Dúchas made the decision/recommendation.

I can only presume that part 4 of the *Planning Act, 2000* was used as a pre-emptive measure, in this case against the planning applicant, who was served with a similar notice. The elderly owner must now, in addition to the negative obligations under the act, take positive steps to prevent his premises from suffering deterioration or a change to its character by a redevelopment of the neighbouring house.

Conveyancing solicitors will have to be mindful in the future of the implications for their clients, both buyers and sellers, of structures that are receiving the 'benefit' of protection under various local authority development plans.

Under section 59 of the act, the local authority can require the owner to do work on his property within a specified period and may, at its discretion, give various forms of assistance, but only if asked for assistance within four weeks of receiving the notice. Under section 60 of the act, there are very limited circumstances under which the local authority will pay for the work.

Section 61 will allow the owner who does not agree with the official notice to carry out work to his property to appeal that notice to the District Court. For example, the owner can argue that he does not have the means to pay for the work. Otherwise, failure to comply with such notice is an offence that carries very substantial penalties.

Under section 69, a local authority can carry out the works, bill the owner for the cost and require

payment. This bill will automatically be a debt due by the owner and secured by the property. Under section 71, a local authority is given power to compulsorily acquire the property and thereafter decide whether it will use it for its own purposes or offer it for sale.

Section 80 says that the minister for the arts, culture and the gaeltacht may, with the consent of the minister for finance, make a provision for grants to be administered by the council. These grants are limited to a maximum in the region of €12,700. This year the national budget to administer the total programme by local authorities, including grant aid nationally, is €3 million – a drop in the ocean.

If your property becomes 'protected', against whom is it protected? The answer is you, the occupier and owner, and at your expense. It is easy to envisage situations where property has suffered from obvious neglect, intentional or otherwise, and there are many examples. It was these structures the legislation was intended to protect. However, the people whose properties have been targeted for protection – in my own county of Mayo at least (and I expect in many other counties) – are those who, in the main, live in their houses, are proud of them and look after them to the best of their ability. The last thing they would do is bulldoze their homes.

All stick, no carrot

Under the plan, people will also be penalised for failing to comply with a positive duty to ensure that their property is 'free from endangerment'. No assurance is given to those people that they will receive assistance. There is no obligation on the part of the local authority or central government to assist those people.

Under section 88(2), the act does set out an entitlement to compensation – but only where the owner can show a reduction in the value of his property where its use has been disturbed, after the owner has received notice requiring him to carry out certain work. These provisions, as it is proposed to implement them in Mayo and probably in many other counties, could impose additional costs on responsible owners and occupiers.

But there is no effort made to use the act where there is an obvious danger to a property. There were two examples in Castlebar, Co Mayo recently. About three years ago, the local authority approved the removal of the chimney stack of the old hat factory, which was a local landmark. More recently, a convent was destroyed following protracted neglect that was obvious to the local authority.

As matters stand, our local authority does not intend to hold an information meeting with the owners of properties which it proposes to 'protect.' This adds insult to injury when one considers that in many cases the only reason there are properties worth protecting is due to the owners' efforts to maintain them.

One can sympathise with the aims of local authorities as stated in the conservation objectives in

The Dúchas handbook entitled *Living with nature*, together with notices of intention to designate different areas within the country, are available from The Heritage Service, 7 Ely Place, Dublin 2, tel: 01 647 3000 and fax: 01 662 0283.



The only reason there are properties worth protecting is due to the owners' efforts to maintain them

draft development plans. One can also understand why, in certain circumstances, the act contains penal provisions and other huge powers of control over 'protected structures'.

The 1996 report of the inter-departmental working group on strengthening the protection of Ireland's architectural heritage was a worthy document. It is now out of print, but all local authorities should have it. The report was submitted to the ministers for arts, culture and the gaeltacht, and the environment. It recognised a need to strike a balance between the interests of property owners and the public interest in protecting built heritage. Its recommendations for the legislative and administrative framework came under the following headings:

- 1) General – listing, work to listed buildings, a national inventory of architecture
- 2) Financial incentives and recommendations, general tax incentives, grant aid
- 3) Training, education and advisory service recommendations.

The first of these has been enacted. Numbers two and three have been almost totally ignored. The overall objective was to strike a balance between the conflicting interests. The 1996 recommendations were severely watered down in the act and have been further diluted since, both in relation to the householder and the support and funding to local authorities. The recommendations were that £10 million (€12.75 million) would be allocated every year to protected buildings – this is now €3 million for the management of the entire system.

There was virtually no debate whatever in the Dáil in relation to part 4 of the *Planning Act, 2000* before its introduction. The *Planning and Development Act, 1999*, which dealt specifically with protecting the built heritage, was debated before it was enacted, but not from the point of view of the

ordinary middleclass householder.

While I agree with the principle of protecting properties at risk, the fact of the matter is that the opposite is occurring. Had the conservation industry consulted with property owners in advance of preparing their proposals and drafting the legislation, we would not have the mess that the legislation's implementation is now creating.

In a series of talks held by the Irish Georgian Society, one senior planning official said the act was 'all stick and no carrot'. He pointed out that not all protected properties are in the hands of unscrupulous developers, and warned that the act's powers should be used fairly and reasonably. But who will see to this?

Another form of 'property protection' has come into being under the heading special areas of conservation, or SACs as farmers know them. Land proposed for this protection is subject to restrictions, for the benefit of wildlife, from the date of the proposal. In addition, the adjoining buffer zones become restricted. The banks are being cautious in lending money on the security of property in a SAC area.

To date, proposed SACs reportedly cover about 25% of Co Mayo and up to 40% of Kerry. Admittedly, much of this is mountain, bog and lake but river valleys (for example, the Moy Valley) also make up a sizeable proportion of the farmland to be conserved under the SAC or special protection area (SPA) schemes. These schemes primarily affect western seaboard counties, but all other counties appear to be included to a lesser extent. These plans will be reviewed every five years. You should note that they only give the notices of intention to property owners in SAC and SPA areas, and not to their agents. **G**

James Cabill is the principal of the Mayo law firm Cabill & Cabill.

'If your property becomes "protected", against whom is it protected? The answer is you, the occupier and owner, and at your expense'

As clear as

This country's colourful history has left our statute book in a mess. Edward Donelan discusses the on-going efforts to make Irish legislation accessible, coherent and easily understood

MAIN POINTS

- OECD report on Irish laws
- Consolidation of legislation
- Use of plain English

Statute law in Ireland is not easily accessible and lacks coherence in form and content. A person looking for a rule of law must consult a variety of sources, and then mentally piece them together into a coherent format. This is a time-consuming and difficult process. This article describes the Irish government's approach to improving access to and coherence of legislation.

Statute law revision is an essential aspect of good governance. This argument was powerfully articulated in an OECD report called *Regulatory reform in Ireland*, published in Paris in 2001. It identified the need for accessible and coherent laws, and recommended that the policy on consolidation and restatement should be enhanced 'with a target review programme based on pro-competition and regulatory high-quality criteria. The 1995 OECD checklist could be used to verify the continued necessity and appropriateness of the existing stock of regulations'. (In this context, 'regulations' means all legislation that regulates, and not the narrower sense used by lawyers of regulations made under an act.)

The government welcomed the OECD recommendations, which provide an international validation of the policies being followed here as regards improving access to and coherence of statute law.

Towards better regulation

The most recent phase of the public service modernisation was the consultation document, *Towards better regulation*, published by a high level group that was established to oversee the implementation of the OECD report. The document has three main themes: performance of the economy, quality of governance and efficiency, and effectiveness of the public service. The issues of accessibility, coherence and effectiveness of legislation are explored in the context of the last theme – effectiveness of the public service. This represents the first serious attempt by the executive to consider issues associated with the process and product of legislation.

Because of Ireland's colourful legal history, our statute law is varied and includes:

- Acts of the English Parliament (pre-1707)



mud?

- Acts of the Parliament of Ireland (pre-1800)
- Acts of the British Parliament (1701-1800)
- Acts of the Parliament of Great Britain and Ireland (1801-1927)
- Acts of the Oireachtas and of the Free State (1922-1937)
- Acts of the Oireachtas (since 1937)
- Statutory instruments, and
- EU regulations.

The British practice of publishing statutes in annual volumes continues today. Acts are frequently amended and repealed yet statutes are not revised, therefore it takes further study and research to identify the current law.

Publication of legislation in an accessible form is crucial to the rule of law.

Access to legislation has been made easier in recent years by providing acts, statutory instruments and the chronological tables of the acts of the Oireachtas on CD-ROM and on the Web. (The chronological tables show amendments made to acts since their enactment.) Statutes passed between 1922 and 2001 are now available at www.attorneygeneral.ie, and work is continuing to bring these materials up to date.

Pre-1922 legislation is not easily available, but is still relevant in areas of law such as conveyancing, landlord and tenant and sale of goods. The Statute Law Revision Unit is formulating a policy to make these materials available electronically, but the cost of such a project must be considered in terms of the priority it deserves in relation to other state projects.

Coherence and clarity

Clarity is one element of coherent legislation that gives rise to controversy in every jurisdiction and in every age. In recent years, there has been a move towards the use of plainer language in legal documents. The case for plainer language was made in Ireland by the Law Reform Commission in its recent report *Statutory drafting and interpretation: plain language and the law* (available at www.irlgov.ie/lawreform/publications). This report asserts that international trends towards plainer language have not been reflected by drafters of legislation in Ireland, and suggests several methods that could be used to improve coherence of statute law. These include consolidation, restatement and revision.



Justice minister Michael McDowell: as attorney general coined the term 'restatement'

The policy options adopted to date to improve access to and coherence of statute law are:

- Making legislation and the chronological tables available electronically
- Consolidation in selected areas – revenue law, social welfare law and the proposed company law consolidation
- Restatement.

Consolidation of legislation

A consolidation act is a form of principal act on one subject, which presents the whole body of the statute law on that subject in a complete form, repealing the former acts. The work of consolidation is largely physical at first glance. The consolidator begins with the text of an act as it stands, cuts out words that have been repealed, replaces text that has been amended and inserts new material.

In a pure consolidation, no change is made to the substance or wording of the text. There are different views on what resources are needed for consolidation projects. The Renton Report (an examination of legislative drafting commissioned in the UK several years ago) stated trenchantly that *'it is wide off the mark to suppose that consolidation can be carried out by any competent lawyer with the aid of scissors and paste. It is highly skilled work'*.

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Many acts are amended, modified, restricted or applied only in particular circumstances and affected by a myriad of factors. The task of consolidation requires more than mere 'scissors and paste'. An experienced drafter must decide how to deal with the problems caused by modifications, restrictions, constructions and the other devices used in drafting law to give effect to complex instructions.

Most consolidation tasks involve restructuring legislation. This is best done in close consultation with an official who is very familiar with the subject matter concerned. It cannot be done by a drafter alone.

Restatement

A restatement is an 'administrative' consolidation. The restated act is not brought before parliament, but is certified by the attorney general as *prima facie* evidence of the statute law set out in the restatement. Former attorney general Michael McDowell came up with the name restatement for this process, and the restatement project was born. The term is peculiar to Ireland in the context of legislation.

The government approved the publication of a bill to empower the attorney general to prepare updated versions of groups of related acts. The *Statute Law (Restatement) Act, 2002* proposes a policy by which the attorney general may make available (in hard copy and electronic form) acts that restate the statute law in any given area in a more intelligible form, with no change to that law except in presentation.

Rather than taking the normal route through the houses of the Oireachtas, it is proposed that these restatements are certified by the attorney general. This expedited approach would allow acts to be restated at regular intervals and will have particular benefit where a series of acts has been consolidated and the consolidation has been superseded by an amending act.

The production of this text will be carried out under statutory authority. Therefore, the process of restatement is an administrative, as distinct from a legislative, process. The text of a restatement will be *prima facie* evidence of the relevant law, and therefore can be used in court. The restatement policy will facilitate regular publication of up-to-date versions of acts.

Revision

The term 'revision' has several meanings. Statute law revision distinguishes between pure consolidation and a more sophisticated form of consolidation. Pure consolidation is essentially the task of cutting words that have been repealed, replacing text that has been amended or inserting new material. Revision, on the other hand, attempts to tidy up the language of an act, gender-proof it, eliminate archaic terms, and modernise it.

Amending or repealing an act to achieve a modified policy objective is sometimes referred to as

statute law revision. Almost all acts that effect amendments can be classified as statute law revision projects.

Future policy

In my opinion, there are two policy options that should be pursued in the future. The first is a *prospective* approach, and the second a *retrospective* approach. This is a personal opinion, but is broadly in line with current thinking on these issues in the Office of the Attorney General.

The prospective approach would direct policy-makers and parliamentary counsel to avoid (unless absolutely necessary) amendments that do not easily slot into the text of the principal or original act. Instead, a body of new legislation would be drafted with a view to coherence. When this new legislation required amendment, it could be done easily, and restated immediately as new text. This would improve the coherence of legislation from, say, 2003 onwards, while the problem of existing legislation would remain.

The retrospective approach would then tackle the existing statute book. This would involve certain steps, the first of which would be the preparation of a restated act each time a new act amends another and, similarly, remaking all statutory instruments that amend previous ones.

This approach would include a programme of revision of all restatements, rewriting them in a more coherent framework with some minor verbal carpentry to make them more readable. This would require a revision of parliamentary procedure so that these bills could be re-enacted by a 'fast-track' procedure. The British Columbia model could be used as a guide for this process, but the exact model to be adopted would be a matter for the houses of the Oireachtas.

Also required would be an adequately funded 'Better Regulation Unit' to implement the statute law revision policies suggested by this paper. This unit would also be responsible for reviewing policies and the relevance of legislation already on the statute book, and incorporating pre-1922 legislation into the database.

It would also review proposed legislation in the context of:

- Policy-proofing issues, such as regulatory impact assessments
- Poverty and other proofs
- Clarity of language used in legislation
- Likely impacts of legislation on competitiveness.

A retrospective programme will cost money but it should be seen as an investment in the legal infrastructure of the state, not as an unnecessary luxury. **G**

Edward Donelan is a barrister and director of the Statute Law Revision Unit in the Office of the Attorney General. This article is based on a paper presented at a conference hosted by the Law Society in December 2001 entitled 'Toward better regulation: the implications for the state.'

'International trends towards plainer language have not been reflected by drafters of legislation here'

BUTTERWORTHS
(isdn'd to Turners



Book reviews

Key issues in planning and environmental law

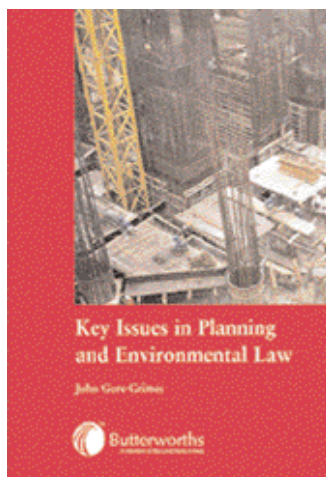
John Gore-Grimes. Butterworths Ireland (2002), 24-26 Upper Ormond Quay, Dublin 7. ISBN: 185475-2545. Price: €100

Book reviews seem to be of two types – either a lengthy dissertation by the reviewer on the subject matter of the book, possibly to show how much more than the author he knows, or the ‘A bloody good read’ type of review beloved of some tabloids. This reviewer is unqualified to give an erudite commentary, having only the average working practitioner’s knowledge of planning and environmental law, but while this book is certainly a bloody good read, it deserves more by way of a review.

Mr Justice Keane in his foreword to this book makes the comment that the pace of urban and rural development has been paralleled by the growth of laws of ever-increasing complexity. These laws have brought about a wealth of literature on planning and environmental law. John Gore-Grimes’ book is a distinguished addition to the corpus of published work, but it sets out with a different

purpose to the usual textbook: it is not another academic exploration, but rather an easy, but nevertheless comprehensive and authoritative, reference book for the use of anyone coming in contact with planning or environmental issues, whether he is a lawyer, a town planner, an architect or a lay person.

Anyone who has attended a lecture by John Gore-Grimes will recognise his clear and authoritative delivery, and his ability to reduce complex issues down to user-friendly concepts, usually by way of a colourful anecdote. The same style of direct and simple communication is brought to this book. The first thing that strikes the reader is that the book is not set out in parts or chapters and there are no footnotes. Instead, the *Contents* section is, in effect, an abbreviated index, and the reader is straight into *Abandonment* on page 1, progressing with obvious,



though rarely emulated, logic to *Works* on page 476.

However, this work is far more than a simple legal dictionary. Virtually every page has a sentence which, while simple and apparently obvious, reflects a comprehensive knowledge and understanding of the subject. For example, did you know that all enforcement provisions in the planning code are now in part VIII of the *Planning and Development Act, 2000*?

The ease with which any aspect of the subject matter is to be found is exemplary, and the style and layout might well be emulated by authors of other works of reference. If, for example, a prescribed form is referred to, the form is there, in the text of that paragraph, rather than buried in some annex at the back of the book.

The only quibble that could be found is that the premise at paragraph 169 is dubious both as to its syntax, and also, since the *Status of Children Act*, its current validity.

I have no doubt that this book deserves to be, and will become, the well-thumbed standard port of call for anyone who has to deal with any planning issue. It will be particularly useful to conveyancers, who are troubled more and more frequently by planning problems. **G**

Patrick Dorgan is chairman of the Law Society's Conveyancing Committee.

The Law Society of Ireland, 1852-2002: portrait of a profession

Edited by Dr Eamonn Hall and Daire Hogan. Four Courts Press (2002), 7 Malpas Street, Dublin 8, Ireland. ISBN: 1-85182-695-5. Price: €45

Speaking in the Gresham Hotel on 28 May 1952 at the dinner to mark the centenary of the granting of the charter of incorporation to the Law Society of Ireland in 1852, the president of the Law Society, Arthur Cox, reflected on the public perception of his own profession through the following anecdote:

‘I understand that in the course of the Spanish Civil War whenever the Reds entered a village, their first step was to take out the priest, the mayor and the solicitor to shoot them and that when the Franco forces entered they in turn took out the leader of the Trade Union and the solicitor and shot them. I think that unanimity was no mere tribute. I think it does show the

place the solicitor plays in the community ...’.

It would be reassuring to think that the public image of the legal profession has improved in the half-century since the Law Society celebrated the centenary of its charter. Regrettably, according to our current director general, Ken Murphy, writing in the

recently published volume marking the 150th anniversary of the granting of the charter, this is not the case. Like Cox, Ken Murphy attributes the lack of popularity of the legal profession to the nature of its work, observing, as one American put it, that ‘if citizens have their property, their family, their good name or even

their liberty at risk, they will want the lawyer in their corner to fight on their behalf with the ferocity of a rottweiler, not the docility of a labrador'.

While the public image of lawyers may not have changed in the intervening half-century, very little else has stayed the same. Change is very much the constant theme running through each of the contributions to this excellently-researched and beautifully-produced volume. The numerical statistics which are to be found throughout the publication tell their own story of a much changed profession: 6,478 members of the society at the end of 2001 compared to 1,114 some 50 years earlier, an income and expenditure account which had increased from £8,731 (€11,086.08) in 1951 to £3,751,075 (€4,762,882.70) in 2001, and reserves which had increased in the same period from £37,608 (€47,752.31) to £18,400,033 (€23,363,222).

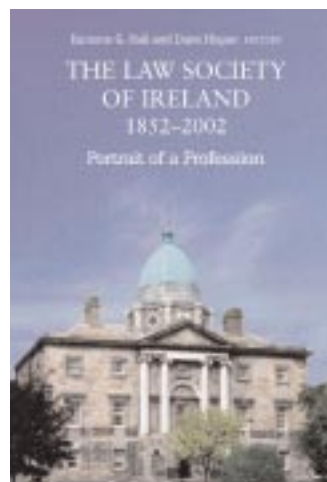
The most startling statistical change quoted in the book is that of the number of women holding practising certificates. Dr Mary Redmond in a chapter on *The emergence of women in the solicitors' profession in Ireland* relates that, in 1950, 44 women held practising certificates, while 50 years later the number of women holding practising certificates was 2,221. The chapter deals with the struggle of women to become members of the legal profession not only in Ireland but also in the UK and the United States. Her story of these early pioneers, and the enormous barriers placed in their way by their male colleagues and, in particular, the male judiciary, provides an intriguing social commentary. Due homage is paid to a number of women who went on to make particular contributions to the profession. Special pride of place is rightly given to Moya Quinlan, the first woman to become president of the Law Society in

1980 and who earlier had chaired the committee that made the courageous and, with the benefit of hindsight, astute decision to purchase its current headquarters at Blackhall Place. Eamonn Hall in *The modern era*, one of two chapters he contributed to the book, records the history of the negotiation to purchase the premises for a sum of £105,000 (€133,322.49) in 1968 and the official opening of the society's new headquarters ten years later.

The volume professes to be a 'portrait' of a profession. Like all portraits, it necessarily ran the risk of representing the narrow subjective perceptions of its authors. The society is therefore to be commended for having chosen as the joint editors of the volume two members of the profession with distinguished records in relation to legal publishing: Dr Eamonn Hall, the chief legal officer of Eircom, who has acted as consultant editor of the *Irish digest* and as chairman of the editorial board of the *Gazette* and is also author of *The electronic age: telecommunication law in Ireland*, and Daire Hogan, a partner in McCann FitzGerald, who is a former president of the Irish Legal History Society and the author of *The legal profession in Ireland (1789-1922)*. The editors have ensured an excellent balance between the necessarily important but occasionally mundane task of recording the key events in the 150 years of the society with some fascinating insights into the decision-making of the Council of the society and the relationship between the solicitors' profession and other bodies such as the government, regulators and, of course, the bar.

The volume opens with three chapters contributed by Daire Hogan. The first of these traces the development of the profession up to the charter of 1852, and, in particular, the

role played by the benchers of the Honourable Society of the King's Inns. His second chapter focuses on the years between the granting of the charter and Ireland becoming an independent state in 1922, in which he refers to a select committee appointed by the House of Commons in 1847 to enquire into the state of legal education in Ireland. The way of life of a solicitor's apprentice was described by a number of witnesses before that



committee, with one solicitor stating that in an apprentice's first year '*he is generally occupied in copying, and by this system of copying, he acquires a habit of drawing legal forms; as he advances, he goes through the details of the business and he at last comes to be what is called an outdoor apprentice, that is, doing court business*'. It is to be hoped that even the most churlish of our current apprentices (or 'trainees', as I understand they are now called) would testify that their training is now, at least, somewhat better! Daire Hogan's third chapter deals with the society from independence to 1960, a period which saw the introduction of the *Solicitors' Acts* of 1954 and 1960.

Mary Redmond's chapter on the emergence of women in the profession is followed by the two chapters contributed by Eamonn Hall. In the first of these, as well as dealing with the acquisition of Blackhall Place, he records the struggle

faced by the profession in gaining a right of audience in the superior courts, a battle finally won by the introduction of the *Courts Act, 1971*. This was to prove of enormous significance to the profession not only in relation to the entitlement to represent our clients in court but also as an important first step towards what Ken Murphy in a later chapter calls 'a historic breakthrough for the solicitors' profession' when the *Courts and Court Officers Act, 2002* provided that solicitors were, for the first time, eligible for appointment as judges of the High Court and Supreme Court. It is to be hoped that the appointment of Mr Justice Michael Peart as the first-ever practising solicitor in Ireland or Britain to be appointed as a judge of the High Court, an appointment generously lauded in a number of places in the volume, will be the first of many such appointments.

Eamonn Hall's second chapter addresses a wide range of prevailing issues. These include solicitors' remuneration, the enquiries by the Restrictive Practices Commission into the profession and the thorny subject of advertising. While the chapter addresses at some length the history of the debate on advertising and the provisions of the *Solicitors (Amendment) Act, 1994* on the topic, it is unfortunate that the timing of the publication allowed for only a cursory reference to the significant changes introduced in the *Solicitors (Amendment) Act, 2002*. Perhaps Dr Hall might be encouraged to come back to the topic at some future date when the full implications of the 2002 act are known.

Dr Hall's contributions are followed by two chapters written by John Buckley, a distinguished former member of the Council of the Law Society and a retired judge of the Circuit Court. These

chapters respectively address the topics of legal education and legal publishing. The chapter on legal education recites the history leading up to the introduction in 1978 of what was then known as the 'new system', providing for a practical-based professional course, followed by 18 months in the office and then a shorter advanced course. The system came in for a significant amount of criticism, initially in relation to the level of fees that were charged but more significantly in relation to what was perceived as an attempt by the society to limit the numbers coming into the profession. In the decade from 1986 to 1996, the society faced a number of legal challenges from students or prospective students. Each of those court cases is faithfully reported in John Buckley's chapter. While this is to be commended, it would have been interesting had he given the reader some insight into the discussions and debate which no doubt took place at Council and Education Committee level during these difficult times.

Margaret Byrne, the inestimable librarian who has been with the Law Society since 1974, provides a chapter on the Law Society Library. She traces the history of the library back to 1841 and recounts that, having built up a significant reference source for the profession, the society suffered an enormous set back in 1922 when the destruction of the Four Courts led to the loss of all 3,000 books in the library, with the exception of 80

books which were out on loan. Fourteen of these were subsequently tracked down and are now shelved together in Blackhall Place in a special collection as a tribute to their survival. Margaret is characteristically modest about the role that the society's library plays in the business of the profession. It is a wonderful resource run by a most able and courteous staff under Margaret's expert direction.

One of the more appealing aspects of the book is the large number of quotations from various individuals which colourfully portray the prejudices of their times. Mary Redmond quotes Lord Finlay (appointed Lord Chancellor in 1916) speaking in 1914 against the enactment of the ultimately unsuccessful *Solicitors (Qualification of Women) Bill* as not believing 'that the active practice of a profession is compatible with the proper work of a woman which, after all, is that of a wife and a mother attending to her family'. Eamonn Hall records the two senior counsel on the committee established in 1971 to address whether solicitors should have a right of audience in the superior courts as holding the view that: 'advocacy is a highly specialised matter and if a lawyer is to practise it in the superior courts he must have training and experience. He must cultivate clarity and order; with commendable brevity, in presenting his client's case. He must have honesty and judgment, a good measure of sagacity and quick discernment. Again, he must above all things have courage and

independence'. Unfortunately, Dr Hall does not enlighten us as to which of these qualities the distinguished members of the bar felt were lacking in solicitors! My favourite quote, however, is that uncovered by Daire Hogan from the Dáil debate in November 1960 on the *Solicitors' Bill*. Richie Ryan TD, a solicitor, raised an objection to the reliance placed upon accountants in a matter relevant to the right of a solicitor to practise. He raised the prospect of the public being prejudiced by 'the dishonest solicitor and the dishonest accountant working in collusion'. This led the minister for justice of the time, Charles Haughey, to remark: 'there is no such thing as a dishonest accountant'.

It is inevitable that any portrait of a profession is more sentimental than self-critical. This volume, however, does a better job than most in identifying the issues of concern to and, more importantly, about the profession. The final chapter contributed by the director general Ken Murphy is entitled *Where were we then? Where are we now? What are the issues today and for the future?* While he does not pretend to answer his own questions, he gives an excellent summary of the challenges facing the profession in the new millennium. His reflections range over the future of multi-disciplinary partnerships, the society's relations with the bar, judiciary, public, government and, most critically, its members and the increasing implications for the

profession of scrutiny by the Competition Authority, observing that 'competition is becoming the card which trumps all others and may be accorded a superior social value to what the legal profession has traditionally held dear'. He also refers to the challenge which the Law Society faces in seeking to continue to effectively represent all firms of solicitors, both small and large. As with the question of advertising, it is to be hoped that Ken Murphy can be encouraged to put pen to paper again over the coming years and share with us his views on the developing answers to his own most thought-provoking questions.

I am told that a book reviewer must always find something to complain about, if only to prove that he or she had actually read the tome in its entirety! Accordingly, a small criticism of what is otherwise a very readable and excellent publication. It would have been nice and proper to record the contribution that members of the profession have made to the improved social fabric of society and, not least, to pay tribute to those solicitors involved in the establishment and work of FLAC.

I enthusiastically recommend this volume to all members of the profession, particularly those who, like me, occasionally wonder whether we should have done something else! **G**

Eugene McCague is managing partner of the Dublin law firm Arthur Cox.

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FOR
10 ISSUES

Dividends back in fashion

Shares are now offering a similar income yield to both cash and bonds, writes David Killen

Despite the recent market upswing, we remain cautious about a sustained rally. The first quarter of 2003 proved to be yet another difficult one, with markets again finishing in negative territory. Obviously the war in Iraq was the key focus for most investors during the last couple of months, with economic and corporate releases a distant second place. However, despite a strong rally on the back of the US-led invasion of Iraq, it is our view that this rally is not sustainable and investors should exercise caution before assuming we are back in a prolonged bull market. To date in 2003, economic news-flow has been very poor, with serious financial imbalances in both the US and the Eurozone. On the back of such evidence, it seems unlikely that there will be a seamless recovery in world markets.

Sound fundamentals

However, despite this pessimistic view of world markets, we believe Ireland will once again outperform. Despite sluggish growth forecasts for a couple of years, there are sound fundamentals to back this view. Our balance of payments is close to zero and our debt/GNP ratio is one of the lowest in Europe. Coupled with this, Ireland's demographic patterns are more favourable than elsewhere, and our corporate tax rate is far lower. These factors must continue to play a key role for investors when considering the rest of this year.

Given the above as a backdrop, it is well worth noting that many shares are now offering a similar income

yield to both cash and bonds, and in some cases yields are well in excess of both. Indeed, recently the dividend yield of the FTSE 100 briefly overtook gilts for the first time since 1957. Crucially, equities with decent dividend yields also offer the potential for both income and capital appreciation to an extent well in excess of that of bonds.

Obvious turnaround

So yields are now back in fashion, with even the mighty Microsoft announcing in January that it would pay its first dividend. This is an obvious turnaround from the bull market years, where the focus was on momentum and picking growth stocks. However, we are in an era of low numbers and that means low GDP growth rates,

low inflation and low interest rates. In this environment, the focus is back on picking shares with the potential to pay a sustained and growing dividend, as income will become a big part of total return. Between March 2000 and July 2002, there was a massive outperformance by dividend-paying companies. According to research conducted by Fidelity Investments, there is clear evidence of a long-term outperformance by higher yielding shares in the top 100 UK stocks between 1900 and 2002. During this period, a basket of high-yielding shares returned 11.4% a year compared with 9.8% for the full basket of 100 shares.

While the current dividend yield on the UK and Irish

Davy
STOCKBROKERS



David Killen: focus on domestic and UK blue chips

market is high, relative to historic yields, there will undoubtedly be dividend cuts over the coming years. Indeed, several high-profile companies have already cut, or indicated that they may cut, their payout. These include Abbey National, Aviva and Prudential. However, we believe that in the current low-growth environment, it will become clear which companies will be able to grow their dividends over time. The key metric in this regard is the level of dividend cover, a track record of increasing earnings and delivering sustainable dividend growth. The table opposite contains a basket of high-yielding, high-quality names which we believe offer investors good medium-term value and the attraction of a yield well in excess of deposit rates. The exception here is Lloyds, as there is speculation that the dividend may be cut. However, even accounting for a 50% cut in dividend, the yield still remains attractive.

So, what's our advice to investors for the coming year? It would be wise to focus on domestic and UK blue chips, with dividends playing a key role in stock selection, as much of absolute return will now stem from this source. **G**

STOCK	Price as at 16/4/03	Yield* %	Dividend Cover**	2003 P/E
Bank of Ireland	10.36	3.6	2.3	10.64
AIB	13.25	4.1	2.7	11.78
Irish Life & Permanent	9.85	4.8	2.2	9.40
Greencore	2.80	4.6	2.5	8.81
Glanbia	1.34	3.7	3.7	7.17
Grafton	3.25	2.9	4.2	8.13
DCC	10.40	2.6	4.0	9.72
Lloyds TSB	402.50	8.4	1.4	8.39
Royal Bank of Scotland	1621.00	3.1	3.1	10.46
Barclays	422.75	4.2	2.2	10.57
Unilever	624.50	2.5	1.2	20.15
Diageo	692.00	3.7	1.6	14.12
Sainsbury	243.25	6.1	1.3	10.58
Average		4.2	2.5	10.76

***Dividend yield:** An indication of the income generated by a share of stock. Dividend yield is calculated by taking annual dividends per share and dividing by price per share.

****Dividend cover:** The dividend cover is calculated by dividing the EPS (earnings per share) by the dividend. Essentially, it tells you how comfortably the company is able to meet its dividend obligation.

Source: Davy Stockbrokers

Past performance may not be a reliable guide to future performance.

David Killen is a portfolio manager with Davy Stockbrokers.

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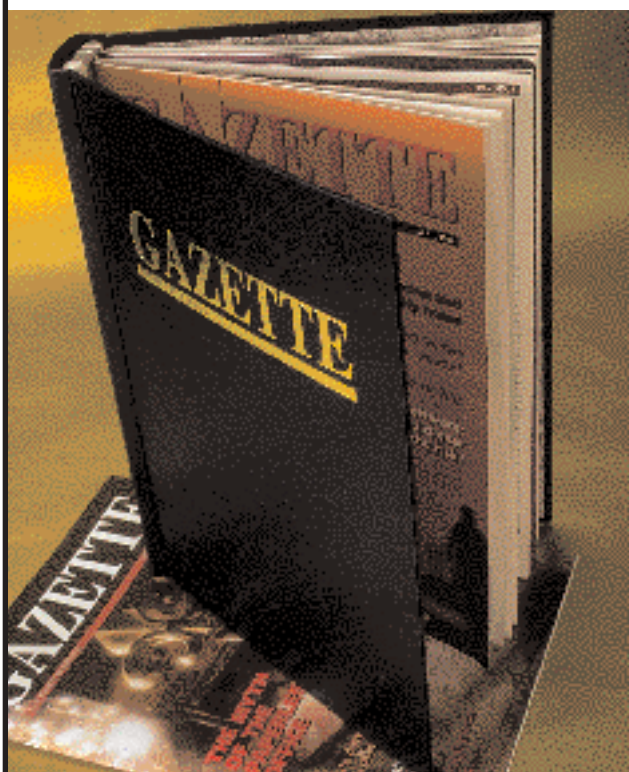
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Report of Law Society Council meeting held on 28 March 2003

Motion: VHI undertakings

'That this Council approves the practice note to be circulated to the profession in relation to the current form of undertaking which the VHI requires solicitors to provide.'

Proposed: Fiona Twomey

Seconded: Michael Boylan

Fiona Twomey outlined the background to the issue and referred the Council to the text of both the 'old' and 'new' forms of undertaking sought by the VHI, which had been circulated. The Council noted that the 'new' form of undertaking required the solicitor to 'repay to VHI Healthcare – out of the proceeds that come into our hands – all such monies paid by VHI Healthcare', while the 'old' form of undertaking required the solicitor to repay 'the net amount recovered in respect of such payments made by the VHI'.

Ms Twomey said that the Litigation Committee was of the view that it was manifestly unjust and inequitable for the VHI to require subscribers to repay more than they had recovered. That injustice was compounded by the demand that the subscriber's solicitor should undertake to underwrite the inequity.

The purpose of the motion was to effect a change in the society's policy with regard to undertakings so that the society would positively recommend against the giving of VHI undertakings in their new form. The committee believed that this position was necessary if the unfair demands and practices of the VHI were to be effectively repudiated.

Several Council members spoke in support of the motion and, on a show of hands, the proposed practice note (published at page 40 of this issue) was unanimously approved by the Council.

Competition Authority study of the professions

The director general gave a detailed presentation on the contents of the Indecon Report published by the economic consultants employed by the Competition Authority and noted that the negative media coverage following its publication was not a fair reflection of the contents of the report. In fact, there was much in the report with which the society wholeheartedly agreed, not least the extremely positive assessment of the society's regulatory and education system.

The next step would involve the Competition Authority drafting consultation papers for each profession. These papers would, among other things, address Indecon's findings and put forward any draft recommendations for regulatory change that the authority might consider desirable. Responses to the draft recommendations would then be invited. The authority might also hold oral hearings with interested parties. Following this process, the authority would publish a final report for each profession, stating its position on the issues raised. These final reports would also list any specific regulatory changes that the authority considered would enhance competition.

John Fish said that he believed the Indecon report ignored the particular demographic of Ireland and much of the material in the report seemed to reflect England and Wales practices and suggested that the English understanding of the relationship between solicitors and their clients was the best one.

The president noted that

Indecon had said the submission from the society was by far the best they had received. Helen Sheehy complimented the president on the speed with which the society had communicated with the profession following the publication of the Indecon report.

Personal Injuries Assessment Board

The director general briefed the Council in relation to a meeting of the Oireachtas Joint Committee on Enterprise and Small Business to discuss the government's insurance market reform programme, during which the tánaiste had indicated that the heads of the bill for the establishment of the PIAB would be brought to the cabinet before the summer. It was intended to put the legislation before the Oireachtas in early autumn and have it enacted by the end of the year.

In addition, she had indicated that the minister for transport would bring forward legislation in relation to road traffic matters, which would also deal with the issue of perjury. The intention was that people would be pursued for perjury in cases of fraudulent claims. It was also proposed that a claimant would be required to sign an affidavit. If any part of the affidavit was false or incorrect, or if exaggerated claims were made in relation to their pain, suffering or injuries, then the whole claim would fail and defendants would be allowed their costs.

In relation to the PIAB itself, the tánaiste had said that lawyers should not necessarily be involved. It might well be that people would need some legal assistance when compiling application forms for the PIAB,

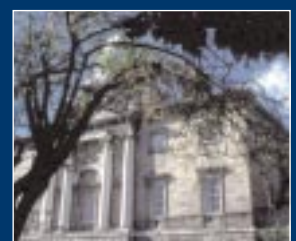
but it was intended that the PIAB system would be paper-based, not a forum for people to appear before in an advocacy role. Matters would be dealt with behind closed doors by a group of appropriate citizens 'with the credibility to ensure that people would want their claims dealt with in that way'.

Increase in stamp duty and court fees

The president noted that an e-mail had issued to the profession on 10 March 2003, attaching copies of the new courts fees orders. She regretted the short notice of the increases, which were quite substantial and would further increase the cost of access to justice. Gerard Doherty said it was extraordinary that the government should make it more difficult for an individual to dispute their costs by way of taxation, as they had increased the fee for this procedure from 6% to 9%. **G**

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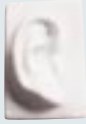


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Practice notes

FOREIGN LAWYERS' OPINIONS: AN UPDATE

The Conveyancing Committee wishes to clarify that the practice note published in the March 2001 issue of the *Law Society Gazette* was not intended to make the provision of a foreign lawyer's opinion mandatory in all transactions involving foreign companies. The committee recommends that practitioners should use their discretion as to whether an opinion is in fact necessary or justified in any transaction involving a foreign company. In exercising that discretion, practitioners are advised to have regard to the nature, value and importance of

the transaction, the similarity of the law of the foreign jurisdiction on the subject matter of the transaction, the likelihood of ever having to rely on the opinion and the likely requirements of the Land Registry or Registry of Deeds (if relevant). This position is reflected in condition 9 of the 2001 edition of the *General conditions of sale*, which only requires the vendor to disclose the fact of its foreign incorporation, leaving the parties then to agree by special condition as to whether an opinion is required.

Conveyancing Committee

PRE-CONTRACT ENQUIRIES REGARDING PROTECTED HABITATS

The following enquiries should be raised pre-contract, as part of a prospective purchaser's pre-contract investigations, where there is a prospect that there is a sensitive habitat in the area or that an environmental protection is in place. They are not appropriate for residential property in the middle of urban areas, and would rarely be necessary in the case of other residential properties, unless a significant land holding is involved.

Where replies in the affirmative are received, then further and more detailed enquiries

should be made.

Habitats directive and related environmental legislation:

- 1) Is any part of the property designated as a natural heritage area, special area of conservation or special protection area?
- 2) If not, is the vendor aware of any proposal for any such designation affecting the property?
- 3) Has any order been made, notice served or agreement entered into under the *Wildlife Acts, 1976 and 2000* affecting any part of the property?

Conveyancing Committee

VHI UNDERTAKINGS

Practitioners will be aware of previous practice notes issued by the Law Society, advising members of on-going difficulties with the new form of undertaking which VHI is issuing to practitioners for completion.

The issue giving rise to the difficulty is VHI's requirement that solicitors undertake, subject to any court order to the contrary, to repay to VHI, out of the proceeds which come into the solicitor's hands, *all* monies paid by VHI on behalf of the

client/subscriber. Previously, the solicitor undertook to reimburse to VHI whatever sum had been *recovered* in respect of monies paid out by VHI.

The society considers the new requirement to be inequitable and unreasonable. For example, if a subscriber sustains injuries due to his own fault, then all monies paid out by VHI in respect of that subscriber will be discharged by VHI. However, if damages are recoverable from a third party, VHI demands to be

reimbursed all the monies it has advanced even where a subscriber has recovered only a proportion of it in the litigation. If, for example, 25% is recovered in the litigation, the subscriber will have to pay the 75% balance out of damages. The subscriber could be left with little or no compensation as a result.

The society is aware of instances where clients are pressuring solicitors into giving the undertaking, notwithstanding the fact that it may be against

the client's best interests in the long term. Solicitors are faced with clients who have been refused cover for future treatment unless the undertaking is signed. It has also been reported that VHI has refused to pay hospital bills unless the undertaking is signed. This resulted in the hospital referring the matter to a debt collection agency.

The society recommends that solicitors do not furnish the VHI undertaking in its new format.

Litigation Committee

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LEGISLATION UPDATE: 15 MARCH – 14 APRIL 2003

ACTS PASSED

Data Protection (Amendment) Act, 2003

Number: 6/2003

Contents note: Gives effect to directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Amends the *Data Protection Act, 1988* by extending data protection rules to certain manual data relating to living individuals which is recorded as part of a relevant filing system. Sets out conditions for processing personal data and makes provision for data subjects' rights, in particular, the right to be informed about the processing of data relating to them. Sets out new rules relating to transfers of data to countries outside the European Economic Area. Provides for certain amendments to the *Data Protection Act, 1988*

Date enacted: 10/4/2003

Commencement date: 24/10/2007 in respect of manual data held in relevant filing systems on the passing of this act insofar as the act: a) amends section 2 of the *Data Protection Act, 1988* and applies it to manual data; b) inserts sections 2A and 2B into the *Data Protection Act, 1988* (per s22(4) of the act). Commencement order/s to be made for all other sections of the act (per s22(3) of the act)

Employment Permits Act, 2003

Number: 7/2003

Contents note: Provides for the grant of employment permits in respect of non-nationals. Prohibits the employment of non-nationals who do not have the requisite permits and creates a specific offence for both an employer and an employee where employment is entered into in the absence of a requisite permit. Provides that the requirement for employment permits will not apply in the case of employment of nationals of EU accession

states under certain circumstances

Date enacted: 10/4/2003

Commencement date: 10/4/2003

Finance Act, 2003

Number: 3/2003

Contents note: Provides for the imposition, repeal, remission, alteration and regulation of taxation, of stamp duties and of duties relating to excise and otherwise makes further provision in connection with finance, including the regulation of customs

Date enacted: 28/3/2003

Commencement date: Various – see act

Local Government Act, 2003

Number: 8/2003

Contents note: Amends the *Local Government Act, 2001* to end the dual local authority/parliamentary membership from the next local elections in 2004; repeals chapter 3 of part 5 (ss39 to 43) of the *Local Government Act, 2001*, which provides for the introduction of direct elections of city and county cathaoirleigh from 2004 onwards; amends s97 of the *Planning and Development Act, 2000* and provides for related matters

Date enacted: 10/4/2003

Commencement date: 10/4/2003 for all sections of the act except section 2, which will come into operation and apply with respect to the local elections to be held in the year 2004 and thereafter (per s2(2) of the act)

Motor Vehicle (Duties and Licences) Act, 2003

Number: 5/2003

Contents note: Amends and extends the *Finance (Excise Duties) (Vehicles) Act, 1952* and the *Finance (No 2) Act, 1992* in respect of certain duties or licences leviable or issuable thereunder and provides for related matters

Date enacted: 10/4/2003

Commencement date: 10/4/

2003 for all sections except section 8, for which a commencement order is required (per s8(2) of the act)

Social Welfare (Miscellaneous Provisions) Act, 2003

Number: 4/2003

Contents note: Provides for the introduction of social welfare measures announced in budget 2003. Provides for increases in child benefit and the respite care grant; extends child dependant allowances for certain children of recipients of short-term social welfare payments; and provides for changes in the means test for certain social assistance schemes. Makes changes to the PRSI system by giving effect to the budget measure for the application of PRSI contributions and health and employment training levies to benefits-in-kind. Amends and extends the *Social Welfare Acts*, the *Health Contributions Act, 1979*, the *National Training Fund Act, 2000*, the *Ombudsman Act, 1980*, the *Freedom of Information Act, 1997* and the *Pensions Act, 1990*

Date enacted: 28/3/2003

Commencement date: Various – see act

SELECTED STATUTORY INSTRUMENTS

Competition Act, 2002 (Section 34(11)) (Director of Consumer Affairs) Order 2003

Number: SI 130/2003

Contents note: Schedule 1 of the *Competition Act, 2002* specifies the statutory bodies that are required to enter into co-operation agreements with the Competition Authority as provided for in section 34 of the act. This order adds the director of con-

sumer affairs to those bodies and requires the entering into of a co-operation agreement between the director and the Competition Authority

Commencement date: 9/4/2003

Finance Act, 2001 (Section 30) (Commencement) Order 2003

Number: SI 126/2003

Contents note: Appoints 6/4/2001 as the commencement date for section 30 of the *Finance Act, 2001* (amendment to section 472B of the *Taxes Consolidation Act, 1997*, which provides for a deduction from taxable income for certain seafarers)

Pensions (Amendment) Act, 2002 (Section 5, insofar as that section inserts sections 126 to 130, 146 and 147 of part XI into the Pensions Act, 1990) (Commencement) Order 2003

Number: SI 119/2003

Contents note: Appoints 28/4/2003 as the commencement date for section 5 of the *Pensions (Amendment) Act, 2002* insofar as it inserts sections 126 to 130, 146 and 147 of part XI into the *Pensions Act, 1990*. These sections provide for the establishment of the Office of Pensions Ombudsman and the appointment of the pensions ombudsman

Pensions (Amendment) Act, 2002 (Sections 45 to 49) (Commencement) Order 2003

Number: SI 120/2002

Contents note: Appoints 28/3/2003 as the commencement date for sections 45 to 49 of the *Pensions (Amendment) Act, 2002* (provisions relating to PRSAs)

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Personal injury judgments

Employer liability – network technician suffering injury as a result of accident at work – allegations of contributory negligence, including failure to have regard for his own safety – dispute over loss of overtime – overtime comparators

CASE

Denis O'Neill v Electricity Supply Board, High Court, judgment of Finnegan P of 31 July 2002.

THE FACTS

Denis O'Neill, aged 55 in 2002, was employed as a network technician by the ESB and had been employed by the ESB since 1965. On 3 March 1999, in the course of his employment, he was dismantling a 'switching unit' and, in the course of so doing, sustained serious injury.

The switching unit is dismantled by a crane. At the time of the incident, the switching unit had been partly dismantled and there remained only a large steel structure which rested on a base comprised of three concrete

supports across which lengths of angle iron were placed. The concrete supports were 5'7" high and 1' wide. A number of inspection covers had been removed from the switching unit and one of these was placed on top of the concrete support. Mr O'Neill stood on the concrete support in order to manipulate a sling on the crane around the remaining part of the unit and in so doing his attention was focused upwards. He moved his feet and stood on the inspection plate, which tilted, causing him to fall.

Mr O'Neill was taken to St Vincent's Hospital, Dublin, where x-rays showed multiple fractures of his left ribs and an infusion at the base of the lung. A drain was inserted into the lung. Mr O'Neill was stated to have a 'stove in' left chest with diminished air entry, and the drain on 30 March 1999 was extracting purulent fluid. On 31 March 1999, he was taken to theatre and a bronchoscopy was carried out. This showed pus in both the right and left lungs, which was sucked clear. A left thoracotomy was carried out.

There were 400 millilitres of pus in his chest. His diaphragm was high. He had multiple double fractures of his ribs. A 1" free segment of rib was impaled into his lung; this was removed. There was a hole in his diaphragm. He was detained in intensive care for seven days and in hospital for one month in all.

High Court proceedings were subsequently issued against the ESB, seeking damages arising from breach of duties in the context of employer liability.

JUDGMENT OF THE HIGH COURT

The case came before Finnegan P of the High Court, who delivered judgment on 31 July 2002. Having outlined the facts, the judge stated that he was satisfied that the ESB had been in breach of the *Factories Act, 1955* as substituted by the *Safety in Industry Act, 1980*. The ESB pleaded contributory negligence and, in particular, it was alleged that the inspection plate had been left on the concrete support by Mr O'Neill, he having removed the same from the switching unit. The judge noted that Mr O'Neill had strenuously denied that he had removed any of the inspection plates or that he had placed the inspection plate on the concrete support. The judge accepted Mr O'Neill's evidence.

The ESB further pleaded general particulars of contribu-

tory negligence: that Mr O'Neill failed to have any or adequate regard for his own safety and failed to anticipate the accident which in fact had occurred. Finnegan P stated that he was satisfied that Mr O'Neill was not guilty of contributory negligence. Accordingly, the ESB was liable to Mr O'Neill, having failed to provide a safe means of access to the place at which he was required to work.

The court then reviewed the medical evidence. The judge was satisfied that throughout Mr O'Neill's time in hospital he was in 'excruciating pain'. When in hospital, he developed back pain. Reference was made to various medical reports. Evidence was given to the effect that by May 1999 Mr O'Neill was short of breath on exercise.

By November 1999, he was attending physiotherapy and was complaining of continuing pain in his lower back. He remained tender and sore around the left side of the chest and had difficulty in sleeping, suffered from shortness of breath when walking and had to stop every 100 yards or so. Moving his left arm caused pain and he was unable to lift weights without causing chest pain. However, his chest wall had stabilised. A diminished expansion of the left lung and diminished air entry were observed.

A further medical review was carried out on Mr O'Neill on 31 July 2000. At that time, he was still suffering low back pain and had pain and numbness in the left side of the chest. He had become depressed and lost confidence. His breathing had

improved but he still suffered from shortness of breath on stairs. On examination at that time, he appeared distressed. His gait was abnormal due to low back pain. There was at that stage a 20% to 25% diminution in the volume of his left lung. He was not then fit enough to resume work. Mr O'Neill remained out of work until June 2001 when he returned to light duties, where he remained up to and including the trial of the action.

Finnegan P accepted that it was reasonable for Mr O'Neill to remain out of work for that period, that he was unfit to return to his pre-accident employment and would never be fit to do so. Mr O'Neill was also left with a significant operation scar. The condition of his left lung was permanent.

There was evidence that Mr O'Neill had minor injuries to his back from football many years ago. This was supported by a number of medical certificates, which he had provided to the ESB. However, there had been evidence that his symptoms would resolve with time.

On 21 February 2002, during another medical examination, Mr O'Neill complained of pain at the site of the broken ribs and pain intermittently in his lower back and of being very stiff in the mornings.

Mr O'Neill also attended a consultant psychiatrist. He had no previous history of psychological distress. He was pre-occupied by the accident and subsequent pain. He had been exhibiting avoidance behaviour, with panic, anxiety, social and agoraphobic fear, hyper-vigilance and increased irritability. He had also experienced intru-

sive and persistent re-living of the accident. Mr O'Neill also found it difficult to take the medication which he had been prescribed.

Subsequently, Mr O'Neill found benefit to a substantial degree from his anti-depressant medication. He had residual difficulties that required him to continue to take medication, but it was considered that returning to light work would assist him in his recovery.

By 28 March 2002, when Mr

O'Neill was interviewed finally by the consultant psychiatrist, he was back at work. Mr O'Neill's mental state was much improved. He no longer experienced flashbacks. His sleep was poor, but this was related to pain. His libido had returned, though he continued to complain of erectile failure.

In relation to damages, there had been a conflict of evidence over loss of overtime. Mr O'Neill sought to rely on the overtime earnings of two com-

parators. Finnegan P held that each of the comparators had duties or qualifications which made it more likely that overtime would be available to them. He also took into account the ESB's policy of reducing the amount of overtime as a result of an agreement reached with trade unions and also the *Organisation of Working Time Act, 1997*. The judge also took into consideration that, notwithstanding Mr O'Neill's condition, he would be able to undertake some overtime. He then calculated a net loss in respect of overtime into the future at €5,000 a year. Having applied the appropriate multiplier, the loss of overtime in the future came to €27,360 and the judge did not propose to make any allowance under the principles in *Reddy v Bates* as Mr O'Neill was in secure employment.

AWARD OF THE HIGH COURT

General damages for pain and suffering to date of trial:	€82,500
General damages for pain and suffering into the future:	€82,500
Loss of overtime to date of trial:	€28,000
Loss of overtime into the future:	€27,360
Loss of basic pay:	€11,000
Medication into the future:	€5,500
Agreed special damages:	<u>€2,500</u>
Total:	€239,360

Employer liability – safe system of work – construction work – injury to eye – failure to wear protective glasses – dispute over provision of safety glasses – notice on site about mandatory wearing of safety equipment – extent of possible contributory negligence

CASE

McGann v Manning Construction Ltd, High Court, judgment of Quirke J of 2 April 2003.

THE FACTS

The plaintiff, a 29-year-old male, was involved in an accident on 19 April 2000. The accident occurred during the course of his employment with Manning Construction Ltd, which was carrying out renovations on Mallow Courthouse.

Mr McGann had been employed by Manning Construction Ltd for six months prior to the incident in question. He had been participating in the construction of shuttering on the building. As part of that operation, Mr

McGann was driving nails through a wooden frame into a concrete wall. He had been given directions in relation to the job the previous day. Mr McGann was not wearing safety glasses when hammering in the nails. During the hammering

process, a sliver of metal from the top of a nail flew into his left eye, perforating his iris and embedding itself in the eye.

Mr McGann sued his employer for damages for breach of duty of care and for not providing a safe system of work.

THE JUDGMENT

The case came before Quirke J of the High Court, who delivered an *ex tempore* judgment on 2 April 2003. Having recited the facts, Quirke J dealt with the issue of the safety glasses. Mr McGann said he had not been provided with the safety glasses. Another employee, Mr Finnegan, also gave evidence to

the effect that he had not been provided with safety glasses either. There was evidence from another employee to the same effect. Quirke J noted that the court had no evidence from the employer on the issue. In those circumstances, the court must determine the issue in favour of the plaintiff, Mr

McGann, to the effect that no safety glasses had been provided to the employee as a matter of probability. The High Court accepted that such equipment should have been provided by the employer.

Quirke J stated that there was an onus on employers engaged in such construction

business to provide equipment which is reasonably intended to protect employees from such injuries as are reasonably foreseeable. There was also a general duty to instruct employees on safety procedures. While the judge accepted that such a duty may not always arise, for example, if experienced craftsmen or

tradesmen were being employed, the duty did exist in the present case, where Mr McGann was a general operative employed on a day-to-day basis. More importantly, however, there was a duty on the employer to enforce the wearing by employees of appropriate safety equipment when engaged in such employment.

On the balance of probabilities, Quirke J was satisfied that there had been a breach of duty by the employer to provide such equipment as was reasonably required to protect employees. He was also satisfied that there had been failure by Manning Construction Ltd to properly instruct Mr McGann on safety procedures and in not enforcing the wearing by employees of appropriate safety equipment.

He considered that Mr McGann had therefore discharged the onus of proving that his employer breached a duty of care to him and that his injury flowed from that breach of duty.

On the issue of contributory negligence, Quirke J found that Mr McGann's failure to comply with a clear sign erected by

Manning Construction Ltd on the site, which indicated that the wearing of safety equipment was mandatory, resulted in contributory negligence on the part of Mr McGann to the extent of 25%.

In relation to the injuries, Quirke J found that Mr McGann suffered a serious eye injury resulting in permanent

damage to his left eye. He had to undergo two operations, the first for the removal of the sliver of metal from his left eye. Five days later, he had to undergo a second operation for the removal of a traumatic cataract that was a result of the accident.

Mr McGann returned to work quickly, but he had only 30% visual acuity in his left eye. In relation to the future, Mr McGann would have some difficulty with distance perception. While the symptoms could be corrected with the wearing of corrective lenses, the judge considered that Mr McGann was entitled to full vision and would now have to wear glasses for the rest of his life. **G**

These judgments were summarised by solicitor Dr Eamonn Hall.

AWARD OF THE HIGH COURT

Quirke J considered it appropriate to award damages on a global basis; he did not make a separate award for damages up to the trial of the action and then for damages into the future.

General damages:	€60,000
Special damages:	€900
Total:	€60,900

As Mr McGann was found to be 25% liable, the overall award was reduced to €45,675.

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CHILDREN AND YOUNG PERSONS

Custody, family law

Family – children – Hague convention – habitual residence – whether respondent wrongfully removed children into jurisdiction – whether court should order their return to UK – Child Abduction and Enforcement of Custody Orders Act, 1991

The applicant and the respondent were the father and mother of two children. Both children were born in Ireland and the family lived in Ireland until late 1999, when they emigrated to England. Unhappy differences arose and the mother, without the knowledge or consent of the father, returned to Ireland with the children. The applicant sought a declaration that the respondent had wrongfully removed minors into the jurisdiction of the courts of Ireland within the meaning of article 3 of the *Hague convention* and an order for the return of the minors to the UK. The parties disagreed with regard to the 'habitual residence' of the children.

O'Donovan J held that the mother had wrongfully removed the children into the jurisdiction but refused to order their return to the UK, declaring that there was grave risk that the return of one of the minors to the UK would expose him to physical or psychological harm. The child should not be exposed to any risk, even a short-term one.

M v M, High Court, Mr Justice O'Donovan, 18/7/2002 [FL7046]

Custody, guardianship

Family law – children – custody – access – maintenance – succession rights – whether maintenance pay-

ments should be increased – Family Law Act, 1995 – Guardianship of Infants Act, 1964

The issues in this case involved access arrangements and maintenance payments in respect of three children. At present, the father of the children was paying €889 a month in maintenance. The father was the owner of a company and had earnings of approximately €89,000 a month. In addition, there were issues raised in relation to succession rights and the ownership of certain items of property.

Mr Justice Herbert made the following orders. The court set out the access arrangements. It could not be said that the mother of the children had a *bona fide* claim for maintenance for herself. The father would be directed to pay €900 a month in maintenance for the children. An order would be made extinguishing the rights of each party to the other's estate under the *Succession Act, 1965*.

McA (D) v McA (K), High Court, Mr Justice Herbert, 17/12/2002 [FL7015]

CRIMINAL

Delay, fair procedures

Practice and procedure – fair procedures – 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, McCracken J dismissed the appeal, holding 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 P O'C, Court of Criminal Appeal, 27/1/2003 [FL7069]

Delay, sexual offences

Appeal against conviction – delay – whether substantial risk of miscarriage of justice if trial permitted to proceed – whether case should be left

to jury – trial judge's charge to jury – whether charge to jury adequate
The respondent was convicted of sexual offences against a minor, alleged to have occurred more than 16 years before the trial began. The appellant submitted that the trial judge should have directed the jury to acquit him on the basis of the delay between the date of the alleged offences and the trial itself. The appellant also complained that the trial judge's charge to the jury was inadequate insofar as it dealt with the problems which flow from the delay and as the importance of the complainant's age had not been addressed expressly by the trial judge.

Delivering the judgment of the court, Denham J dismissed the appeal, holding that the trial judge did not err in failing to direct an acquittal as there was *prima facie* evidence before the court upon which the matter could proceed to the jury for determination. It was for the jury to assess issues such as the credibility of the complainant. Nor would it generally be required of a trial judge to rule on the age of a complainant in his charge to the jury. No formula had been established nor had any guidelines been given as to the charge to be given in such cases. The charge by the trial judge was fair and adequate insofar as it had drawn the jury's attention to the difficulties of delayed cases and charged also on the issue of corroboration. Accordingly, there was no ground upon which the court could interfere with the way in which the trial judge exercised his discretion.

People (DPP) v RB, Court of Criminal Appeal, 12/2/2003 [FL7079]

Drug offences, judicial review

Forfeiture of assets – proceeds of drug trafficking – adjournment of forfeiture hearing to receive additional evidence – whether proceedings civil or criminal in nature – jurisdiction – whether trial judge had jurisdiction to adjourn – whether discretion to adjourn exercised outside jurisdiction – whether exercise of discretion unreasonable – whether adjournment possible to receive additional evidence – Criminal Justice Act, 1994, section 39

The DPP applied to the first respondent, Judge Elizabeth Dunne, for an order pursuant to section 39 of the *Criminal Justice Act, 1994* directing forfeiture of monies seized from the applicant, which, he alleged, represented the proceeds of drug trafficking. The evidence proceeded on affidavit, with which she was unsatisfied. Accordingly, holding that, as it was a 'hybrid' case with a civil standard of proof, she had jurisdiction to put the matter back so that further evidence could be given to the court, she adjourned the matter for that purpose. The applicant obtained leave to apply for an order of prohibition restraining the first respondent from proceeding with any hearing held to receive further evidence which might be tendered on behalf of the second respondent on the grounds that the proceedings were criminal in nature and, that being so, the court did not have any jurisdiction to adjourn the hearing at the conclusion of the second respondent's case for the purpose of receiving additional evidence.

Kearns J refused the relief sought, holding that section 39 of the 1994 act provides for a forfeiture proceeding which is *in rem* and does not provide for the creation of a criminal offence. Although possessing characteristics which could be described as 'hybrid', the nature of the proceedings are essentially civil in character. In civil proceedings, a judge may adjourn a matter for further consideration. Accordingly, the judge had jurisdiction to adjourn. In so

adjourning, the trial judge was entitled to take into account the assurance given by the DPP that no new or additional material would be entered and so the exercise of her discretion could not be said to be unreasonable.

England v Judge Elizabeth Dunne and the DPP, High Court, Mr Justice Kearns, 14/2/2003 [FL7003]

Evidence, larceny

Case stated – whether error tendered in evidence warranted dismissal of charges – jurisdiction of District Court – Summary Jurisdiction Act 1857

The accused had been charged and convicted of handling stolen property in the District Court. The accused stated a case for the opinion of the High Court. It was contended that there had been an error relating to the evidence tendered by the prosecution witnesses relating to the dates on which they, the owners of the property, had identified their property at the local garda station. The District Court judge had indicated at the trial that the prosecution witnesses had erred with regard to the naming of dates but that the error was not sufficient to justify a direction to dismiss the charges.

Ó Caoimh J held that the District Court judge was entitled to conclude that the witnesses had been mistaken as to the dates on which they inspected their property at the garda station. The judge was entitled to find that there was a case to answer, to refuse to dismiss the charges and to find the accused guilty of the charges.

DPP v Noonan, High Court, Mr Justice Ó Caoimh, 16/12/2002 [FL7036]

Firearms, jurisdiction of District Court

Firearms offences – practice and procedure – jurisdiction of District Court – whether firearms offences could be dealt with summarily in District Court – Summary Jurisdiction Act 1857, section 2 – Courts (Supplemental Provi-

sions) Act, 1961, section 51 – Firearms Acts, 1925 to 1990 – Offences Against the State Act, 1939

The accused had been charged with a firearms offence. In the District Court, the prosecution indicated that the DPP consented to the summary disposal of the charges. The District Court judge indicated that scheduled offences under the *Offences Against the State Act, 1939* were indictable. In addition, the District Court judge held that in order to obtain jurisdiction he had to be satisfied that the DPP had determined: i) that the charges could be tried by the ordinary courts and that ii) the charges could be tried summarily by the District Court. In the absence of such decision and information, the District Court had not acquired jurisdiction to dispose of the charges summarily within the meaning of section 45(1) the *Offences Against the State Act, 1939*. The DPP stated a case for the opinion of the High Court.

Ó Caoimh J held that it was clear in the case of each of the offences charged against the defendant that they were offences which the District Court had jurisdiction to dispose of summarily. The question of these offences being scheduled offences was secondary. If they were scheduled offences, the District Court could only direct that the defendant be sent forward for trial to the Special Criminal Court if the DPP so requested. It was clear that no such request was made and accordingly the offences remained to be dealt with by the District Court. The District Court judge had erred in law in holding that the Special Criminal Court had exclusive jurisdiction to hear and determine the charges in question.

Kershaw v DPP, High Court, Mr Justice Ó Caoimh, 27/1/2003 [FL7030]

Judicial review, prisons

Temporary release – entitlement to fair procedures – legitimate expecta-

tion – Criminal Justice Act, 1960 – Prisoners (Temporary Release) Rules 1960

The applicant began a life sentence for murder in June 1989. In July 1999, he was granted temporary release. On the day upon which his temporary release was due to expire, he was arrested and questioned in relation to a murder but not charged. His temporary release was not renewed. The applicant sought judicial review of the decision.

Finnegan J refused the relief sought, holding that there was no entitlement to fair procedures on the exercise of the right to grant or refuse temporary release. There could be no legitimate expectation that temporary release would be granted.

Dowling v Minister for Justice, Equality and Law Reform, High Court, Mr Justice Finnegan, 14/5/2002 [FL7045]

Proceeds of crime

Drug trafficking – confiscation of proceeds of drug trafficking – determination of whether person benefited from drug trafficking made on balance of probabilities – whether inquiry into and determination of whether plaintiff benefited from drug trafficking constitutes criminal procedure – whether confiscation order made in due course of law – Criminal Justice Act, 1994, section 4 – Bunreacht na hÉireann, articles 38.1 and 38.5

The Special Criminal Court, having convicted and sentenced the plaintiff for drug offences, entered into an inquiry pursuant to section 4 of the *Criminal Justice Act, 1994* to determine whether the plaintiff had benefited from drug trafficking and made a consequent confiscation order relating to certain of the plaintiff's assets under that section. The plaintiff challenged the constitutionality of a number of provisions of the 1994 act and the jurisdiction of the Special Criminal Court to make a determination under section 4.

McCracken J granted a declaration that the Special Criminal Court had no jurisdiction to

make a determination under section 4 of the 1994 act, holding that the provisions of the act of 1994 relating to confiscation were not ancillary to the jurisdiction of the Special Criminal Court, not being powers relating to the trial of offences, which is the only purpose for which the Special Criminal Court may exist under the constitution. In relation to the challenge into the constitutionality of the provisions of the 1994 act, he held that section 4 of the 1994 act does not purport to create a criminal charge nor does it provide for the trial of any person on a criminal charge and cannot therefore be held to offend against article 38 of the constitution.

Gilligan v Special Criminal Court, DPP, Ireland and the Attorney General, High Court, Mr Justice McCracken, 8/11/2002 [FL7010]

Proceeds of crime, property

Seizure of assets – practice and procedure – interlocutory order – proceeds of crime – property – whether interlocutory orders should be discharged – Proceeds of Crime Act, 1996

Interlocutory orders had been made against the defendants under section 3 of the *Proceeds of Crime Act, 1996*. The defendants sought to have the orders discharged on the basis that the parties had been unaware as to the substantive nature of the hearing granting the section 3 orders. It was claimed that the defendants, had they been aware of the true nature of the hearing, could have sought the delivery of a statement of claim or availed of discovery procedures. It was contended that the orders should be discharged on the basis of injustice.

Finnegan J refused the relief sought. The orders made under section 3 of the *Proceeds of Crime Act, 1996* were final in nature. Save for the statutory jurisdiction to discharge or vary the order, the court had no other power to discharge the order. As such, the correct remedy lay in appealing a final order to the

Supreme Court.

M(FM) v C(M), High Court, Mr Justice Finnegan, 26/4/2002 [FL7041]

Sentencing

Respondent convicted of fraudulent trading – one-year suspended sentence imposed – whether custodial sentence appropriate – circumstances of case – whether sentence unduly lenient – Criminal Justice Act, 1993, section 2

The respondent pleaded guilty to a charge on indictment of fraudulent trading and was sentenced by the trial judge to one year's imprisonment, suspended for two years. The director of public prosecutions applied, pursuant to section 2 of the *Criminal Justice Act, 1993*, for a review of that sentence as being unduly lenient. The applicant argued that the failure to impose a custodial sentence amounted to an error of principle.

Delivering the judgment of the court, McCracken J refused the application, holding that the test was whether a custodial sentence was appropriate in the circumstances of a particular case. As such, a trial judge is entitled to be lenient if he considers it is just in all the circumstances of a particular case. The trial judge gave reasons for his leniency which he was entitled to take into account when imposing sentence, including the age of the accused, his motive in committing the crime, whether the accused benefited personally from his crime and the likelihood of re-offending. Unless imposed by statute, there is no principle that a court should apply a minimum sentence.

People (DPP) v Clarkin, Court of Criminal Appeal, Mr Justice McCracken, 10/2/2003 [FL7070]

DISCOVERY

Practice and procedure

Documents sought by defendants to test plaintiff's assertion that legislation unconstitutional – whether categories of documents sought to be

discovered relevant – whether necessary for fair disposal of action – whether extent of discovery sought proportionate to defence raised – whether documents should be discovered – Public Health (Tobacco) Act, 2002

The plaintiffs challenged the constitutionality of certain provisions of the *Public Health (Tobacco) Act, 2002* as being a disproportionate interference into their property rights and rights to freedom of speech and communication. The defendants sought discovery of documents relating to advertising and marketing campaigns and market research conducted in the ten years prior to the start of the proceedings, which they alleged were necessary to test assertions made by the plaintiffs that the act was disproportionate in its effects.

Kelly J refused to make an order for discovery, holding that, at the trial, the plaintiffs would have to lead evidence as to how the new regime imposed by the 2002 act was going to impact upon them and that such evidence would be open to cross-examination and that the categories of documents sought would be irrelevant for the purposes of that exercise, given that the material sought had been generated in a different regulatory regime to that envisaged in the 2002 act. Even if such documents were relevant, they were unnecessary for the fair disposal of the action because the objective manifestation of the behaviour of the plaintiffs was what was at issue, which was in the public domain and known to the defendants. Furthermore, discovery over the ten-year period sought was disproportionate.

Pf Carrolls Ltd v Minister for Health and Children, Ireland, AG and Morris Holland BV, High Court, Mr Justice Kelly, 17/1/2003 [FL6980]

ENVIRONMENTAL

Judicial review, planning and development

Refusal of planning permission – failure to furnish reasons – fair procedures – reasonableness – whether material before respondents to support decision that public health would be compromised by development – whether decision of respondents to refuse permission irrational – whether decision ultra vires

The applicant was refused planning permission by the respondent to build a housing estate on the grounds that the public sewage system into which sewage from the estate would flow had inadequate capacity and would therefore pose a threat to public health. The applicant sought to have that decision quashed.

Peart J refused the relief sought, holding that the court was confined to the manner in which the respondent reached its decision rather than carrying out any consideration of the merits of the decision and that there was material before the respondent from which it was entitled to conclude that the development could produce a situation prejudicial to public health and to refuse permission for that reason.

Ryan & Sons Ltd v An Bord Pleanála and Limerick Corporation, High Court, Mr Justice Michael Peart, 6/2/2003 [FL7029]

Statutory interpretation

Judicial review – planning and development – environmental law – statutory interpretation – whether respondent obliged to carry out environmental impact assessment – Local Government (Planning and Development) Regulations 1994 – European Communities (Environmental Impact Assessment) (Amendment) Regulations 1999 – Environmental Protection Agency Act, 1992

The applicant applied for judicial review by way of *certiorari* of a decision of the respondent granting an integrated pollution control licence. The applicant contended that the state was in breach of its obligations under

European Community law. Specifically, the applicant argued that section 98 of the *Environmental Protection Act, 1992* prevented the planning authority or the board from taking environmental pollution into account in deciding whether there should be an environmental impact statement and therefore Ireland had failed to correctly transpose relevant directives. The applicant also contended that the respondent had failed to give proper consideration to the effects that the granting of the licence would have on habitats.

The Supreme Court (Fennelly J, *nem diss*) dismissed the appeal, holding that section 98 did not bear the meaning propounded on behalf of the applicant. There was no failure to transpose the directives. As regards protection of habitats, a report had been submitted by an ecological consultant who stated that no adverse effects were to be expected.

O'Connell v Environmental Protection Agency, Supreme Court, 21/2/2003 [FL7019]

FAMILY

Contract law, property

Contract – option to buy – division of property – whether respondent entitled to exercise option to pur-

chase – whether option to purchase had been extinguished by lapse of time

The applicant and respondent in a family law case entered into an agreement whereby the respondent had an option to purchase the applicant's share in a property for £20,000 within 28 days of the division of the property having been agreed. A dispute arose as to whether the respondent was still entitled to exercise the option to purchase having been called upon to do so on a number of occasions by solicitors for the applicant. The solicitors for the respondent indicated that their client intended to proceed to exercise the option. The solicitors for the applicant proceeded to have the property partitioned and gave notice to the respondent to exercise her option to purchase within 28 days.

Mr Justice Geoghegan held that there was no such thing as a unilateral partition as set out by the solicitors for the applicant. Obviously, there was either to be an agreed partition or the court would partition the property. However, having regard to the history of the case and the long lapse of time from when the solicitors for the respondent had indicated that their client would exercise the option, the applicant was entitled to treat the option as having ended once

the 28-day period had elapsed. The respondent was not now entitled to purchase the applicant's share for £20,000. Steps should now be taken to partition the property in question.

M(B) v (M)M, High Court, Mr Justice Geoghegan, 10/7/2000 [FL6979]

INSURANCE

Liability, negligence

Tort – personal injuries – MIBI agreement – plaintiff passenger in car – uninsured driver – whether plaintiff knew or ought to have known that driver uninsured – onus on bureau to establish plaintiff's actual or imputed knowledge – whether bureau liable

The plaintiff was injured while a passenger in a car which was being driven negligently as a result of which he suffered personal injuries. As the car was uninsured at the time, the plaintiff sued the Motor Insurers' Bureau, which resisted the claim on the basis that the plaintiff either knew or ought to have known that the car was uninsured. The High Court (Butler J) dismissed the action on the grounds that the plaintiff was engaged in a criminal escapade, that he probably knew that the car in which he was a passenger was uninsured and that the court has an inherent jurisdic-

tion to refuse relief where a plaintiff deliberately lies to the court with a view to obtaining damages. The plaintiff appealed against that decision.

Keane CJ, delivering the judgment of the court *ex tempore*, dismissed the appeal, holding that the trial judge was entitled to reach a conclusion that if the plaintiff did not know that the car was uninsured, he ought to have known had he been approaching the matter in a responsible manner, bearing in mind that the onus was on the bureau to establish that the plaintiff knew or ought to have known that the car was uninsured. However, it was not open to the trial judge to find from the evidence that the plaintiff had been engaged in criminal activity due to the presumption of innocence to which he was entitled.

Ward v Ward and Motor Insurers' Bureau of Ireland, Supreme Court, 18/2/2003 [FL6995] 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

Draft EC merger regulation published

On 11 December 2002, the European Commission published a draft regulation¹ intended to replace the existing *EC merger regulation*² (ECMR) under which mergers, acquisitions and full-function joint ventures (concentrations) that satisfy the turnover threshold tests set out by the ECMR are subject to review by the European Commission. The draft regulation substantially amends the text of the ECMR, introducing many changes and improvements based on the commission's experience of working with the ECMR and the comments it received during the extensive consultation procedure conducted over the past year.

Case allocation

One of the main objectives of the draft regulation is to reduce the need for multi-jurisdictional merger control filings within the EU for those concentrations that do not satisfy either of the jurisdictional threshold tests set out by the ECMR (that is, those without a Community dimension) and which therefore may require notification in several EU member states. Rather than change the threshold tests set out by the ECMR, it is proposed to allow parties to a concentration to indicate which authority they consider best placed to deal with it. It is also proposed to amend the existing provisions on the transfer of cases between the commission and national authorities.

Under article 4(4) of the draft regulation, the parties to a concentration with a Community dimension may request that the

national merger control authorities of an EU member state examine the concentration instead of the commission. The parties may request this by way of a reasoned submission to the commission, stating *'the concentration affects competition in a market within a member state which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that member state'*. Having consulted the member state in question, the commission may decide to refer the whole or part of that case to that member state. Where the whole of a case is referred, there will be no need for the concentration to be notified to the commission.

Conversely, article 4(5) of the draft regulation will allow the parties to a concentration which does not have a Community dimension, but which does meet the merger control jurisdictional thresholds of various EU member states, to request that the commission examine the matter instead of the member states. Again, the parties to the concentration must make a reasoned submission to the commission, arguing *'the concentration has significant cross-border effects and should therefore be examined by the commission'*. If at least three member states agree (or all of the member states concerned, if less than three), competence automatically transfers to the commission. Otherwise, the commission may decide to examine the concentration. Concentrations to be examined by the commission must be notified to it in the usual way.

The existing provisions on the transfer of cases between the commission and national authorities set out in articles 9 and 22 of the ECMR have also been amended. In particular, the procedure for the referral of a case by member states to the commission set out in article 22 of the ECMR has been greatly elaborated. The commission hopes that this will encourage member states to refer cases to it that would otherwise be considered by several different authorities.

As regards the examination of concentrations, another important change is the insertion of article 3(4), which provides that two or more transactions that are conditional on one another, or are so closely connected that their economic rationale justifies their treatment as a single transaction, shall be treated as the same concentration.

Substantive test

The draft regulation also amends the substantive test against which mergers will be analysed. Currently, the commission considers whether a concentration would lead to the creation or strengthening of a dominant position as a result of which competition would be significantly impeded in the common market or a substantial part of it. Under the draft regulation, the definition of dominance in article 2 of the regulation will be extended to deem dominance to exist where a merger would result in a reduction of competition but would not result in the creation or strengthening of a dominant

position as defined in EU jurisprudence.

The intention is to close a perceived gap in the ECMR by allowing the commission to examine mergers between non-dominant players in oligopolistic markets (that is, markets characterised by a small number of players). This is proposed instead of replacing the dominance test with a test based on whether a concentration would lead to a 'substantial lessening of competition' (SLC) – the test used in the US and recently adopted in Ireland and the UK. However, while the commission does not favour the adoption of the SLC test, it is expected that arguments in its favour will be put forward again when the draft regulation is considered by the council of the EU.

Notification and time limits

Under the draft regulation, article 4 would be amended to allow notifications to be made either before or after agreement is reached. This would help businesses to co-ordinate merger filings in different jurisdictions (for example, where a filing in the EU and the US is required).

The implementation of concentrations notified to the commission (with the exception of public bids) remains prohibited. However, it is proposed to add a new power to article 7 enabling the commission to issue regulations granting a derogation from the obligation to suspend implementation to certain categories of concentrations. These categories will be limited to concentrations which, in general, *'do not lead to a combination of*

market positions giving rise to competition concerns'. Examples might be where a venture capitalist invests in unrelated economic sectors or a joint venture to exploit a new technology.

It is proposed that the time limits for the commission's review of cases, set out in article 10, be amended. The time provided for preliminary phase one inquiries would be extended to 25 working days (extendable to 35 days where a member state requests jurisdiction or where the parties have offered commitments to address any competition concerns arising). In-depth phase two inquiries would be extended to 90 working days (extendable to 105 working days where commitments have been offered). An additional 20 working days could also be added to the timetable for an in-depth investigation either by the commission (with the consent of the parties) or where the parties request such an extension within 15 working days of the initiation of phase two.

The draft regulation also provides that where the European Court of Justice (ECJ) annuls the whole or part of a commis-

sion decision regarding a concentration, the time limits shall start again from the working day following either the receipt of a new notification, additional information to supplement the original notification, or a certificate that there have been no changes in the market that would require additional information to be submitted.

Procedural powers

Article 8 of the draft regulation will give the European Commission the power to impose interim measures to ensure that conditions of effective competition are not distorted in cases where an implemented concentration is prohibited or where completion of a concentration has not been suspended following its notification to the commission. It is also proposed to increase the commission's power to gather information.

A new power to interview persons (natural or legal) for the purpose of collecting information is included in article 11. Article 13 has also been amended to provide the commission with the power to seal any business premises, books or records,

and to ask staff for explanations on facts or documents during the course of on-site inspections. Article 13 also provides that the police of the member state concerned may assist commission officials to enable them to conduct their inspection where the inspection is opposed by the business in question, subject to the approval of the courts of that member state.

It is proposed to amend article 14 to enable the commission to impose fines on businesses of up to 1% of their aggregate turnover (the current maximum is €50,000) where they: supply incorrect or misleading information to the commission or fail to supply information within the required time limit; refuse to submit to an inspection; or break seals attached by the commission.

Article 15 would also be amended to allow the commission to impose periodic penalty payments of up to 5% of the average daily turnover of a business for each working day a business fails to co-operate (the current maximum is €25,000 a day) in order to compel the supply of complete and correct

information, submission to an inspection or compliance with interim measures ordered by the commission.

The draft regulation is to be adopted under the EU's consultation procedure, which obliges the council of the EU to consider the opinion of the European Parliament before conducting its deliberations. It is expected that both the European Parliament and the council will propose amendments to the draft regulation and therefore the final version may differ from the draft published by the commission. Once adopted, the new regulation is expected to come into force on 1 May 2004.

Footnotes

- 1 *Proposal for a council regulation on the control of concentrations between undertakings*, COM (2002) 711.
- 2 *Council regulation 4064/89/EEC on the control of concentrations between undertakings, as amended by council regulation 1310/97/EC*. **G**

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Recent EU legislative developments: October 2002 – February 2003

Final step in new telecoms regulation framework.

The European Commission identified 18 markets in the electronic communications sector that national regulators will have to investigate in order to decide whether these markets continue to justify sector-specific regulation. The list of the markets is a key element of the new regulatory framework for electronic communications in Europe. By listing the markets where the commission considers that regulation may be justified, the recommendation seeks to roll back regulation where it is no longer required and provide greater legal certainty for suppliers of communications networks and services.

Link to Information Society DG's documents on the new regulatory framework can be found at: <http://www.europa.eu.int>

Draft regulations to implement four of the five new directives were published before Christmas for consultation by the Department of Communications, Marine and Natural Resources. The directives must be transposed by 25 July 2003. Link to the department's consultation can be found at: <http://www.dcmnr.gov.ie>

Treaty of Nice entered into force on 1 February 2003.

The treaty makes adaptations to the European institutions, which are necessary for enlargement. The treaty will also facilitate decision-making in the Council of Ministers by changing the decision rule from unanimity to qualified majority in a number of policy fields. It foresees a major reform of the union's judicial system in order to tackle the case overload in the ECJ. Finally, it improves the procedure to detect and address a serious breach of fundamental rights by a member state.

The institutional changes

foreseen by *Nice* will take concrete effect in 2004, the year when enlargement will happen. The new European Parliament, which will be elected in June 2004, will have 732 members. This is the new maximum number defined in the *Nice treaty*, which also contains a new division of seats per member state. The next European Commission, which will take office in November 2004, will have 25 members (one per member state). This means that the bigger member states will no longer appoint a second commissioner. Once the EU reaches 27 members, the number of commissioners will be lower than the number of member states. Also, from 1 November onwards, a new weighting of votes will apply in the Council of Ministers. In addition to meeting the threshold for a qualified majority vote, *Nice* stipulates that a vote in the council will need the support of a majority of member states, and that a member state can request verification of whether the majority vote represents at least 62% of the population.

The *Treaty of Nice* will also facilitate decision-making in the Council of Ministers. It contains 27 provisions, which move from the unanimity rule to a vote with qualified majority. For instance, measures to encourage actions that counter discrimination, specific support measures in the industrial policy field, the statute and regulations governing political parties at European level, and judicial co-operation in civil proceedings having cross-border implications all move away from unanimity. These and other cases also become part of the co-decision procedure, which means that the European Parliament will legislate on an equal footing with the council.

The negotiation and conclusion of international agreements on services and commercial aspects of intellectual property from now on fall under the qualified majority rule, with some exceptions. Finally, the future appointment of key figures, such as the president and members of the European Commission, the high representative for common foreign and security policy, special representatives, and the deputy secretary-general of the council, will no longer require a unanimous decision in the council.

The president of the European Commission receives increased powers. He or she can decide on the internal organisation of the commission, will allocate portfolios to commissioners and if necessary re-assign them during the term of office, will appoint a number of vice-presidents, after collective approval of the college, and may request a commissioner to resign subject to approval by the college.

The *Nice treaty* introduces a new procedure to detect a potential serious breach of fundamental rights by a member state. If this new prevention mechanism failed to address the situation, the European Council could declare the actual existence of such a breach and suspend certain rights of the country concerned – for instance, the right to vote in the council.

The *Nice treaty* allows for a major reform of the union's judicial system in order to tackle the problem of case overload and speed up the delivery of judgments. It provides for the possibility of setting up internal chambers in the Court of First Instance to deal with certain proceedings. The possibility of more decentralisation in the handling of cases within the ECJ is foreseen. The approval by the council of the rules of

procedures of both courts will happen by qualified majority instead of unanimity. In foreseeing this reform, the *Nice treaty* ensures the coherence of jurisprudence.

Green paper published on law applicable to contractual obligations (Rome I).

In January 2003, the European Commission adopted a green paper to launch a broad discussion about the desirability of a conversion of the existing *Rome I convention* into a Community instrument and its modernisation. <http://www.Europa.eu.int>

EU enforcement against Ireland

Ireland's obligations under aeroplanes directive. On 15 October 2002, the court declared that by failing to adopt within the prescribed time-limit the laws, regulations or administrative provisions necessary to comply with council directive 98/20/EC of 30 March 1998 amending directive 92/14/EEC on the limitation of the operation of aeroplanes covered by part II, chapter 2, volume 1 of annex 16 to the *Convention on international civil aviation*, second edition (1988), Ireland has failed to fulfil its obligations under that directive

New colleagues. On 10 December 2002, the court declared that, by failing to adopt within the period prescribed the laws, regulations and administrative provisions necessary to comply with directive 98/5/EC of the European Parliament and the council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a member state other than that in which the qualification was obtained, Ireland has failed to fulfil its obligations under that directive.

Safety rules for transportable pressure equipment.

In December, the commission decided to take Ireland to the court of justice for not transposing into national legislation European safety rules on transportable pressure equipment.

Peatlands. In December, the European Commission decided to refer Ireland to the ECJ for the second time in order to enforce a previous judgment of the court handed down in September 1999. The commission also decided to propose to the court that daily fines of €21,600 be imposed on Ireland. These fines would apply from the day of the second judgment of the court. The case concerns non-compliance by Ireland with the *Environmental impact assessment directive* with regard to peat extraction.

Waste. In December, Ireland was given a final written warning for failing to apply certain provisions of the *Packaging waste directive* and because of shortcomings in Irish legislation implementing EU legislation on packaging waste. The directive sets minimum targets for the recovery of packaging waste, to be met by 2005. To meet these targets, Ireland will need to double its existing levels of packaging waste recovery. However, not all the necessary national legislation is yet in place.

Public contracts. In February, the commission sent Ireland reasoned opinions on two cases relating to public contracts. The government extended without competition contractual arrangements for the provision of social welfare payment services by An Post. In a separate case, existing arrangements for Dublin City Council (formerly Dublin Corporation fire brigade) to provide emergency ambulance services to the Eastern Regional Health Authority were also not subject to competition. These cases are not specifically covered by the

detailed procedural requirements for the advertising and award of contracts laid down in the directive on the public procurement of services (92/50/EEC). However, the commission considers both cases are covered by the general provisions of that directive, by general EU law obligations such as non-discrimination, equal treatment and transparency, and by the principles covering the free movement of services laid down in the treaty.

EU regulations

Community designs. Commission regulation (EC) no 2245/2002 of 21 October 2002 implements council regulation (EC) 6/2002 on community designs by prescribing the form and detail of procedures relating to applications, fees, registration, renewal, transfer, registration of licences, changes, surrender, invalidity, decision-making processes, oral proceedings and the taking of evidence, notifications, time limits, interruption of proceedings, representation, written communications, information to the public, the Community designs bulletin and database, file-keeping, administrative co-operation and costs.

EC regulation 2245/2002

Ro-Ro safety. Regulation (EC) no 1970/2002 of 4 November 2002 amending council regulation (EC) no 3051/95 on the safety management of roll-on/roll-off passenger ferries came into force on 26 November 2002 and, by direct effect, applies the updated provisions of the *International safety management code* compiled by the International Maritime Organisation in each member state.

EC regulation 1970/2002

Prevention of pollution from ships. Regulation (EC) no 2099/2002 of 5 November 2002 establishes a committee on safe seas and the prevention of pollution from ships (COSS) and

amends the regulations on maritime safety and prevention of pollution from ships. A key function of COSS will be to 'accelerate the updating of and facilitate subsequent amendments to' EU maritime legislation. The regulation, which has direct effect in each member state, came into force on 19 December 2002.

EC regulation 2099/2002

Civil aviation security. Regulation (EC) no 2320/2002, which establishes common rules in the field of civil aviation security, entered into force in part on 31 December 2002, and was in force in its entirety from 19 January 2003. The regulation obliges each member state to adopt a national civil aviation security programme and to nominate a single entity, the responsibility of which will be to co-ordinate and monitor its implementation, in part by means of a national civil aviation security quality control programme. In its annex, the regulation stipulates detailed standards and methodologies relating to airport security (including procedures for screening staff and aircrew), aircraft security (on-board and while out of service), passengers, cabin baggage and hold baggage, mail and cargo, aircraft catering supplies and cleaning services, staff recruitment and training, and equipment standards and specifications (such as x-rays).

EC regulation 2320/2002

EU directives

Restriction of exclusive rights in electronic communications. Directive 2002/77/EC, which entered into force on 7 October 2002, is intended to restrict severely the capacity of member states to grant special or exclusive rights in the field of electronic communications networks and services. Principal features include: member states must ensure that vertically integrated public undertakings which provide electronic com-

munications networks and which are dominant do not discriminate in favour of their own activities; regulation of rights to use frequencies; provisions regarding directory services; provisions regarding satellites; and a requirement that an undertaking which provides public electronic communications networks does not operate its cable television network using the same legal entity as it uses for its other public electronic communications networks. The directive has an effective transposition date of 24 July 2003.

Directive 2002/77/EC

Protection of employees in the event of insolvency.

Directive 2002/74/EC, which amends directive 80/987/EEC on the approximation of the laws of other members states relating to the protection of employees in the event of the insolvency of their employer, came into force on 8 October 2002 and must be transposed into national law by 8 October 2005. Part-time employees, workers on fixed-term contracts and temporary workers may not be excluded from the scope of the directive. It also provides that no qualification period may be set for a worker to qualify to claim under the directive.

Directive 2002/74/EC

Distance marketing of consumer financial services.

Directive 2002/65/EC concerning the distance marketing of consumer financial services amends directives 90/619/EEC, 97/7/EC and 98/27/EC and is intended to approximate the laws of member states in this field. Key points are: a consumer must be provided by the supplier with detailed information relating to the supplier, the financial service, the distance contract, and means of redress, all prior to the conclusion of the distance contract; the consumer will have a right of withdrawal within 14 days generally, and 30

days in the case of life assurance and pension products; the ability of suppliers to make tacit renewals will be restricted; member states may (not 'must') provide that a consumer may cancel a distance financial services contract at any time, free of charge and without penalty, if the supplier fails to comply with national provisions adopted pursuant to the directive; consumers may not waive the rights conferred on them by the directive, and the provisions may not be avoided by the choice of law of a non-EU state; and although judicial redress procedures must be made available, member states must also promote out of court redress procedures. The directive came into force on 9 October 2002 and must be transposed into national law by 9 October 2004.

Directive 2002/65/EC

Insurance mediation. Parliament and council directive 2002/92/EC on insurance mediation came into force on 15 January 2003 and must be transposed into national law by 15 January 2005. It seeks to co-ordinate national provisions on professional requirements and registration of people offering services as insurance and reinsurance mediators.

Directive 2002/92/EC

Human blood/blood products standards. Directive 2002/98/EC of 27 January 2003 sets standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood components and amends directive 2001/83/EC. This corrects the anomaly whereby human blood products were excluded from the EU code relating to medicinal products for human use. The new directive provides that, whatever the intended purpose of human blood or a human blood product, it should be of a comparable quality and safety in each member state.

Directive 2002/98/EC

Legal aid in cross-border disputes. Directive 2003/8/EC, which entered into force on 31 January 2003, is intended to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes. It does not apply to Denmark.

Directive 2003/8/EC

Supplementary supervision of financial conglomerates. Directive 2002/87/EC on supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate entered into force on 11 February 2003

and must be transposed by 11 August 2004. It seeks to take into account an overall view of financial groups (conglomerates) containing two or more regulated entities. Member states must establish a system of supplementary supervision in the case of financial conglomerates.

Directive 2002/87/EC

Access to environmental information. Directive 2003/4/EC on public access to environmental information entered into force on 14 February 2003 and must be transposed into national law by 14 February 2005. Its objectives are to guarantee the right of access to environmental information held by or for public authorities and to set out the basic terms and conditions of, and practical arrangements for, its exercise, and to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information.

Directive 2003/4/EC

Decisions

By council decision 2003/93/EC of 19 December 2002 (*Official journal* (OJ) L48, 21 February 2003), member states have been

authorised by the European Council to sign the 1996 *Hague convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children*

Council framework decision 2003/80/JHA of 27 January 2003 (OJ L 29/55, 5 February 2003) was adopted in recognition of a need for co-ordinated standards and approach to the criminalisation of acts and omissions which cause damage to the environment. However, the proposal did not receive the majority that was necessary in order that it might be introduced by directive and so the present decision was adopted instead. The decision must be implemented in national law by 27 January 2005. However, the EU Commission has announced that it will bring a challenge to the European Court of Justice regarding the implementation of this initiative by means of a decision rather than a directive

Council decision 2003/33/EC establishes criteria and procedures for the acceptance of waste at landfills pursuant to article 16 of, and annex II to, directive 1999/31/EC. **G**

Sinead Boyle is a trainee solicitor with the Irish law firm McCann FitzGerald in Brussels.

Recent developments in European law

FREE MOVEMENT OF PERSONS

Case C-413/99 *Baumbast, R v Secretary of State for the Home Department*, 17 September 2002. The Baumbast family was refused leave to remain in the UK. Mr Baumbast is German and his wife is Colombian. The family included two daughters, one of whom holds Colombian nationality and the other who is a dual German/Colombian national. In 1990, they were granted resi-

dence permits in the UK for a period of five years. Mr Baumbast worked in the UK between 1990 and 1993 and since then he has been employed by German companies in China and Lesotho. During these years, the family owned a house in the UK and the children attended school there. In 1996, the secretary of state for the home department refused to renew the residence permit of Mr Baumbast and his family. R is a US citizen who was married to a French national and has two chil-

dren who have a joint French/US nationality. In 1990, she moved to the UK as the spouse of an EC national exercising free movement rights within the EC. She was granted leave to remain in the UK until 1995. She obtained a divorce in 1992 but continued to live in the UK. The children had on-going contact with their father but lived with their mother. She bought a house and started a business as an interior decorator. In 1996, indefinite leave had been given to her children to

remain in the UK as children of a migrant EC worker. Mrs R's application to remain was refused. The UK Immigration Appeals Tribunal made a reference to the European Court of Justice (ECJ). The court held that children of a citizen of the EU residing in a member state during the exercise by their parent of rights of residence as a migrant worker in that member state are entitled to continue to reside there to attend and complete general educational courses pursuant to article 12 or

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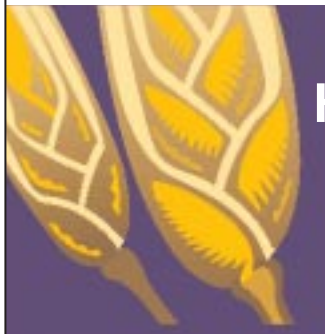


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regulation 1612/68. To prevent the child of a migrant worker from completing his education might dissuade the worker from exercising his rights to freedom of movement. The divorce of the parents and the fact that only one parent is an EU citizen and that parent has ceased to be migrant worker and that the children are not themselves EU citizens is irrelevant. This ruling applies to both the Baumbast and the R children. The second question the court examined is whether this right to attend educational courses entitles a non-EU parent (who is the carer of the children) to reside with the children to facilitate their exercise of that right. It held that to refuse to allow these parents to remain with the children might deprive the children of a right granted to them by EC law. Regulation 1612 must be interpreted in the light of the requirement of respect for family life set out in article 8 of the *European convention on human rights*. This is a fundamental right that is recognised by EC law. The court held that article 12 of regulation 1612 cannot be interpreted restrictively and in these circumstances to deny a right of residence to a parent who is a primary carer infringes this provision. The court then considered whether an EU citizen who no longer enjoys a right of residence as a migrant worker enjoys a right of residence by direct application of article 18(1) of the treaty. It held that he has. The exercise of that right is subject to a number of limitations and conditions. Directive 90/364 provides that member states can require nationals of other member states to be sufficiently covered by sickness insurance so that they do not become a burden on the social assistance system of that

state. However, this limitation must be applied in accordance with general principles of EC law, in particular, the principle of proportionality. Thus, the UK was not entitled to refuse to allow Mr Baumbast exercise his right of residence by virtue of the application of the directive on the basis that his sickness insurance did not cover emergency treatment.

LITIGATION

Case 167/00 *Verein für Konsumenteninformation (VKI) v Karl Heinz Henkel*, 1 October 2002. The VKI is an Austrian consumers' organisation. Henkel is a German trader who organises sales promotion trips in Austria. In his dealings with consumers in Vienna, Henkel used terms and conditions that the VKI considered to be contrary to Austrian legislation. The VKI sought an injunction in the Austrian courts to prevent Henkel using these terms in contracts concluded with Austrian consumers. Henkel argued that the Austrian courts did not have jurisdiction over him. The Austrian court referred the matter to the ECJ asking whether proceedings of this nature fell within article 5(1) (relating to contracts) or article 5(3) (relating to tort) of the *Brussels convention*. The UK government made a submission arguing that a claim of this nature did not fall within the scope of the *Brussels convention*. It argued that a consumer organisation seeking an injunction was a public law action and thus did not fall within 'civil and commercial matters'. Seeking to protect an entire class of consumers is a task undertaken in the public interest. The court did not entertain this submission and referred to earlier cases where it had determined that actions between

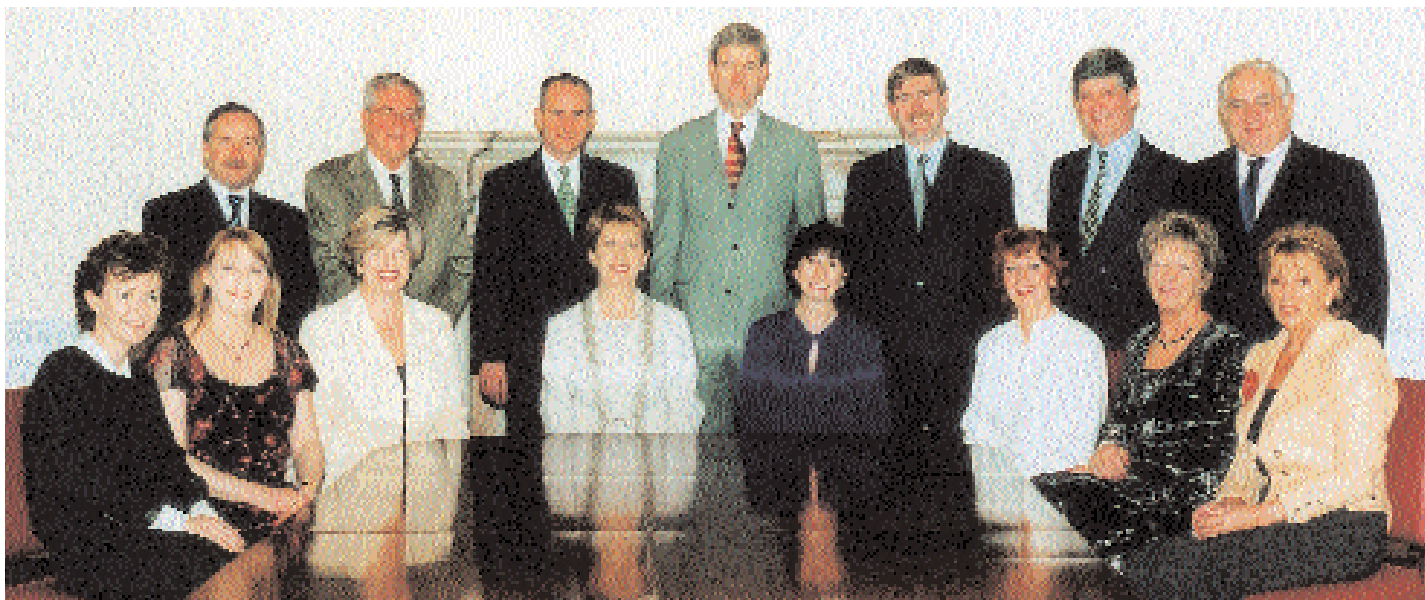
a public authority and a private individual fall outside the scope of the convention only in so far as the authority is acting in the exercise of its public powers. In this case, VKI is a private body and the action was seeking to make relationships governed by private law subject to review by the courts. The ECJ also held that the consumer protection provisions in article 13 to 15 did not apply. These provisions are for the benefit of a private consumer and cannot be invoked by an association on behalf of consumers. This follows the decision in case C-89/91 *Shearson Lehman Hutton*, where the court held that the assignee of the rights of a private consumer, without being party to a contract between a professional and a private individual, could not be regarded as a consumer within the meaning of the convention. The court then considered whether the claim could be viewed as contractual. The organisation and the trader are not linked in a contractual relationship. The legal basis for the action is not contractual but a right conferred by statute to prevent the use of certain terms. The ECJ concluded that the action fell within article 5(3) and was more in the nature of a tortious claim. The court felt that the term 'harmful event' in this article had been interpreted sufficiently broadly to cover the undermining of legal stability by the use of unfair terms, just as much as where an individual had personally sustained damage. Henkel had argued that article 5(3) was inapplicable as it presupposes the existence of damage. The ECJ rejected the argument and held that the article applied equally to actual damage and to an action seeking to prevent the occurrence of damage.

Case C-334/00 *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)*, 17 September 2002. The applicant is an Italian company and the respondent is a Germany company. In 1996, Tacconi brought an action in the Italian courts against HWS, seeking a declaration that a contract between HWS and a third party had not been concluded because of the failure of HWS to carry out the sale and therefore it had breached a duty to act honestly and in good faith. Tacconi had entered into a leasing agreement in respect of the moulding plant that was the subject of the contract for sale between HWS and the third party. HWS had agreed to this leasing contract. Tacconi argued that it had a legitimate expectation that the sale would go through. HWS argued that the Italian courts did not have jurisdiction due to an arbitration clause in the contract or because the matter concerned a contract and article 5(1) of the *Brussels convention* applied. Tacconi argued that the claim was tortious in nature and under article 5(3) Italy was the appropriate jurisdiction as that was where it had suffered loss. The Italian court referred a question to the ECJ asking whether an action founded on pre-contractual liability is a matter relating to tort, delict or quasi-delict within the meaning of article 5(3) of the convention. The court held that article 5(1) did not apply. Article 5(1) does not require that a contract be concluded. However, 'matters relating to a contract' does not cover a situation in which there is no obligation freely assumed by one party towards another. In this case, there was no such obligation, thus any liability in these circumstances is tortious. **G**

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Meet at the Four Courts

LAW SOCIETY ROOMS
at the Four Courts



President for dinner

The Law Society was honoured recently to host a dinner for the president of Ireland. The distinguished lawyer and businessman Peter Sutherland was also among the guests. (*Front row, from left*) Yvonne Chapman, deputy director general Mary Keane, Elma Lynch, Uachtarán na hÉireann Mary McAleese, Law Society president Geraldine Clarke, Catherine Griffin, Patricia Fish and Maruja Sutherland. (*Back row, from left*) Gerard Griffin, John Fish, Dr Martin McAleese, Frank Murphy, Law Society director general Ken Murphy, Dr Frederick Falkiner and Peter Sutherland



Far west

The Mayo Bar Association met in Daly's hotel, Castlebar, on 13 January. Members are pictured here with (*seated, front row*) James Cahill, bar association president Jacqueline Durcan, Law Society president Geraldine Clarke and director general Ken Murphy



Limerick liaisons

Pictured at a recent meeting of the Limerick Bar Association were (*front row, from left*) association president Ted McCarthy, Law Society president Geraldine Clarke and director general Ken Murphy. (*Back row, from left*) Paddy Glynn, Julie Sadlier, Jackie Murray, Margaret O'Connell, Maeve Callanan and Eamon O'Brien



Doctor Risk

Celebrating the publication of a new title for GPs entitled *Risk manager for GPs* were (*from left*) Kieran Doran, editor with Beauchamps Solicitors; Catherine Dolan of Round Hall Publishing; and Imelda Reynolds, managing partner of Beauchamps Solicitors



New perspectives

David Simpson (*background*) is the newly appointed chairman of law firm Vincent and Beatty. He is pictured here with managing partner Walter Beatty. Simpson was a founding partner and former managing partner of BDO Simpson Xavier, and is also former president of the Institute of Chartered Accountants in Ireland



Meeting of the tribes

The Galway Bar Association met at the Ardilaun House Hotel on 10 March. In the photo (front row) between Law Society president Geraldine Clarke and director general Ken Murphy is association president Jarlath McNerney



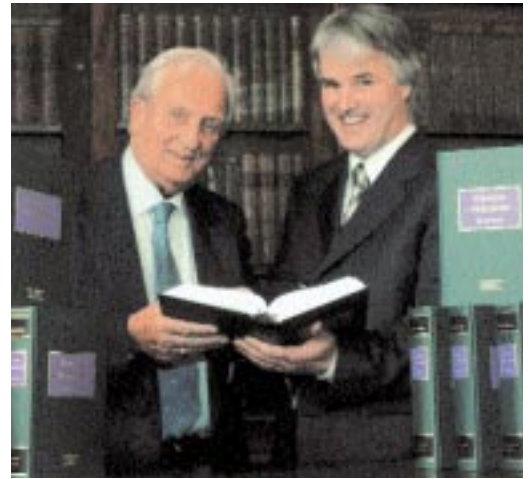
Entente cordiale

Louis Buchman, Law Society president Geraldine Clarke, judge Jon Stokholm and Michel Gout, CCBE past president, enjoy a tipple at the CCBE plenary sessions in Dublin in December, attended by representative lawyers from all of Europe



Surprised by the camera

Rupert Wolff, then CCBE president John Fish, who chaired the CCBE plenary sessions, and Marcella Prunbauer are pictured having a chat



Criminal text

Criminal procedure, a new book on the Irish criminal justice system, was launched on 10 April at the University of Limerick (UL) by retired Supreme Court judge Anthony Hederman (left). The author, Dermot Walshe, professor of law and director of the centre for criminal justice at UL is on the right



Quizzical

Laurence K Shields, managing partner at the law firm LK Shields Solicitors, presents a cheque for €5,500 to Barbara Finn, fundraising co-ordinator of the Special Olympics. The law firm hosted a table quiz at Fitzwillian Law Tennis Club in April, which raised €6,526 for the 'Support an athlete' programme of the 2003 Special Olympics world summer games

Cross-border client care initiative

The law societies of Ireland and Northern Ireland recently held a joint client care workshop in Derry. The workshop was based on one previously held in Dublin and was led by Antoinette Moriarty of the Law Society of Ireland and Anne Fenton and Ruth Craig of the Institute of Professional Legal Studies in Belfast. Between North and South, 14 participants took part. The workshop focused on helping participants assess and develop their skills in dealing with clients through dialogue, video and role-play. Following its success, the societies plan to run another in Connaught in early autumn.

Advocacy crosses frontiers



The first advanced advocacy course ever to be run as a joint venture by the law societies of Northern Ireland and the Republic took place in the Slieve Russell Hotel in County Cavan on 21-23 March. Participants and tutors are pictured here.

National Institute of Trial Advocacy (NITA) members from the US ran the course and were ably assisted by local Irish tutors: Dermot Lavery and Yvonne McNamara from the South and Eileen McBride and Fiona Donnelly from the North.

Participants performed various advocacy exercises and



were assessed by expert tutors using the NITA method. Performances were recorded, and each participant got a videotape covering his or her examinations and submission techniques to study or admire.

All applicants successfully

completed the course and many want to return to the programme as quickly as possible. The musical interlude on Saturday night and Sunday morning was alone worth the journey and the course fee!

On behalf of the president

and governing council of each organisation, we would like to thank all involved for the enthusiastic support that allowed this unique event to take place. The volume of work involved in a course like this can often be underestimated. We wish to note the warmth, companionship and mutual support between the organisations and hope that we can repeat the success next year. **G**

Lindsay Bond is the Law Society's continuing legal education executive, and Tony Caber is chairman of the Law Society of Northern Ireland's advocacy working party.



A royal affair

The Meath Bar Association met on 24 March in Navan. (Left to right) Oliver Shanley, Law Society director general Ken Murphy, president Geraldine Clarke, association president Pat Rogers and Michael Keavney



Web whizz

John Furlong (pictured standing) presented two workshops on legal research on the Internet in Tipperary Institute in Thurles on 26 March

Annual dinner of the Law Society 2003



Enchanting evening

Labour party leader Pat Rabbitte TD and Law Society president Geraldine Clarke



Charming conversation

Geraldine Clarke shares a laugh with Law Society senior vice-president Gerard Griffin and Olive Braiden



The chain gang

Geraldine Clarke, president of the Institute of Chartered Accountants in Ireland Adrian Burke and Gerard Griffin



Line-out

(From left) Law Society junior vice-president John Fish, Dublin City Sheriff Brendan Walshe, Geraldine Clarke and former president Tom Shaw



Strike a pose

(From left) John Fish, former president Moya Quinlan, Geraldine Clarke and former president judge Frank O'Donnell



Meeting the Dons

(From left) Council member Donald Binchy, former president Don Binchy and Gerard Griffin

SADSI

Solicitors Apprentices Debating
Society of Ireland

New website

With PPCI returning to the office and PPCII settling back into Blackhall Place, the last four weeks have been an extremely busy time for SADSI. The new website is now operational and we are continuously adding content and new

features. The accommodation section in particular was used by many of the PPC II intake. If you haven't already visited our site, we urge you all to take a look. Suggestions for content are most welcome. You can contact us at sadsi_committee@campus.ie.

End of PPC1

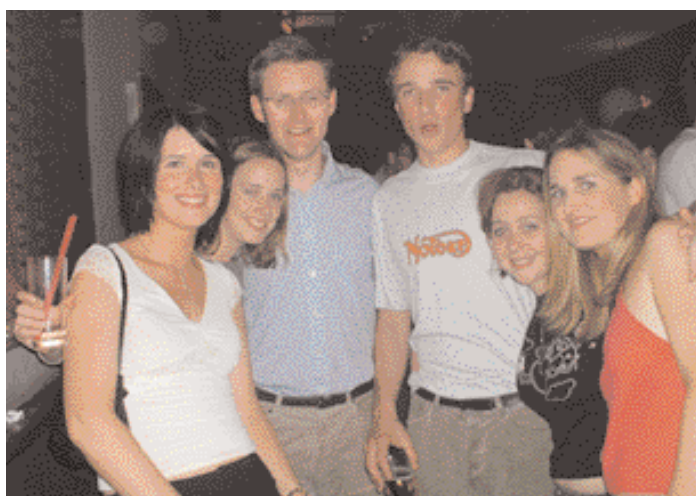
Tuesday 8 April brought the end of the PPC I exams and the final night social. The event was extremely well attended and huge praise must be given to those trainees who stayed the distance after a punishing exam and assessment schedule. The evening started in Frank Ryans

and then moved on to Q Bar. Simon Hannigan, acting as SADSI PPC I rep and class rep, organised a sizable contribution towards the costs of the evening. Acknowledgment must be made of the huge effort the PPCI social reps have made during their time in Blackhall.

PPC II welcome back party

Following weeks of planning, the Odeon in Harcourt St was the scene of PPC II's welcome back party on Tuesday 29 April. An exceptionally high turnout guaranteed that the Odeon's function room filled swiftly and stayed full until the early hours. Kudos to Nessa Barry, SADSI's PRO, for organising the room, promotional materials and the DJ, and to Des Barry for resolving some financial difficulties that cropped up.

Eamonn Kelly, Treasurer



Survey of trainee solicitors

Now that the most important social issues have been put in train, your committee is currently focusing its attentions on the pressing matters of

wages and in-house training. SADSI will circulate a survey over the next three weeks to gauge your opinions and those of your colleagues. We would

ask you please to help your committee by participating in this survey. The SADSI apprentice survey of four years ago was instrumental in

securing the milestone increase in trainee wages, and if we are to effect similar change this year, we will require similar levels of student participation.

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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 9 May 2003)

Regd owner: John Daly, Dernakesh, Cootehill, Co Cavan; folio: 1314F; lands: Dernakesh; area: 0.2706 hectares; **Co Cavan**

Regd owners: Nicholas and Mary Geraldine Considine; folio: 13029; lands: townland of Toornahoon and barony of Corcomroe; area: 28.6311 hectares; **Co Clare**

Regd owner: Michael O'Brien, Aughinish, Ogonnelloe, Killaloe, Co Clare; folio: CE19109F; lands: property situate in the townland of Caher and barony of Tulla Lower; area: 2.457 hectares; **Co Clare**

Regd owners: Frank McNamara and Bridget McNamara, Knockpogue, Clooney South, Ennistymon, Co Clare; folio: 27679; lands: (1) townland of Clooney South and barony of Corcomroe and (2) townland of Clooney South and barony of Corcomroe; area: (1) 31.0849 hectares and (2) 2.9845 hectares; **Co Clare**

Regd owner: James O'Donnell; folio: 12279; lands: townland of Ballynahown and barony of Corcomroe; area: 4.474 acres; **Co Clare**

Regd owner: John Sadlier; folio: 8760F; lands: townland of Rinerrinagh and barony of Inchiquin; area: 0.2450 hectares; **Co Clare**

Regd owner: John Pyne, Cragroe, Kilmaley, Ennis, Clare; folio: 6251; lands: townland of Kyleatunna and barony of Islands; area: 30.0580 hectares; **Co Clare**

Regd owners: John and Ann Ryan; folio: 19805; lands: townland of Carrowcraheen and barony of Inchiquin; area: 0.419 hectares; **Co Clare**

Regd owners: Cornelius M Carroll

and Marion Rice; folio: 6766L; lands: situate in the townland of Ballincollig and barony of Muskerry East in the county of Cork; **Co Cork**

Regd owner: Patrick Murphy; folio: 60506; lands: known as the townland of Cloghboola Beg situate in the barony of Muskerry West and the county of Cork; **Co Cork**

Regd owners: Horst Noetzel and Karin Noetzel; folio: 40738; lands: a plot of ground being part of the townland of Tooreen situated in the barony of Bear in the county of Cork; **Co Cork**

Regd owner: Laurence O'Mahony; folio: 943F; lands: a plot of ground being part of the townland of Kilnamucky situate in the barony of Muskerry East in the county of Cork; **Co Cork**

Regd owners: Mabel Trinder and John Trinder; folio: 22077F; lands: known as the townland of Ardarrig situate in the barony of Cork and the county of Cork; **Co Cork**

Regd owners: David Woosnam and Agnes Woosnam; folio: 40360F; lands: a plot of ground being part of the townland of Carrigaline Middle situate in the barony of Kerrycurrihy in the county of Cork; **Co Cork**

Regd owner: Carolan Enterprises Limited; folio: DN72045L; lands: the property being the car park forming the outer-roof at the junction of Henry Street/Mary Street/Mary Mall situate on the west side of Moore Street and on the south side of Parnell Street in the parish of St Mary district of North Central and city of Dublin; **Co Dublin**

Regd owner: Edward Casey; folio: DN78835F; lands: property known as 6 Rueben Avenue situate in the parish of Saint James and district of South Central; **Co Dublin**

Regd owners: Brendan Keating and Philomena Delahunty; folio: 48393L; lands: property known as 12 Woodvale Drive situate in the townland of Hartstown and barony of Castleknock; **Co Dublin**

Regd owners: Brian David Madden and Maureen P Madden; folio: DN13411F; lands: property situate in the townland of Burrow and barony of Coolock; **Co Dublin**

Regd owner: John Maher; folio: DN124983F; lands: property no 14 Earlsfort Gardens, Lucan, Co Dublin property situate in the townland of Ballyowen and barony of Newcastle; **Co Dublin**

LawSociety
Gazette**ADVERTISING RATES**

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Regd owner: Michael Maloney; folio: DN15148; lands: property situate in the townland of Brownsbarn and barony of Newcastle; area: 1.578 hectares; **Co Dublin**

Regd owner: Brian O'Riordan; folio: DN14872; lands: property situate on the north side of Lorcan Grove in the parish and district of Santry and city of Dublin; **Co Dublin**

Regd owner: the County Council of the county of Dublin; folio: DN8600; lands: property situate in the townland of Ballough and barony of Balrothery East; **Co Dublin**

Regd owner: Michael O'Connor, St Annins, Killannin, Roscahill, Co Galway; folio: 1271F; lands: townland of Carrowroe North and barony of Moycullen; area: 0.2074 hectares; **Co Galway**

Regd owner: Rowena Parker, 60 Claremont Circular Road, Galway; folio: 26651F; lands: ground situate to the north side of Rahoon Road in the parish of Rahoon borough of Galway; **Co Galway**

Regd owner: Mary Keady, Currylusk, Lettermore, Co Galway; folio: 38511; lands: (1) townland of Lettermore and barony of Moycullen and (2) townland of Lettermore and barony of Moycullen; area: (1) 6.185 acres and (2) 24.844 acres; **Co Galway**

Regd owners: Patrick and Geulah McGrath; folio: GY35052F; lands: townland of Shanballyduff and barony of Galway; **Co Galway**

Regd owner: Odlum Group Limited; folio: 12858; lands: townland of Osberstown and barony of Naas North; **Co Kildare**

Regd owner: Odlum Group Limited; folio: 10669; lands: townland of Osberstown and barony of Naas North; **Co Kildare**

Regd owner: Jackie O'Malley; folio: 24452F; lands: townland of

Oldcarton and barony of North Salt; **Co Kildare**

Regd owners: John Walsh and Mary Walsh; folio: 15113; lands: Rathpatrick, Slieverue, Co Kilkenny and barony of Kilkenny; **Co Kilkenny**

Regd owner: Robert French; folio: 15089; lands: townland of Derrybeg and barony of Pubblebrien; **Co Limerick**

Regd owner: Eugene O'Shaughnessy; folio: (1) 24164F and (2) 26816; lands: townland of Derryknockane and barony of Pubblebrien; **Co Limerick**

Regd owner: Philip J Hourican, Rathmore, Aughnacliffe, Co Longford; folio: 4522; lands: Cleenrah; area: 7.2109 hectares; **Co Longford**

Regd owner: Patrick Rogers, Timoy, Togher, Co Louth; folio: 2294; lands: Adamstown; area: 30.543 acres; **Co Louth**

Regd owner: Raymond McTigue; folio: 31766F; lands: townland of Cregganavar and barony of Carra; area: 0.186 hectares; **Co Mayo**

Regd owners: Michael and Eileen Heraty; folio: 7967F; lands: townland of Cuiltrean and barony of Burrishoole; area: 0.7409 hectares; **Co Mayo**

Regd owners: Patrick J and Rosemary Carabine; folio: 16402; lands: townland of Cashel and barony of Gallen; area: 3.3270 hectares; **Co Mayo**

Regd owners: Nora and James Gerard Walsh; folio: 50298; lands: Carrowkeel and barony of Clanmorris; **Co Mayo**

Regd owners: Patrick Gerard Weldon and Olivia Mary Weldon, Dogstown, Trim, County Meath; folio: 1306F; lands: Dogstown 1st division; area: 0.1620 hectares; **Co Meath**

Regd owners: David and Patricia Glennon, 24 Brookside, Bettystown, Co Meath; folio: 1663L; lands: Betaghstown; **Co Meath**

Regd owner: Thomas Sweeney; folio: 675; lands: townland of Cashel South and barony of Leyny; area: 7 acres, 40 perches; **Co Sligo**

Regd owner: Thomas Sweeney; folio: (1) 166; lands: townland of Cashel South and barony of Leyny and (2) townland of Cashel South and barony of Leyny; area: (1) 2.6203 hectares and (2) 28.4291 hectares; **Co Sligo**

Regd owner: William and Ellen Burke; folio: 3507; lands: townland of Ballinurra and Lissadober and barony of Iffa and Offa East; **Co Tipperary**

Regd owner: John O'Dwyer; folio: 12602F; lands: townland of Newtowndrangan and barony of Middlethird; **Co Tipperary**

Regd owners: Patrick and Maria Lynam, Tangara, Marlinstown, Mullingar, Co Westmeath; folio: 4291; lands: Marlinstown; **Co Westmeath**

Regd owner: John Kearney; folio: 1716F; lands: townland of Springmount and barony of Bantry in the county of Wexford; **Co Wexford**

Regd owner: Francis Randall; folio: 258R; lands: Killurin and barony of Shelmaliere West; **Co Wexford**

Regd owners: Stephen and Elizabeth Whyte; folio: 1292F; lands: townland of Bellevue Demesne and barony of Rathdown; **Co Wicklow**

Regd owner: Mary E Byrne; folio: 4400; lands: townland of Tinnahinch and barony of Arklow; **Co Wicklow**

WILLS

Brennan, Joseph (deceased), late of Ballinalag, Swinford, Co Mayo. Would any person having knowledge of a will made by the above named deceased who died on 27 December 2002 at Ballinamore House Nursing Home, Ballinamore, Kiltimagh, Co Mayo and who had been treated at St Luke's Hospital, Dublin, please contact: T Dillon-Leetch & Sons, Solicitors, Ballyhaunis, Co Mayo, tel: 0907 30004, fax: 0907 30574, e-mail: Dermotmurphy@dillon-leetch.ie

Connolly, Josephine (deceased), late of 46 Hazelmere, Naas, Co Kildare. Would any person having knowledge of a will made by the above named deceased who died on 10 November 2002, please contact James V Tighe & Co, Solicitors, Main Street, Celbridge, Co Kildare, tel: 01 6272397, fax: 01 6270529, e-mail: jvt@indigo.ie

Corrigan, Michael (deceased), late of Lower Eglis, Fivalee, Birr, county

of Offaly. Would any person having knowledge of a will made by the above named deceased, who died on or about 1 July 2002, please contact Thomas W Enright, Solicitors, John's Place, Birr, County Offaly, tel: 0509 20293, fax: 0509 20802, ref: TWE/MC/RB/C594/1

Faherty, Coleman, late of Poureen, Inverin, Co Galway, who died on 9 December 1996. **Reward paid** to any person having any knowledge of the whereabouts of a will dated 20 July 1988 and made by the above named deceased, please contact John M Ford & Son, Solicitors, Sea Road, Galway, tel: 091 582980, fax: 091 583911, e-mail: information@fordsolicitors.com

Gaughran, Colm (deceased), late of 87 Donnycarney Road, Dublin 9. Would any person having knowledge of the whereabouts of a will made by the above named deceased please contact PJ O'Driscoll & Sons, 179 Church Street, Dublin 7 (reference: PL/BN), tel: 01 8728144, e-mail: pydriscollandsons@eircom.net, DX 1032 Four Courts

Harrington, Donald Declan (deceased), late of 5 Glebe Hill Road, Tandragee, Craigavon, Co Armagh BT62 2DT, Northern Ireland and formerly of 109 Mullahead Road, Tandragee, Craigavon, Co Armagh BT62 2LB; 25 The Mount Tandragee, Craigavon, Co Armagh; 39 Ballymore Road, Tandragee, Craigavon, Armagh BT62 2AQ; 211 Lisburn Road, Belfast BT9 7EG; 10E Mount Vernan House, Shore Road, Belfast and 34 The Rise, Waterfall Road, Bishopstown, Cork. Would any person having knowledge of a will made by the above named deceased with the aforementioned previous addresses please contact John Richardson of O'Keeffe & Moore, Solicitors, 31 Molesworth Street, Dublin 2, tel: 01 6766060, fax: 01 6767853, e-mail: john.richardson@okandm.com

Kelly, Alan (deceased), late of 31 Courtney House, Appian Way, Dublin 6 (formerly Lisboy, Elphin, County Roscommon). Would any person having any knowledge of a will executed by the above named deceased who died on 24 April 2003, please contact CE Callan & Co, Solicitors, The Crescent, Boyle, County Roscommon, tel: 079 62019, fax: 079 62869

Kennedy, John (deceased), late of No 1 Harbour Road, Arklow, Co Wicklow and formerly of Kilmacoo,

Avoca, Co Wicklow, who died on 7 March 2003. Would any person having knowledge of the whereabouts of a will made by the above named deceased, please contact Augustus Cullen & Son, 7 Wentworth Place, Wicklow, tel: 0404 67412, fax: 0404 69219

McFarlan, Diana Mary (previously known as Diana Mary Hartford) (deceased), late of Stonewall, Bailieboro, Co Cavan and also Fairways Nursing Home, Rathfarnham, Dublin 16. Would any person having knowledge of a will made by the above named deceased who died on 7 April 2000 please contact Ben O'Rafferty, Solicitors, 18 Merriem Row, Dublin 2, tel: 01 6767225, fax: 01 6612020

O'Halloran, Sheila (also known as Mimi) (deceased), late of 33 Riverview Dock, Dock Road, Limerick and also formerly of 34 Belmont Avenue, Donnybrook, Dublin 4. Would any person having any knowledge of the whereabouts of a will made by the above named deceased please contact Martin A Harvey & Company, Solicitors, 9 George's Quay, Cork, tel: 021 4963400

O'Mahony, Laurence (deceased), late of 4 Glenview Terrace, Tower, Blarney, Co Cork. Would any person having any knowledge of a will made by the above named deceased who died on 13 June 1996 please contact James J O'Donoghue & Co, Solicitors, Shournagh House, Tower, Blarney, Co Cork, tel: 021 4381861, fax: 021 4382399, ref: JJO'D/EM, e-mail: jamesjod@eircom.net

Saunders, Eamon, Mountrath Road or New Row, Abbeyleix, Co Laois. Would any person having knowledge of a will made by the above named who died on 17 October 2002 please contact Cahill & Co, Solicitors, Abbeyleix, Co Laois, tel: 0502 31220, fax: 0502 31480

Webb, Emer (deceased), late of 19 Weir View, Lucan, Co Dublin, formerly of Reeside, Barrymore, Athlone, Co Roscommon. Would any person having knowledge of a will executed by the above named deceased subsequent to 14 September 1991 who died on 23 February 2002 please contact Padraig Turley & Co, Solicitors, Bridge Street Lower, City Gate, Dublin 8, tel: 01 6790166, fax: 01 6790168, e-mail: 27lbslaw@eircom.net, ref: JJO'D/EM

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35/36 Arran Quay, Dublin 7.

Tel: (01) 872 5622
Fax: (01) 872 5404

e-mail: moranryan@securemail.ie
or Bank Building, Hill Street
Newry, County Down.
Tel: (0801693) 65311
Fax: (0801693) 62096
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EMPLOYMENT

Assistant solicitor required for busy North Cork practice. Please reply with CV to **box no 43**

County Kerry established practice for sale. Principal to retire gradually. **Box no 41**

Legal Aid Board: Two locum solicitors positions will arise in the Legal Aid Board, Refugee Legal Service at our Nth Brunswick Street Office, Dublin 7. The positions are for three months' duration from June 2003 to August 2003 approx. The Refugee Legal Service provides legal aid and advice to asylum-seekers at all stages of the asylum process. Applications should be made to HR Section, RLS, 47 Upper Mount Street, Dublin 2, to reach Martina O'Connell, tel: 01 6441907, e-mail: mno'connell@legalaiddboard.ie, not later than 5pm on Friday 23 May 2003

Locum solicitor required for six-month period for an in-house role with the GSM Association, an international trade association in the telecommunications sector. To start as soon as possible. Commercial experience necessary.

For further information or to reply, contact Margaret McGinn at e-mail: mmcginn@gsm.org

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Solicitor required for busy general practice in Gorey, Co Wexford. Two years' PQE needed in conveyancing, probate, litigation and family law. Applications with CV to Reynolds & Co, Solicitors, The Avenue, Gorey, Co Wexford or e-mail: reyandco@eircom.net

Solicitor – in house, required for client company to work an average two days a week in the Mayo area. Contact: Michael Cosgrove & Partners, Chartered Accountants, Breaffy Road, Castlebar, Co Mayo

Solicitor required for well established General Practice in County Wicklow. Mainly litigation/conveyancing. IT skills desirable. Please apply with CV to **box no 40**

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Willing enthusiastic female solicitor – three years' PQE in large commercial firm – seeks change to general practice (full-time, Dublin area). Particular interest in family law. Reply to **box no 42**

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

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

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TITLE DEEDS

We would be most grateful for any information as to the whereabouts of the title deeds to 23 Rathdown Park, Terenure, Dublin 6, which property was owned by the late Andrew David Brennan (otherwise Davy Brennan, otherwise Andrew De Valera Brennan), publican. If you have any information in this regard, please contact Raymond Smith, Smith Foy & Partners, 59 Fitzwilliam Square, Dublin 2, DX no 240 Dublin, tel: 01 6760531

Notice is hereby given that we, as solicitors for Kieran Doyle, Sean Doyle and Peter Keane, all of South Brown Street, Dublin 8, intend to apply to the county registrar under the provisions of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978* to acquire the interest of the successors in title of Joseph Lapham and Joseph William Lapham and all intermediate interests and superior in the property known as 115/116 Cork Street (now known as 117 Cork Street) in the City of Dublin. Any person who wishes to object or notify the county registrar of any interest in the said property should contact Carroll & Kelly Solicitors, 90 Marlborough Road, Dublin 4, solicitors for the applicants.

Dated: 17 April 2003

Signed: Carroll & Kelly, Solicitors, 90 Marlborough Road, Dublin.

In the matter of the *Landlord and Tenant (Ground Rents) Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978*: an application by T Kiernan & Sons Limited

Take notice that any person having any interest in the freehold estate of or superior interest in the following property: all that and those the premises formerly known as no 68 Navan Road and

now known as The Breffni Inn, 27 and 29 Ashtown Grove, Navan Road situate in the barony of Castleknock and county of Dublin held under an indenture of lease dated 26 July 1961 and made between Clare Dunn, Judith Darling, Jessie Mary Doyle, Edward J Doyle, Charles Hart and Eileen Gray of the one part and Thomas Kiernan of the other part for a term of 123 years from 25 March 1955, subject to the yearly rent of £80 thereby reserved and the covenants on the part of the lessee and the conditions in said lease contained.

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

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

Date: 11 April 2003

Signed: Gerard O'Shea, Solicitors, Meridian House, 13 Warrington Place, Dublin 2

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

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 no 20B and 20c Nottingham Street in the parish of St Thomas and in the city of Dublin, being part of the hereditaments and premises comprised in an indenture of lease dated 25 January 1879, made between Alexander William Grant and John Philip Martineau (surviving devisees in trust named in the will of Laurence Walker, deceased) of the one part and Patrick Hackett of the other part for a term of 200 years from 1 November 1869, subject to the payment of the yearly rent of £10 and the covenants on the part of the Lessee to be performed and conditions therein contained.

Take notice that Michael McGuirk

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

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

Date: 15 April 2003

Signed: Maurice E Veale & Co (solicitors for the applicant), 6 Lower Baggot, Street, Dublin 2

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

Take notice that any person having an interest in the freehold estate in respect of property known as 43/44 James's Street, Dublin 8, held under lease dated 20 January 1897 made between Gilbert Cockburn of the one part and Christopher Burgess of the other part for a term of 200 years from 20 January 1897 at a yearly rent of £22.50 (now €28.57). Take notice that David Gardiner and Mary Gardiner, the applicants, intend to submit an application to the county registrar in the county of the city of Dublin for the acquisition of the freehold interest together with any intermediate interest in the aforesaid property and any persons asserting that they hold a superior interest in the aforesaid premises are called upon to furnish evidence of title to the aforementioned premises to the undersigned of this notice.

In default of any such notice not being received by the undersigned's solicitors, the said David Gardiner and Mary Gardiner intend to proceed with the application before the county registrar in the county of the city of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion to the aforesaid property are unknown or unascertained.

Dated: 16 April 2003

Signed: McGrath McGrane (solicitors for the applicants), 124 Ranelagh, Dublin 6

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PARTNERS: Séamus MacGiolla Dé, Sanjeev Bali

Reparation and Civil Litigation

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Phone. 0141 225 6300 Fax. 0141 847 0648 Email: mail@gildeas.net

Edinburgh Office: 30 Melville Street, Edinburgh EH3 7HA

Phone. 0131 467 6643 Fax. 0131 476 6742 Email: mail@gildeas.net