Law Society Gazette

Regulars

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Cover Story

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Rising to the challenge

Parting is such sweet sorrow! This has certainly been a bitter-sweet year for me, but one that I will never forget. It has undoubtedly been the most exciting and enjoyable of my life, and one that brought challenging developments for the profession.

One of the most frustrating aspects of my year in office was the fact that the radical, practical and cost-free proposals for reforming the civil litigation system, contained in the society's *Real reform* document, were dismissed or ignored by the tánaiste and the media in the almost unseemly rush to introduce the Personal Injuries Assessment Board. In their desire to satisfy the business lobby's agenda, the interests of victims who have no organised voice to speak on their behalf has been ignored. This is very wrong and even at this 11th hour, I hope that the tánaiste will open her mind to consider the positive proposals and submissions.

Sterling work at grassroots level

I am delighted that the initiative to re-establish the Public Relations Committee and to involve the bar associations in our effort to promote the image of the profession has been so successful. Almost all bar associations have now participated, and there have been three meetings of the public relations officers, who have now begun to do sterling work at local level. I would like to thank Donald Binchy, chairman of the PR Committee, and Ken Murphy for their hard work and enthusiasm in overseeing this and other important PR initiatives.

During the course of the year, Ken Murphy and I visited no fewer than 19 bar associations, and for me, these visits were among the highlights of my presidency. The Law Society is lucky to have such a strong body of support to call on.

I acknowledge that it has not been an easy year for the profession. Apart from the PIAB proposal, members had to cope with the introduction of mandatory CPD from 1 July and the designation of solicitors under the money-laundering regulations. However, there were a great many highlights. Among them, I would include the holding of the first-ever council meeting in Sligo in May. It was a particular pleasure for me as a Sligo woman to be able to do so, in the superb newly renovated courthouse. We were delighted to have so many representatives of Sligo and surrounding bar associations present as observers, and I know that they found it informative and interesting.

My dream of holding the society's annual conference in Istanbul was shattered by the uncertainty surrounding the war in Iraq. However, a last-minute decision was made to change the venue to Lisbon, a suitable, sunny and successful alternative. I would like to thank the loyal and supportive colleagues who attended. I know they enjoyed it. It would not have happened, of course, without the ingenuity and hard work of James McCourt and his conference committee.

Go raibh maith agaibh!

There are many people without whose help I could not have done my job. My senior vice-president Gerry Griffin and junior vice-president John Fish were always on hand with helpful advice. The support of the Council members – so crucial to every president – was overwhelming. I would particularly like to thank the chairmen and members of our committees and task forces who undertook a huge amount of work during the year and devoted their valuable time to the Law Society's work.

The boundless enthusiasm and energy of Ken Murphy and Mary Keane was an inspiration: their guidance and advice were greatly appreciated.

This year would not have been possible without the loyalty and commitment of my partners Frank Murphy and David Larney, Margaret Behan and all our colleagues and staff at Gleeson McGrath Baldwin. They carried a large workload in my absence and made it possible for me to devote the necessary time to the job.

My husband Eric, and our daughters Kate and Kamala, were unfailingly encouraging and supportive, and ensured that I had a home to go to. I leave the presidency and Council in safe hands, and I know that we have a highly skilled, dedicated and hardworking profession which will rise to the challenges that face us.

It has been a great honour to be president of the Law Society and I am grateful for the trust that was placed in me. I shall miss it.

Geraldine Clarke,
President

'I leave the presidency in safe hands. I shall miss it'

***CONVEYANCING HANDBOOK* UPDATE**

The contact name and details for Arthur Dunne and Des Holmes of the Architecture and Surveying Institute that appear at page 7.36 of the *Conveyancing handbook* should no longer be used. Instead, practitioners should contact Kevin Sheridan, 45 Mount Anville Park, Dublin 14, tel: 01 607 0500, fax: 01 607 0651, mobile: 087 222 3985 or e-mail: sheridankc@eircom.net.

FLYING THE FLAC

The Free Legal Advice Centres has a new head office at 13 Lower Dorset St, Dublin 1. The office was officially opened last month by Mrs Justice Catherine McGuinness, who also launched a book entitled *Access to justice: the history of the Free Legal Advice Centres, 1969-2004* by journalist Pádraig O'Moráin.

PARTNERSHIP BOOKLET

The Law Society's Guidance and Ethics Committee recently published a booklet that provides basic information for solicitors considering becoming partners in law firms. Copies of *Partnership?* are available free of charge and can be requested from the committee secretary at the Law Society or by e-mail from a.collins@lawsociety.ie.

Professions to get 'the full Monti'

'A dose of liberalisation' is on the way for professions across the EU. This was the phrase used by one of the many speakers at a major day-long conference in Brussels on 28 October. The conference had been called by European Commissioner for Competition Mario Monti. One representative from each of the major professions in every EU member state was invited to hear a detailed discussion of both the economic necessity and legal basis for the European Commission's first-ever systematic review of competition in the professions. The Law Society of Ireland was represented by director general Ken Murphy.

As the final speaker of the day, Commissioner Monti announced that he had instructed his staff to prepare a report on competition in the professions in the EU, with the report to issue by the middle of next year. Both state and self-regulation of professional services would be examined to ensure that all restrictions on competition operated in the interests of consumers rather than suppliers of services and that consumer protection objectives were achieved by the means least restrictive of competition.

Director general Ken Murphy

Among the earlier speakers was the chairman of Ireland's Competition Authority, Dr John Fingleton. He noted that Ireland, along with the UK and Scandinavian countries, was very much at the liberal end of the scale – lightly rather than heavily regulated – in terms of the level of potentially anti-competitive regulation of the professions as determined in a recent survey by a Vienna-based institute commissioned by the EU. 'Although Ireland is "the good boy in the class", there are still problems', he said.

Women in the law

Law Society president Geraldine Clarke was one of the keynote speakers at last month's launch of the first-ever report on women lawyers in Ireland. *Gender InJustice* is based on research conducted over 18 months by Trinity College academics Ivana Back and Catherine Costello and statistician Eileen Drew.

Clarke pointed out that she was the second woman president of the Law Society in succession and that 42% of the solicitors on the roll in Ireland were now women. Up to 70% of those undertaking the current professional practice course were also women. She warmly welcomed the report, although she didn't agree with all of its conclusions. She concluded by saying that 'we need to raise awareness of women lawyers' issues, and create an atmosphere in which belittling of women lawyers and the issues affecting them is not tolerated'.

PRACTICE MANAGEMENT NEWS

The value of a professional practice is very subjective. There is no definitive answer to the question 'what is my practice worth?'

Various rules of thumb have been used to value practices in the past:

- A multiple (between one and two) of the annual gross fees
- A multiple (between three and five) of the maintainable profit before tax, or
- A value based on net assets (including a full work-in-progress valuation) plus an additional and very negotiable figure for practice goodwill. It may be advisable to use legal costs accountants to help value the work in progress.

The first two options are extremely subjective, and wide differences will exist between the vendor and the purchaser. The third option mixes hard fact (the real value of work in progress on a case-by-case basis) plus a subjective add-on for goodwill. This is the most common method used.

In evaluating goodwill, the main considerations for the purchaser are:

- The past profitability of the practice as a guide to its future earnings potential
- Factors governing the future continuation of the practice, and
- The nature and timing of the consideration to be paid on satisfactory completion of a deal.

In seeking to determine a practice's value, it is profitability that matters, not gross fee income. Although vendors may have expectations that their practice is worth a multiple of gross fees, no well-advised purchaser would consider buying a practice on this basis.

What should buyers look for?

Simply put, quality – in terms of clients, work and staff, good technology systems and a well-stocked, easily referenced wills cabinet. Potential buyers should determine past profits by getting an accountant to review the accounts for the past three years and adjust for exceptional or non-recurring items, and beware of attempts to

It's a full house for Drogheda walkout

More than 30 Drogheda solicitors staged a walkout from the District Court on Friday 23 October in frustration at the on-going failure to provide a reasonable courthouse. Last month, they learned that plans to move the courthouse from the town bingo hall, where it has been sitting for 12 years, to a more suitable venue had been abandoned (see last issue, page 5).

At the start of the day's court sitting, Drogheda Bar Association president Gerry Daly made a short statement, then led the walkout with his colleagues. According to the association's press officer Fergus Minogue, the district judge went ahead with the list of the day's cases but 'a lot of bench warrants were issued for people who didn't turn up'.

'We could not quietly accept that nothing can be done', said Minogue. 'We need to get Drogheda courthouse higher on the agenda. About 130 courthouses have been dealt with over the past three years, but the situation in Drogheda is rolling'. He added that 'the walkout was a statement of intent – we cannot let the issue die away again'.

PHOTO FRAN CAFFREY NEWSFILE.IE

Gerry Daly speaking on behalf of the Drogheda Bar Association after the walkout from the bingo hall that doubles as a District Court

• Meanwhile, at the end of September, Navan District Court was relocated from a bingo hall to a purpose-built courthouse in an office building. There are plans to eventually build a permanent courthouse, but, for the moment, the judge and Navan solicitors are delighted about the move, after almost 40 years.

Last call for Galway judge

A reception in Galway on Saturday 27 September marked the retirement of District Court judge John Garavan. Referred to as longest-serving, and the most colourful, genial and animated District Court judge in Ireland, he made headlines two years ago with his remark about 'Galway's dreadful drunken girls', for which he again apologised at the reception.

He graduated as a solicitor and was appointed to the bench in 1974, when he served for some time in the Special Criminal Court before moving to Galway. He was involved in several high-profile cases, including the Mountbatten murder trial and the Sallins train robbery case.

WOMEN LAWYERS' AGM

The Irish Women Lawyers' Association will hold its AGM and a seminar on *Women in law in Europe* from 10am to 1pm on Saturday 22 November at Blackhall Place. The seminar is free to members.

COMPENSATION FUND PAYOUTS

The following claim amount was admitted by the Law Society's Compensation Fund Committee and approved for payment by the Law Society Council at its meeting in October 2003: Dermot Kavanagh, 2 Mary Street, New Ross, Co Wexford – €1,270.

SOLICITORLINK

The Law Society provides a confidential service, SolicitorLink, to solicitors wishing to buy, sell or merge their practices. The service allows practitioners to register their firm's details with the society and, once registered, each practitioner is sent details of all firms wishing to buy, sell or merge with another firm within a particular area. Firms' identities are not revealed until both parties are in agreement, and the society is not involved in the negotiations. Interested members should contact the society's member services executive, Claire O'Sullivan, for further information.

window-dress the past accounts to achieve an artificially high profit figure. A failure to write off irrecoverable outlay or the absence of a bad debt provision may indicate that the profit figures are being massaged for the vendor's benefit.

Continuity

An important factor in arriving at the final purchase price is the amount of assurance the buyer has that clients will remain and will continue to refer new work. Two factors are important. First, the buyer should try to negotiate a 'pay if they stay' clause to protect him from a sudden haemorrhage of clients. Second, it is desirable that the vendor should appear (at least in the public eye) to retain a connection with the firm.

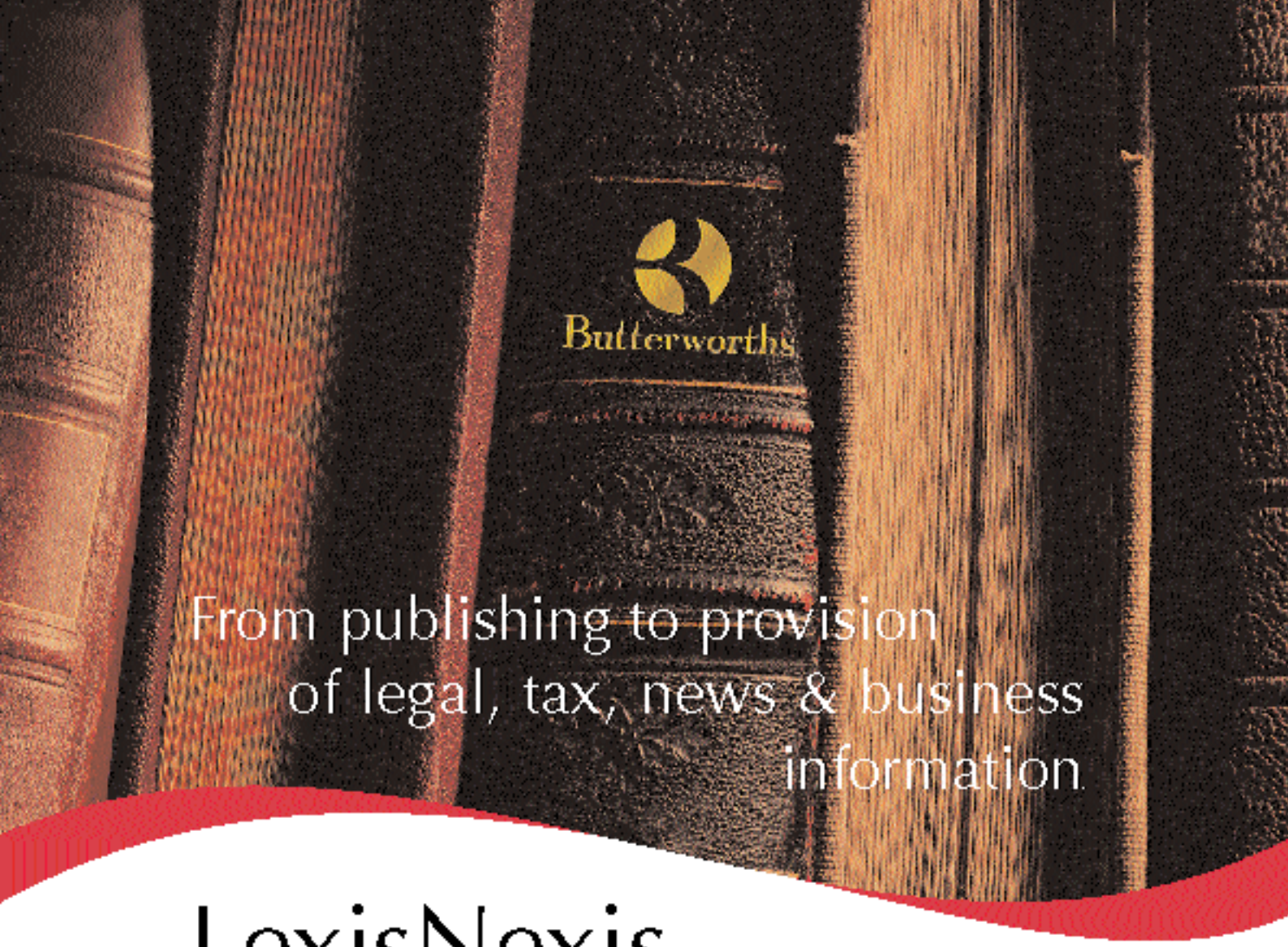
Nature and timing of consideration

The parties may have very different viewpoints about the nature and timing of consideration. At its simplest, the vendor will generally want a once-off capital payment, whereas the buyer will want to pay over an extended period, which has obvious benefits:

- Not having to find a large capital sum
- Tying the vendor to the practice for an agreed number of years
- Payments will be made out of revenue generated by the practice
- Tax relief on the payments which could be charged as consultancy fees in the practice account.

To obtain these benefits, however, the purchaser may have to pay a considerably higher price. Conversely, the vendor should be willing to accept a considerably lower price where a once-off capital sum is involved. Both parties should bear in mind that there may be differing tax implications for both payment methods, and it is vital that professional tax advice is obtained in all circumstances. G

Claire O'Sullivan is the Law Society's member services executive. This article was reproduced with the kind permission of Charles Russell of chartered accountants Russell & Associates.



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Court challenge to *in camera* rule

The High Court has allowed a challenge to the mandatory *in camera* rule in family law cases. The applicant, Dr Bob McCormack, applied for permission to seek a judicial review of the rule, arguing in his affidavit that imposing 'absolute secrecy' in family law cases is unconstitutional and 'stifles any inquiry into the workings of the family law courts or scrutiny of the behaviour of judges, lawyers, court officials and family assessors'.

Law Society deputy director of education Geoffrey Shannon expressed surprise that the issue had not been raised before now. 'Justice must not only be done, but be seen to be done', he said. 'It is a balance between the right to privacy and the right to a fair and transparent system of justice. Family law cases are not reported in the press and there is a poverty of written judgments'. And he warned that the public loses confidence in the judicial system if they cannot see how decisions are reached.

The High Court has interpreted sections 34 of the *Judicial Separation and Family Law Reform Act, 1989* and 38 of the *Family Law (Divorce) Act, 1996* to mean that family law cases must be heard 'otherwise than in public', but article 34 of the constitution says that justice must be administered in public, with limited exceptions. Shannon refers to *B and P v UK*, a landmark case heard by the European Court of Human Rights, which ruled that the mandatory *in camera* rule is in breach of a fair trial.

'The issue will have added significance when the *European convention on human rights* is incorporated into Irish law on 31 December', he said.

The Innocence Project

Applications will be taken for secondment placements with the Innocence Project in New York in the coming months. The Innocence Project is a voluntary organisation set up by attorney Barry Scheck to address cases of injustice throughout America using modern forensic science. The placement is entirely voluntary and lasts for approximately ten weeks during the summer months.

Applications are open to all trainees and can be sent to Gráinne Butler in the Law School or e-mailed to keithfarnan@hotmail.com.

The application should include a one-page CV and a short written submission outlining the reasons for your application, the qualities you feel are necessary to the project and why you would be of assistance. You should also outline how you would arrange accommodation and support while in New York. Closing date for applications is 19 December 2003. A seminar on the project will be held on 26 November at 1pm.

Rules committees to get more support?

The Court Rules Committees should be provided with a support unit to help them cope with growing volume of domestic and EU legislation, a new report has said. The rules committees draw up regulations governing practice and procedure in the courts, but a committee chaired by Mrs Justice Susan Denham says that 'the growth in legislation and litigation requires the development of a new infrastructure'. It recommends the creation of a Rules Committee Support Unit in the Courts Service to provide administrative, drafting, and other services and skills to the three rules committees.

LEGAL DIARY
The Courts Service has confirmed that it will continue to produce a fully printable version of the *Legal diary,* as well as the usual web version, on its website (*www.courts.ie*). The service is free.

LIMERICK BASH
The annual Christmas night out for Limerick city and county solicitors will be held on Friday 12 December in Freddie's Bistro. Tickets are available from association treasurer Robert Kennedy. Further details will be circulated closer to the date.

NEW BOSS AT ARTHUR COX
Dublin law firm Arthur Cox has appointed Padraig O'Riordain as new managing partner at the end of his predecessor's four-year term. The firm was recently named 'international law firm of the year' by the *International Financial Law Review.*

O'CONNOR HEADS UP DSBA
Law Society Council member John O'Connor was elected president of the Dublin Solicitors' Bar Association at its recent AGM. The newly-appointed vice-president is Orla Coyne, who also sits on the Law Society Council.

EUROPEAN PATENTS CONFERENCE
The second *epoline* annual conference will be held in Barcelona from 9 to 11 December. The conference is organised by the European Patents Office (EPO), to bring together patent professionals from all over Europe to learn about developments in the area. This theme of this year's conference is *Cutting edge issues in intellectual property today*. For more information, see *www.epoline.org/events/barcelona.*

Italy's other dons make an of

European law is all well and good in theory, but what happens when a member state stubbornly refuses to implement it? Irishman Henry Rodgers and his non-Italian colleagues have been fighting for equal employment rights in Italy for a number of years, in the face of intransigence by one of the founding members of the EU. Here is his story

This September, I petitioned the European Parliament on the unacceptable length of time it is taking for Irish and other non-national teaching staff in Italian universities to have rights under the parity of treatment provision of the *EU treaty* (article 39) enforced. The petition was co-signed by Proinsias De Rossa, vice-chairman of the parliament's Petitions Committee. The committee is empowered to refer petitions to the European Commission and demand appropriate initiatives.

Litigation by non-national teaching staff in Italian universities for parity of treatment began at European level in 1987, with the referral of a case to the Court of Justice by the *Pretura di Venezia* for a preliminary ruling. The subsequent clear-cut 1989 ruling of the court was repeatedly misinterpreted by Italy, causing the foreign teaching staff and subsequently the commission, in infringement proceedings on their behalf, to return to the court for further refinements of the original judgment. In a last resort to compel Italy to comply with the ruling in infringement

case *Commission v Italy*, the commission opened article 228 enforcement proceedings in January 2002. An eventual ruling in these proceedings, currently at the reasoned opinion stage, is unlikely before 2006. By then, foreign lecturers will have been fighting 19 years – half an average academic working life – for rights that should be automatic under the *EU treaty*.

Decline and fall

Initially, under Italian law, foreign language lecturers in Italian universities could be employed on one-year contracts, with a possibility of five further annual renewals. Lack of a continuous employment relationship gave rise to many abuses – most notoriously, the denial of maternity leave. A foreign lecturer, Pilar Allué, challenged the legality of the temporary contracts and, on the grounds that our Italian counterparts had open-ended contracts, won in the Court of Justice in 1989. The case is mentioned in textbooks on EU law for the court's rejection of the defence that tenured university teaching fell within the public service exemptions provided for under article 39(4).

Italy interpreted the 1989 verdict of the court as abolishing the six-year limit (one annual contract plus five renewals), but as condoning temporary annual contracts for foreign lecturers. Pilar Allué, now joined by co-plaintiffs, challenged this misinterpretation. Recourse to the Court of Justice takes time: four-and-a-half years would pass before the 1993 court ruling in *Allué 2*. Three of the judges from 1989 presided, while the advocate-general and the Italian defence lawyers were unchanged. The judgment, an emphatic victory for Allué, clarified the import of the earlier ruling: all time limits on the contracts of foreign teachers were discriminatory while Italian university teachers had open-ended contracts.

To comply with the *Allué* case law, Italy had merely to introduce legislation converting the temporary foreign lecturer contracts into open-ended contracts. The 1995 law that Italy introduced in response to *Allué 2* demoted foreign teachers to a newly-created rank of 'collaborators and linguistic experts'. As applied, the new rank was held to constitute a new employment relationship, with the forfeiture of the acquired rights to seniority payments, raises and pension contributions accumulated over the years of previous service. Colleagues with years of experience in their universities were astounded to note that their first pay slip as 'collaborators and linguistic

Stepping into the breach: judi

Are we at the point when Irish courts are accepting too much jurisdiction and deciding on matters that should not be in the judicial domain at all? asks Pat Igoe

Lawyers know better than most that the courts are the final bulwarks of protection for the ordinary citizens in their quest for justice – against the might of the state, an unfair employer or even a noisy neighbour.

Government, like nature, abhors a vacuum. It is arguable that the government and the Houses of the Oireachtas have become less prominent in terms of leadership, for whatever reason, and that the judiciary is being called on to fill the void.

The last issue of the *Gazette* included an article by Professor David Gwynn Morgan on the development of the role of the

ffer you can't refuse

experts' recorded them as having just started employment.

Pizza the action

Besides recourse to the European and local Italian courts, the foreign teachers sought political help. The European Parliament has passed four motions condemning the discrimination. So far, Dáil Éireann is the only member-state parliament to have invited a foreign lecturer to testify, in 1996. The Oireachtas Joint Committee on European Affairs subsequently lobbied the commission, which soon after opened infringement proceedings against Italy for non-implementation of the *Allué* case law. The infringement proceedings, with their requirement of dialogue and negotiation with member states, take time. In his recommendations to the Court of Justice in February 2001, advocate-general Geelhoed was scathing of the duration of the discrimination. The subsequent June 2001 judgment in *Commission v Italy* accepted his recommendations in full, finding yet again that Italy's discriminatory treatment of foreign lecturers violated article 39.

Article 228, introduced under the *Maastricht treaty*, empowers the Court of Justice, upon application by the commission, to impose financial penalties on member states that ignore its rulings. After the commission opened article 228 proceedings, Italy responded with a draft contract for foreign lecturers containing terms significantly worse than those ruled discriminatory in *Commission v Italy*. In a subsequent letter published in *European voice*, the authoritative Brussels-based weekly on EU affairs, I urged the commission to heed advocate-general Gellhoed's criticism and to prosecute the case with urgency. In the same newspaper, John Cushnahan MEP regretted that 'a founding member of the union verges on being the first member state to be fined for discrimination', but concluded that 'Italy's intransigent behaviour clearly leaves the commission with little choice'. A follow-up letter from Proinsias De Rossa showed how the Italian state's intransigence put it at odds with its own judiciary – the local Italian courts have consistently awarded foreign lecturers their full rights under article 39.

Just one cornetto

The foreign lecturers in Italy are part of the first generation of Europeans to move to work in another member state. I believe our e-group archive of messages will in time be seen as an important social document, showing how a category of non-national workers responded to discrimination and gradually educated themselves in EU law.

Some of the reluctance of colleagues to educate themselves in law may stem from the lawyer/client relationship in Italy. Most of the foreign lecturers are in litigation against their universities before local courts. In my experience, deference to the competence of lawyers and their handling of a case is total, reminiscent perhaps of the Irish lawyer/client relationship of 30 years ago.

As Italy has not complied with the terms of the reasoned opinion, the commission must soon decide on referral of its enforcement procedures to the court and the recommendation of an appropriate fine. The eventual case is unlikely to be decided before 2006, 19 years from the first referral to the Court of Justice.

In a recent report on free movement of workers, the commission wrote that parity of treatment 'is perhaps the most important right under community law, and an essential element of European citizenship'. It is tragic that an intransigent and protectionist member state can avoid its obligations under article 39 for so long. G

Henry Rodgers teaches English at La Sapienza University in Rome.

cial activism revisited

judiciary (page 14). It dealt with an important issue: where do the politicians end and the judges begin?

No more big gaps

This is an old dilemma, and one that is not unique to Ireland. The eminent American judge, Oliver Wendell Holmes, wrote that if the people of the United States wanted 'to go to hell', it was his duty as a judge to help them get there. No exaggerated judicial activism there! He saw the role of judges as 'interstitial legislators', filling the gaps and crevices in the legislation – but no more.

Professor Gwynn Morgan applauded the current Supreme Court for effectively deciding that major socio-

VOX POP

A recent report found that more than one-in-three women in the legal profession still suffer discrimination. Do you think this is true?

Yes. I don't think it's a problem with salary. I think women are earning as much as men, but I think there's a problem with 'jobs for the boys'. In areas like insurance companies and tribunals, if you don't play rugby you're not in! That's definitely my view on it.
Geraldine Kelly, Geraldine Kelly and Co, Solicitors

They may do so, but I haven't personally come across it. And I don't believe I have reached a glass ceiling.
Helen Sheehy, Sheehy Donnelly, Solicitors

I think that in the past it was true, and I think I was discriminated against myself. But I qualified in the 1970s and things were very different. Younger people may not realise how bad things were. I think that, particularly in the public sector, women are treated quite fairly.
Rosalind Hanna, CIE solicitor

It is very apparent. I think that if a woman wants to be successful in the profession, she has to get a reputation for being completely ruthless. In court, you can see the way that women solicitors are treated by male barristers or solicitors.
Emma Coffee, trainee solicitor

economic issues should be left to the politicians, who can see the relevant issues from a wider perspective than the court can. He approves what he sees as the court taking a significant turn away from the individual in favour of the community.

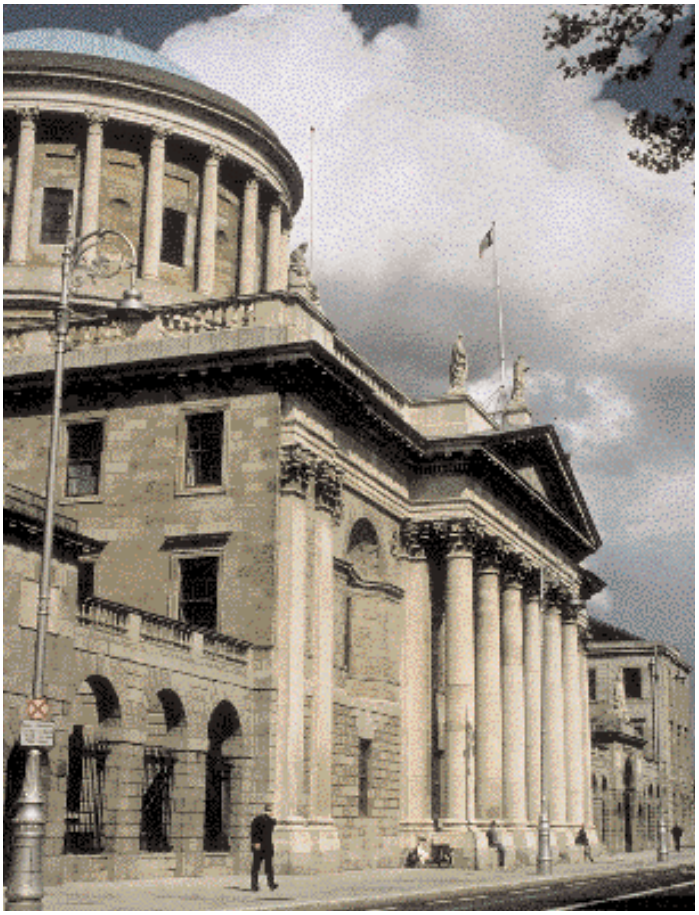
The basic rules of when the courts should and should not get involved were laid down by Mr Justice Costello in *O'Reilly v Limerick Corporation* (1989). In this case, travellers sought a mandatory injunction requiring Limerick Corporation to provide them with adequate, serviced halting sites. The judge ruled that it was up to the government to decide how it allocated resources.

He explained that the courts would be abrogating to themselves the role of the government in seeking to order how taxpayers' money should be spent. This would be 'distributive justice' – that is, allocating common goods. By contrast, 'commutative justice' is concerned with the distribution of resources between individuals in a relationship, and is indeed a matter for the courts.

Arguably the clearest and most broad-ranging discourse on the role of the courts vis-à-vis the executive is in *Re: Secession of Quebec* (1998) before the Canadian Supreme Court. The court identified three clear grounds on which a court may (and perhaps should) refuse to address an issue on the basis that it was non-justiciable.

The three grounds outlined were:

- If to take on the case would take the court beyond its own assessment of its proper role
- If the matter was outside the court's own area of expertise, or
- If the issues were too imprecise or if there was not enough information on which to base a decision.



In a significant contribution to this debate, barrister and academic Paul Anthony McDermott wrote in a recent issue of *The Irish jurist* on *The State (C) v Frawley* (1976) and two recent cases before the High Court, *DB v Minister for Justice* and *TD v Minister for Education*.

Frawley was an example of how precedent as set down can operate so as to deprive litigants whose constitutional rights have been breached of a remedy. The applicant was a prisoner in Mountjoy prison. He sought an order of *habeas corpus* on the basis that he was not getting adequate treatment. He suffered from a sociopathic personality disturbance and repeatedly swallowed metal objects. His 'treatment' included that he was kept in solitary confinement and occasionally detained in the Central Mental Hospital.

The then-president of the High Court, Mr Justice Finlay, accepted that the state was under a constitutional duty to protect the health of prison inmates but that it was not the proper role of the court to direct the government on how to allocate resources. The decision was consistent with available precedents.

However, by 1999, the situation was sufficiently extreme for a High Court judge to push out the court's frontiers. In *DB v Minister for Justice* (1999), Mr Justice Peter Kelly held that the applicant, a young offender requiring secure accommodation in a high-support unit, was entitled to an injunction directing the minister to provide funding for such a unit.

The judge quoted former chief justice Cearbhall Ó'Dálaigh in the 1965 case of *The State (Quinn) v Ryan*, when he said that 'it was not the intention of the constitution in guaranteeing the fundamental rights of the citizens that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and that the courts were custodians of these rights'. Mr Justice Kelly noted that orders against the administrative branch of government would not be made lightly due to the need to respect the separation of powers as provided for in the constitution.

In the 2000 case of *TD v Minister for Education*, Mr Justice Kelly made a similar order in respect of the construction of a number of other high-support units for children at risk. He said that the court was trying 'to fill the vacuum which exists by reason of the failure of the legislature and executive'.

But in 2001, the Supreme Court overturned Kelly. 'If citizens are taught to look to the courts for remedies for matters within the legislative or executive remit, they will progressively seek further remedies there and progressively cease to look to the political arm of government', according to Mr Justice Adrian Hardiman.

So where are we now then? Clearly, the Keane-led Supreme Court would appear to carefully seek to interpret the constitutional separation of powers and not usurp what it regards as the role of the government, as in the 2001 *Sinnott v Minister for Education* case, while fending off excesses by the legislature as in the 2002 Abbeylara case of *Maguire v Ardagh*, when the Oireachtas' committee's powers were curtailed.

Goldilocks and the forebears

Where jurisdiction is accepted and judicial decisions are taken, there seems to be a consensus emerging that there is a swing away from the rights of the individual towards protecting the rights and assets of the community. This is consistent with the principle that the courts should not simply apply logic and precedent as hermetically-sealed and handed down from defunct forebears

and by-gone eras of different social and economic climates.

It is difficult to see how any complaints of over-zealousness that might be made against the modern Irish judiciary could be sustained. From the *Frawley* case in 1976 through the *O'Reilly* travellers case in 1989 to such cases as *MacMathuna v Attorney General* (1995), where the Supreme Court decided that it could not order the Oireachtas and the government on how they provide financial assistance to citizens, the courts have adopted a careful 'render unto Caesar' approach.

Traditionally, the courts look at legislative provisions using one of the three rules of interpretation – what the textbooks call the literal rule, the golden rule, and the mischief (that is, the avoidance thereof) rule. Essentially, of course, both the golden rule and the mischief rule would be adopted if the literal rule would lead to absurdity or inconsistency and involve the court giving words in a statute their ordinary meaning and suppressing the mischief as sought.

But, essentially, Irish judges have not deviated from the *dicta* of Mr Justice Budd in *Rahill v Brady* (1971), when he said that 'in the absence of some special technical or acquired meaning, the language of a statute should be construed according to its ordinary meaning and in accordance with the rules of grammar'. He added that 'while the literal construction generally has *prima facie* preference, there is also a further rule that, in seeking the true construction of a section of an act, the whole act must be looked at in order to see what the objects and intention of the legislature were'.

Pat Igoe: judiciary being called on to fill the void

Pit and the pendulum

Meanwhile, the courts have never been busier. More judges are being appointed and the courts are being asked to rule on an ever-increasing breadth of topics. Judicial review is now easily the fastest-growing area in litigation, with the courts being asked to rule on a variety of decisions by various public bodies. The range stretches from immigration applications to schools to criminal law procedures.

Judicial activism in Ireland was perhaps kick-started in the halcyon days of the Ó'Dálaigh Supreme Court, confirming citizens' unenumerated constitutional rights, including the right to sue the state and to protect their good name. The pendulum may be swinging back in favour of the community and a reluctance by the courts to 'step into the breach' left by the government. G

Pat Igoe is principal of the Dublin law firm Patrick Igoe and Company.

Babes in t

Juvenile crime is a growing issue in more ways than one. The *Children Act, 2001* is the latest legislative attempt to get to grips with the scourge of problem children and those with special needs. Geoffrey Shannon looks at how the act deals with kids who fall foul of the law

MAIN POINTS

- **Family conferencing**
- **Children in garda stations**
- **Parental responsibilities**

The *Children Act, 2001* is the culmination of three decades of debate, and attempts to put in place a modern statutory framework for dealing with juvenile justice. The act reflects a rights-based approach to youth justice, imported in large measure from international examples. Among other measures, it provides for family welfare conferences and special care orders (see **panels**) to deal with unruly children or those children with special needs. It also introduces a comprehensive strategy on restorative cautioning.

Broadly speaking, the 2001 act supports the philosophy that children in conflict with the law must be treated as children first. It is based on the premise that detention should be used only as a last resort and should only be considered after a range of community-based measures have been exhausted.

The 2001 act repeals the *Children Act 1908* and was signed by the president on 8 July 2001, but several of its provisions are not yet in force. While it signals a movement towards a more progressive juvenile justice system, it certainly has a number of significant shortcomings. For example, the act does not acknowledge the socio-economic context that encourages deviant behaviour in children; instead, it sees the family as the primary cause. Sections 111 to 114, for instance, attempt to sanction failed parenting (see below), but a similar approach is not adopted when the state is fulfilling a parenting role. In fact, although the state as a parent has had a disturbing history, it is effectively immune from prosecution. There is a real question of double standards here.

Children in need

The *Children Act, 2001* amends the *Child Care Act, 1991* by inserting a new part IV(a). The 1991 act was widely criticised for failing to make provision for

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secure placements for unruly children in need of care. The High Court partly filled the gap, using its inherent jurisdiction over children to order secure detention (*FN v Minister for Health* (1 IR 409 [1995]); *DB v Minister for Justice* (1 IR 29 [1999]); and *TD v Minister for Education, Ireland, the Attorney General, the Eastern Health Board and the Minister for Health and Children*, unreported, High Court, Kelly J, 25 February 2000). Before this, unruly children could only be detained by being charged with an offence so that the courts could have jurisdiction over them.

The new approach was sanctioned by the Supreme Court in *DG v Eastern Health Board* (1 ILRM 241 [1998]). There, the court ruled that although the High Court's jurisdiction involved the deprivation of the child's right to liberty, this was justified by the requirement that the child's welfare be promoted as a paramount consideration.

The Supreme Court decision in *DG v Eastern Health Board* was subsequently appealed to the European Court of Human Rights, which issued its judgment on 16 May 2002. The case challenged the legality of detaining in St Patrick's Institution a 16-year-old non-offending child with serious behavioural problems. Article 5 of the *European convention on human rights and fundamental freedoms* guarantees the right to liberty and security, though this is not an absolute right, and allows for '*the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority*'.

Article 5 has been invoked in cases involving disturbed children, for whom there are at present insufficient high-support units in Ireland and where, in many cases, these children are held in penal institutions for want of appropriate accommodation. The European Court held that the detention of the child in St Patrick's Institution in *DG* was in contravention of rights guaranteed under the convention. The court ruled that the Irish state acted unlawfully in failing to provide the disturbed child with a safe, suitable therapeutic unit and upheld the claim that the child's human rights were violated and his right to compensation under the convention denied. It noted, in particular, the fact that St Patrick's was not 'an interim custody measure for the purpose of an educational supervisory regime which was followed speedily by the application of such a regime'.

It is unlikely that the European Court's judgment in *DG* will impact on the constitutionality of special

PIC: EVERETT COLLECTION/REX FEATURES

Fagin, with his bunch of loveable, singing petty criminals

care orders, given the wide interpretation afforded by the European Court to educational supervision. A relevant and instructive case is that of *Koniarska v UK* (European Court of Human Rights, judgment of 12 October 2000), where the court held that placing a child in secure accommodation was not contrary to the convention as it amounted to 'educational supervision' within the meaning of article 5.

Section 16 of the 2001 act is unfortunately vague. There is, for example, no satisfactory definition of 'substantial risk', or of 'health', 'safety', 'development' or 'welfare'. Without further clarification, the precise meaning of these terms will have to be worked out on an *ad hoc* basis in the courts. The fact that such provisions lie in the middle of a criminal justice act is also worrying. Modern legislation, by contrast with the *Children Act 1908*, deliberately separates child care proceedings from juvenile criminal proceedings, the obvious logic being that action seeking to promote the welfare of the child should at all costs avoid 'criminalising' him. It is at least arguable that the provision for special care orders should have been contained in a separate amending act.

The creation of a formal duty to make special provision for troubled youth in care is welcome. It is hoped that this legislative reform, however, will be matched by financial resources, aimed at enhancing the number and quality of suitable places available for such children.

Cops and robbers

The 2001 act raises the age of criminal responsibility from seven – the lowest age in Europe – to 12 years of age. This means that children under the age of 12 will no longer have the capacity to commit offences.

Part 6 of the act deals with the treatment of child suspects in garda stations. It obliges the gardaí to have due regard to the dignity of children and their vulnerability because of their age and level of maturity. This part of the act, with the exception of sections 59 and 61(1)(b), came into force on 1 May last year. It says that a detained child must be kept separate from a detained adult and must not be kept in a cell, unless there is no other place available.

When a child is arrested, he must be informed of the details of the alleged offence in language appropriate to his age and understanding and told that he is entitled to consult a solicitor and that his parent or guardian has been notified. If the parents cannot or will not attend, the child is to be told of his 'entitlement to have an adult relative or other adult reasonably named by him or her given the information specified in (section 58(1)(a)) and requested to attend at the station without delay'.

The act also sets out in detail how gardaí must conduct their interviews. A child cannot be interviewed unless his parent or guardian is present. But significantly, section 61(4) allows the garda in charge of the station to remove an adult from where a child is being questioned or where a written statement is being taken if he has reasonable grounds for believing that the conduct of the adult amounts to an obstruction of the course of justice.

Section 61(7) defines parent or guardian as including the adult reasonably named by the child under section 58. In the absence of the parent or guardian or the other adult reasonably named by

SPECIAL CARE ORDERS

The *Children Act, 2001* introduces a 'special care order', designed to provide for children in need of special care or protection. This part of the act is to be commenced by the end of the year, with the exception of section 23(d), which provides for an emergency special care order, allowing the gardaí to deliver a child into the care of the health board. The concept of special care orders is imported from New Zealand and is designed to maximise the use of the child's social and family support networks at a time of crisis in his life.

The philosophy behind the 2001 act is that the application for a special care order should be used only as a last resort. Before applying for the order, the relevant health board must arrange for a family welfare conference. The board may still wish to proceed with an application for a special care order. If so, the views of the Special Residential Services Board, established in part 11 to co-ordinate residential services for children placed in special care units or detained in detention schools, must be sought. Non-offending children with behavioural problems who are the subject of special care orders and child offenders are to be placed in separate residential accommodation. Part 11 will come into effect later this year.

As with care orders and supervision orders, only the health board – the statutory body with responsibility for promoting the welfare of children at risk – can make the final decision on whether to apply for a special care order. However, the parents of a child may request the health board to make such an application. If the board refuses, it must inform the parents in writing.

Once made, the order has the effect of committing the child to the care of the health board that has applied for the order. The child is to be kept in a special care unit for a specified period of between three and six months. During this time, the board is required to provide for the care, education and training of the child. On the expiry of the order, the board can apply for an extension, but only where the conditions that gave rise to the original order still exist.

FAMILY CONFERENCES

The *Children Act, 2001* provides for three types of conferencing.

The family welfare conference, provided for in part 2, is to be convened by the health board. It deals with young people who are not offenders but whose behaviour presents a serious risk either to themselves or others, and children before the court for their criminal behaviour but whom the court considers may need care and protection.

A family welfare conference must be convened before the board can apply for a special care order. It provides a framework by which a child, his family and appropriate agencies can find solutions to the problems that have led to the child being vulnerable. One of the most significant and progressive elements of the family welfare conference is that children will be present at the conference.

The basic purpose is to produce a plan for the future care, protection and development of the child. This will involve the family taking responsibility for the child and coming up with proposals for the plan with the assistance of the professionals attending the conference.

The second type of conference is the garda conference. Part IV of the 2001 act places the garda juvenile liaison scheme on a statutory footing and renames it the diversion programme. The garda conference has been in force since 1 May 2002. It is convened by the Garda Síochána, and involves the formulation of an action plan for the child. It provides an opportunity to confront the child with the consequences of his offence in the presence of the victim and allows the child to apologise and make reparation to the victim. It will provide a forum for the child, his parents and other family members, possibly other interested parties and, where appropriate, the victim to discuss the child's offending and the reasons for it.

The third type of conference is a family conference, which is convened under part 8 of the act by the Probation and Welfare Service where a child is charged with an offence and the court considers that a family conference is desirable. The conference is court-supervised and enforceable. The principle is that the child is best looked after within his own family. The family conference is not yet in force.

the child, the garda in charge can nominate another adult. The act supplies little guidance as to what 'reasonably named' means. This is likely to cause confusion and affords a wide discretion to the garda in charge of the station in deciding whether to allow the adult named by the child to attend the interview.

A parent or guardian must be given a copy of the charge sheet and is to be notified in writing, as soon as practicable, of the date of the child's first appearance in court.

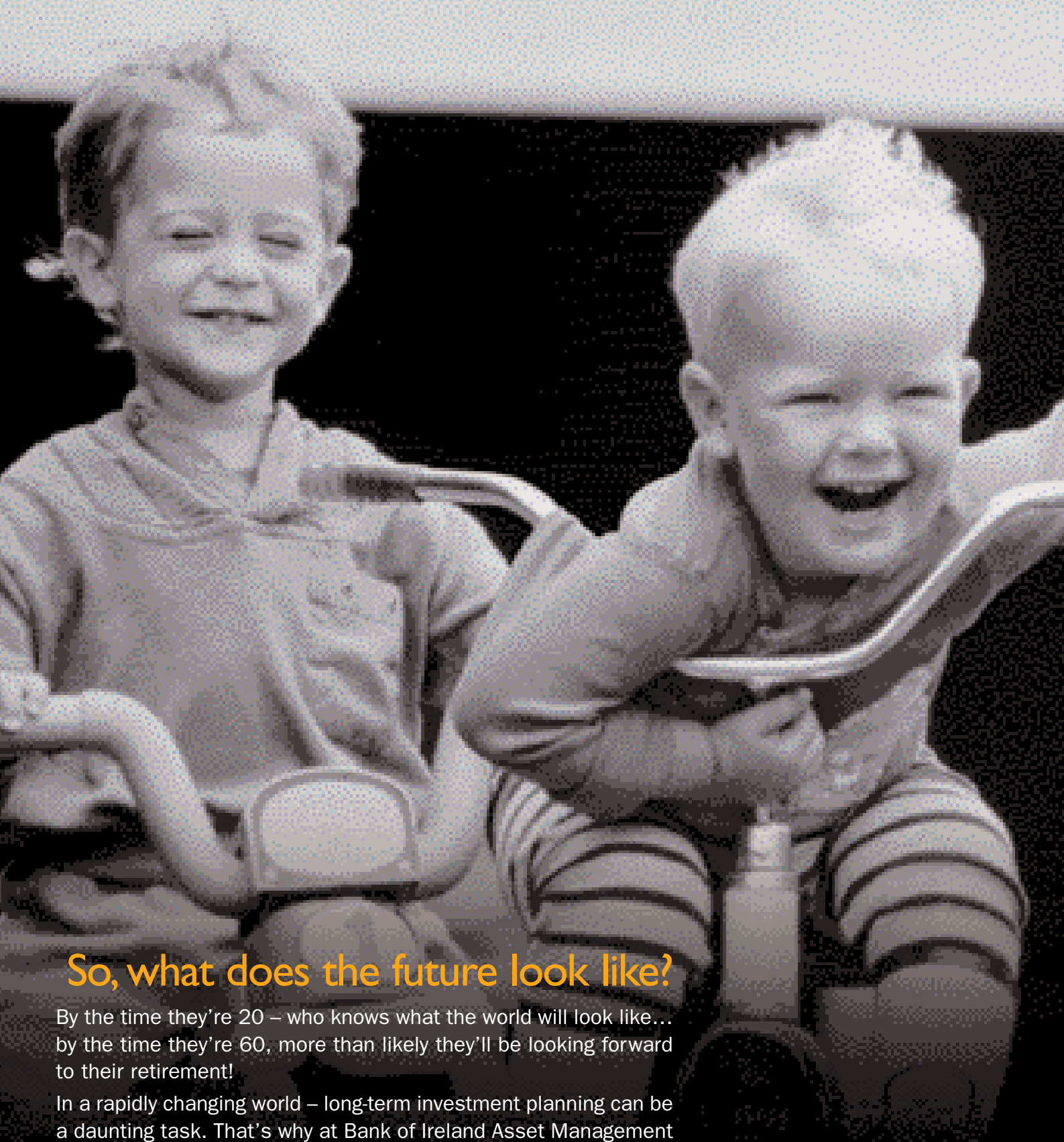
Sections 70(b) and (c) of the 2001 act allow the minister for justice, equality and law reform to make regulations governing the role of any of the adults present at the interviewing of children in garda stations. These regulations will provide useful guidance as to whether the adult present during the questioning of the child is there to ensure procedures are complied with, to ensure the child is properly treated or to offer support to the child.

The former Juvenile Court has been abolished. In its place, section 71 of the 2001 act establishes a new Children's Court, which will now deal with anyone under the age of 18. The Children's Court has been given a new central role in implementing the restorative justice provisions in the 2001 act.

Up before the break

Part 8 of the act allows the court to adjourn the criminal proceedings where it considers that a child's real problem is a need of care or protection. In such cases, the local health board will be directed by the Children's Court to convene a family welfare conference in respect of the child and report back to the court on what action, if any, it intends to take. Following the outcome of the family welfare conference, the court will have the discretion to dismiss the charge against the child.

In this jurisdiction, remanding young offenders in custody has been the subject of considerable



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debate due to the fact that children on remand have been mixed with children being detained. Section 88(5) of the 2001 act is to be criticised in that it empowers the minister for justice, equality and law reform, with the agreement of the minister for education and science, to designate as a junior remand centre any place (including part of any children's detention school) which in his opinion is suitable for children who are remanded in custody. If the remand centre is part of a children's detention school, it is difficult to see how children on remand can be kept apart from those in detention.

Parents are required to attend all stages of proceedings in court where a case is being heard against their child (section 91). Failure by the parents or guardians to do so without reasonable excuse will be treated as if it were contempt of court.

Part IX of the act sets out the powers of a court on finding a child guilty. Those powers must be exercised in accordance with the principles set out in section 96 of the 2001 act relating to the exercise of criminal jurisdiction over children, one of which is the need to adopt and implement alternatives to formal criminal prosecution, wherever possible, in order to divert young offenders away from the criminal justice system.

Bringing it on back home

The *Children Act, 2001* imposes responsibilities and obligations on parents to participate in their children's welfare. Under section 111, the court may make a parental supervision order. This gives the court the power to instruct parents to undergo treatment for substance or alcohol abuse and/or to attend a course in parenting skills. Failure to comply with a parental supervision order can be treated as contempt of court.

Parents can be ordered to pay compensation instead of their child. Before making a compensation order, the court must be satisfied of the parents' ability to pay and that a wilful failure on the part of the parents to take care of or control their child contributed to the child's offending. This provision, which enables the court to compel parents to pay compensation to the victim of an offence committed by their child, seeks to bring home to parents the fact that their responsibilities extend to the consequences of their children's actions. In similar fashion, the courts can order the parent or guardian of a child offender to enter into a recognisance to exercise proper control over the child.

The use of parental control mechanisms in the *Children Act, 2001* demonstrate a reluctance to acknowledge the social context that contributes to a child's delinquent behaviour, such as poverty, drug addiction or disadvantage.

The provisions in the *Children Act* relating to family welfare conferences and the juvenile liaison scheme (which has been restructured and renamed the diversion programme) are positive steps forward. The latter introduces a system based on restorative justice. The benefits of restorative justice are well documented, providing, as it does, an opportunity to turn young offenders away from crime. Replacing the categorisations of reformatories and industrial schools with children detention schools, under the control of boards of management, and the establishment of a special residential services board to co-ordinate the provision of care for children in detention are all evidence of a more long-term approach to solving the problem of youth crime.

The 2001 act has enormous potential, but that potential will only be realised with adequate resources. In this regard, the delay in implementing the early intervention sections of the act, and in particular part 2 of the 2001 act, is to be regretted. Early intervention is critical to the success of the *Children Act*, and means galvanising resources and proper care plans for families in crisis, while children are still of an age to be rescued from permanent alienation. G

Geoffrey Shannon is the Law Society's deputy director of education and author of Children and the law *(Round Hall, 2001).*

OVER THE HILL

A House of Lords' decision has implications for the issue of assessing solicitors' costs in England and Wales. Tom Murran contrasts the system in that jurisdiction with the Irish position

MAIN POINTS

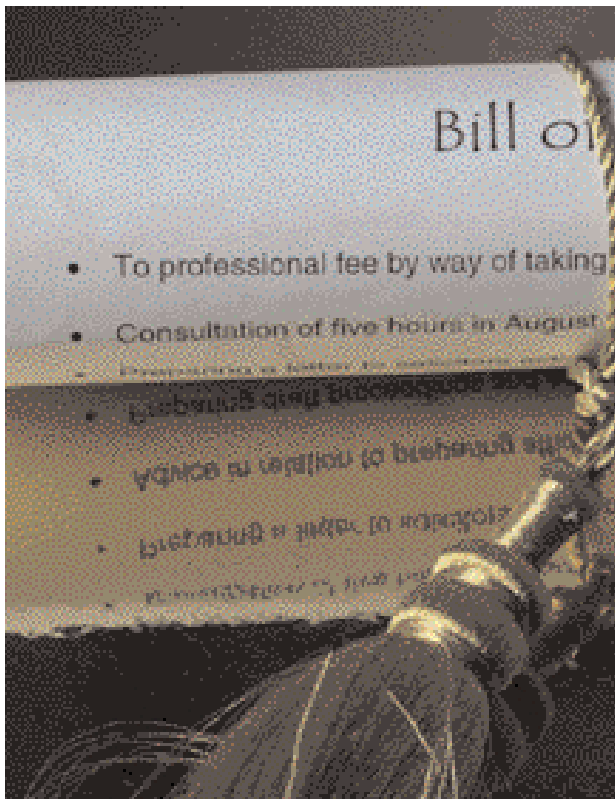
- **Solicitor-and-client costs**
- **Legislation in England and Wales**
- ***Callery v Gray***

In the July/August 2002 edition of the *Gazette*, taxing master James Flynn wrote about the legal basis for 'solicitor-and-client' costs and 'party-and-party' costs. He said that 'there is a mistaken impression among some solicitors that a solicitor-and-client fee is chargeable in every case. Quite to the contrary is in fact the case'.

It is not my intention to comment on the views expressed by the taxing master (which must, of necessity, be of persuasive, if not binding, authority), but rather to look at the system in the neighbouring jurisdiction in light of the law lords' judgment in the case of *Callery v Gray* on 27 June 2002.

In England and Wales, the *Access to Justice Act 1999* (building on the *Courts and Legal Services Act 1990*) 'introduced a new regime for funding litigation, and in particular personal injury litigation' (paragraph 2, *Callery v Gray*). Before this legislation, legal aid provided out of public funds was the main source of funding those of modest means to make or defend claims in the civil courts.

As time passed, the defects of the legal-aid system became more and more apparent: 'While the scheme served the poorest well, it left many with means above a low ceiling in an unsatisfactory position; too well-off to qualify for legal aid, but too badly-off to



contemplate incurring the costs of contested litigation. There was no access to the courts for them' (paragraph 1).

According to Lord Bingham, the 1999 act had three aims:

- To contain the rising costs of legal aid to public funds

CALLERY V GRAY

The case was a straightforward personal injury claim. On 2 April 2000, Callery was injured as a passenger in a car when it was struck from the side by Gray's car, which was insured by Norwich Union. He consulted his solicitors and the following is the sequence of events:

- 28 April: he instructed his solicitors, Amelans, and signed a CFA that provided a success fee of 60%
- 4 May: he took out an ATE insurance policy with Temple through his solicitors for a premium of stg£367.50, inclusive of VAT
- 4 May: his solicitors wrote to the defendant intimating a claim on his behalf
- 19 May: Norwich Union wrote to his solicitors admitting liability
- 12 July: Amelans offered to accept stg£3,010 plus costs
- 24 July: Norwich Union counter-offered to settle at stg£1,200
- 7 August: settlement was agreed in the sum of stg£1,500 plus costs.

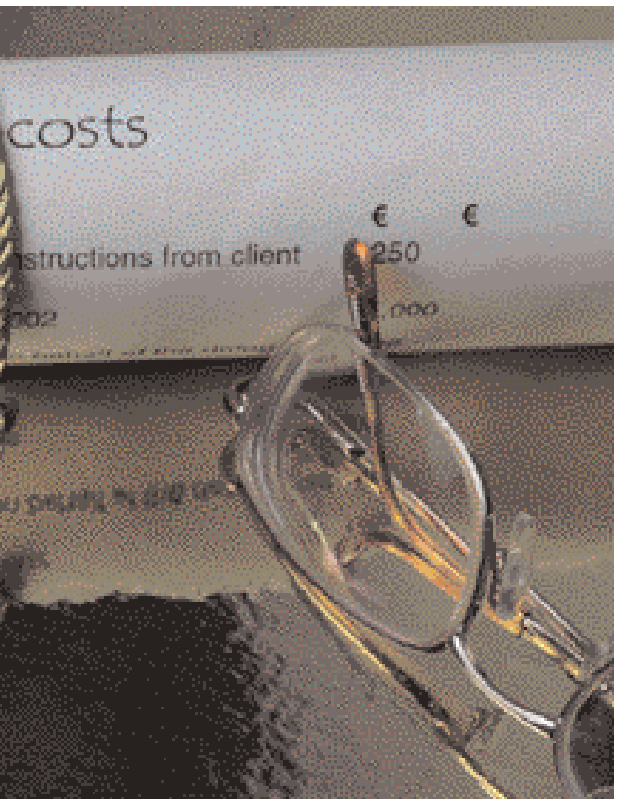
There followed a dispute about costs, which were submitted by Amelans in the sum of stg£4,709.34 inclusive of outlays and disbursements, including the premium of stg£350 plus VAT on the ATE insurance policy.

On assessment of the costs in the first instance, district justice Wallace fixed costs at stg£1,941 (including VAT) and ordered that costs of the assessment be paid. The costs award included a success fee of 40% and the ATE premium. Norwich Union appealed to Judge Edwards on the basis that the 40% success fee was too high, and, on a further appeal, it was held by the Court of Appeal that the appropriate uplift would be 20% rather than the 40% ordered by the lower court in respect of the success fee.

Ultimately, the House of Lords had to determine whether the Court of Appeal was correct: a) in allowing a success fee of 20% in what was, by common consent, a very low risk case; and b) in allowing a premium of stg£350 for an ATE insurance policy taken out before the claimant had issued proceedings and, indeed, before the defendant insurers were on notice of the claim.

While the view of the House of Lords was not unanimous (four to one), and almost all law lords expressed some reservations, the court refused to interfere with the decision of the Court of Appeal.

S AND FAR AWAY



- To improve access to the courts for members of the public with meritorious claims, and
- To discourage weak claims and enable successful defendants to recover their costs in actions brought against them by indigent claimants.

Pursuant to the first of these aims, publicly-funded assistance was withdrawn from run-of-the-mill personal injury claimants. 'The main instruments upon which it was intended that claimants should rely to achieve a second and third of these aims … are conditional fee agreements and insurance cover obtained after the event giving rise to the claim' (paragraph 68).

Conditional fee arrangements (CFAs)

The *Callery* judgment continued: 'A feature of a CFA is that, if the claim fails, the lawyer … receives no remuneration but, if the claim succeeds, the lawyer becomes entitled not only to the normal fee for his services but also to a success fee, calculated as a percentage of the normal fee. The percentage uplift ... must not exceed 100% of the normal fee.

'The logic of the success fee is that its size will reflect the risk the lawyer is incurring in taking on the case. The more difficult the case and the less clear that the outcome will be a successful one, the higher the percentage uplift that can be justified; and, of course, vice versa. The CFA protects the claimant who enters into it from having to remunerate his lawyer if the claim fails'.

After-the-event insurance

A CFA does not protect the claimant from the risk that, if litigation is commenced, he may find himself ordered to pay the costs of the defendant. In order to protect himself from that risk, he may take out after-the-event (ATE) insurance. A typical ATE policy indemnifies the claimant up to an agreed figure against an order for costs awarded against him and indemnifies him for disbursements paid out by his own solicitor in unsuccessful litigation. A noteworthy feature of the policy in *Callery* was that the premium would not become payable until the conclusion of the case. Furthermore, the recoverable amount of the premium would be so much as might be successfully recovered by the claimant from the paying party.

So a CFA is a 'no foal, no fee' arrangement between the claimant and his solicitor with a success fee built in, and an ATE is also a 'no foal, no fee' agreement between the claimant and his insurer with a guarantee that his insurer would pay any costs awarded against him.

Under this regime, the claimant who makes appropriate arrangements can litigate without any risk and a lawyer participating in those arrangements is rewarded for the risk undertaken by him by way of the success fee. Not only is this lawful, but it is actually encouraged by the legislature as part of its policy to help achieve the three aims outlined above.

While undoubtedly there is no statutory basis for a success fee in this jurisdiction, a success fee based on a percentage of the award, or indeed a percentage of the claimant's costs, would appear to be ruled out by section 68 of the *Solicitors (Amendment) Act, 1994*.

Nevertheless, the *Callery* case does raise the interesting question as to whether or not in this jurisdiction a solicitor for a claimant is entitled to any reward for the risks undertaken in effectively acting for the claimant on a 'no foal, no fee' basis, as most solicitors do. If there is to be any reward for undertaking this risk, is the defendant obliged to pay it or is it a charge that properly belongs as a solicitor-and-client item? If so, on what basis is it computed?

If, on the other hand, the instruction fee contains no element of reward for risk undertaken, then is it not something that we as a Law Society should look for, in the interest not only of impecunious claims but also of properly rewarding us for risk undertaken? G

Tom Murran is a member of the Law Society Council and is managing partner with the Waterford firm Peter O'Connor & Son.

NO LONGER

As Poland prepares to take its place as a member of the European Union, members of the society's EU and International Affairs Committee were invited to Warsaw to begin a programme of co-operation and mutual assistance with their Polish counterparts. Hugh O'Donoghue reports on this show of solicitor solidarity

The EU and International Affairs Committee may not be as well known, nor its activities as widely appreciated, as other Law Society committees. This may be understandable, as the committee's remit has not traditionally been of foremost relevance to the daily concerns of the average Irish solicitor.

But now it's a different story: international law, including EU and human rights law, is a rising star

MAIN POINTS

- **Structure of the Polish legal profession**
- **Constitutional history**
- **Mutual recognition of qualifications**

POLES APART

PIC: AVIKAINEN/REX FEATURES

Scales of justice: the mermaid Syrenka, emblem of Warsaw

of the legal family. European law provides us with the most obvious example of this ascendancy. Not only is knowledge of aspects of public international law now indispensable to Irish lawyers, but the reach of a typical practice has also expanded beyond national boundaries. How many solicitors have not had an enquiry from a client buying property abroad? Most solicitors will also have had a client who has had an accident while travelling or who may be involved in a dispute beyond national borders. At the same time, the enforcement of court judgments across national frontiers is now a more familiar chore in the life of a general practitioner.

Bearing in mind the committee's role in fostering relations with other bars, and given the growing importance of EU and international law, it frequently happens that the committee responds to other law societies who request co-operation and assistance. The course of lectures in company law to South African lawyers last year (see *Gazette*, May 2002) is one example. An approach from the Warsaw Chamber of Legal Advisors earlier this year fell into the same category. The proposal was that the Warsaw bar and the Irish Law Society begin a programme of co-operation and mutual assistance, sharing common know-how and experiences. As a result, the Warsaw lawyers suggested a series of lectures on European law for the benefit of their qualified lawyers and trainees. No doubt they had in mind the proposed accession of Poland to the EU in May 2004. In all, six lectures were suggested and committee members delivered the first of the proposed talks in June.

The Chamber of Legal Advisors in Warsaw is part of the statutory architecture of self-government designed for legal advisors. Advocates – the other branch of the profession – have a separate organisational structure. Chambers are organised on a regional basis and – like law societies elsewhere – have responsibility for practitioners within their area. They also have a disciplinary function. However, it is their role in organising professional training that brought them into contact with the Law Society earlier this year.

Polishing your knowledge

Before being admitted as a trainee legal advisor in Poland, candidates must have a basic law degree from either a Polish or a compatible non-Polish university. The entrance exam for the Warsaw professional course is considered to be extremely daunting: the success rate is approximately 15%.

Candidates must also be of good character, with no history of criminal convictions and have full legal capacity and civil rights. They must be fluent in Polish and must undergo a three-and-a-half-year professional course and pass the requisite exams.

PIC: ISOPRESS/REX FEATURES

Big stone lions have been terrorising the centre of Warsaw for years

THE EU AND INTERNATIONAL AFFAIRS COMMITTEE

The committee has existed for over 40 years. It currently consists of ten solicitors and meets once a month. Wendy Hederman is the current chair and Bríd Moriarty, the sole barrister, is secretary.

The duties of this non-standing committee are to advise the president and Council of the Law Society on European law and transnational juridical developments. The committee also has the function of informing the profession of current international legal developments and achieves this through seminars and publications. The *European law healthcheck* is now a hardy annual in the diary of the profession. The *Eurlegal* section of the *Gazette* is also part of the process. The committee also aims to foster relations with legal professions in other countries.

The course consists of both formal training/lectures, and time spent in professional offices. There are now nearly 650 trainees at various stages of professional courses in Warsaw.

In June, Bríd Moriarty and I travelled to Warsaw to deliver the inaugural lectures. The idea was that the first talk would give an introduction to Irish law and the Irish legal system.

The Polish lawyers who attended were both qualified and trainees. They were particularly interested in the Irish constitutional story and how it related to common law. They were also interested in how fundamental rights may be restricted or even circumscribed in Ireland in the interest of the common good and especially how the courts have explained these limitations of rights. They also learned about the jurisdictional structure of our courts and received an outline of the doctrine of precedent. Finally, the first lecture dealt with the way that qualified lawyers in the European Union may practice in Ireland, the regulations in force at present and the practice adopted by the Law Society in implementing the new rules.

Return of the professor

The first talk was intended to prepare participants for the following specialist lectures on EC laws. The

THE POLISH LEGAL PROFESSION

Poland is served by two legal professions – legal advisors and advocates. The allocation of their functions is more a result of haphazard development than can be explained by systematic planning, the qualifications of the constituent members or the existence of distinct fields of competence. The professions overlap, even more so than in Ireland.

In Poland, legal advisors largely correspond to solicitors, especially as specialists in the broad field of commercial or business law. But while in Ireland solicitors and barristers work as a team in litigation, and barristers are engaged by solicitors as consultants of last resort, no such commerce between the two categories of the profession exists in Poland. Both branches operate independently. If anything, legal advisors are the dominant profession.

Advocates do exactly what is says on the tin, and, by comparison, legal advisors are not allowed to practise in the family and criminal courts, with only rare exceptions. Litigation is not, however, rampant in Poland and commercial litigation is uncommon. Legal advisors see their primary role as preventing the expense and hazard of litigation.

But the demarcation between the professions can often be blurred. This overlap has been accentuated by recent legislation, where both may now represent economic and other entities as well as individuals. Moreover, legal advisors may now play a part in certain business-related criminal proceedings, though their role there is not co-extensive with advocates, whose field was traditionally criminal law.

SHARED CONSTITUTIONAL HISTORY

The Poles, like us, have been at the vanguard of constitutionalism. More so for Poland, where the venerated constitution of 3 May 1791 is second only in time to the constitution of the United States of America and more or less contemporaneous but somewhat earlier than the constitution of the Republic of France of 1791. The 3 May constitution, cast as it was in the cauldron of Enlightenment ideas, contained then what we now characterise as a bill of rights, a novelty in the absolutist milieu created by dominant church and state that was then the rule throughout Europe.

History repeated itself in Poland with the inauguration of the constitution of the Polish Republic on St Patrick's Day 1921. The structure and character, as well as the wording of the preamble of that 20th century document, for example, displays striking correspondence to the terms of the Free State constitution of 1922. Indeed, that very same Polish document of 1921 was studied in the course of a comparative evaluation of continental constitutions by the Free State government with a view to providing a working framework for the drafting of what came to be known as the Saorstát constitution.

But the shared constitutional experience runs deeper still in that there is a seam of human rights values embedded in both the 1791 and 1921 Polish charters. For example, the constitutional right of access to the courts (art 98), the right to property (art 99) 'as one of the fundamental principles', the inviolability of the dwelling (art 11), freedom of movement (art 101), the right to dispose of one's labour (art 102), the rights of the child (art 103), freedom of expression (art 104), freedom of the press (art 105), privacy (art 105), freedom of association (art 108), minority protection (art 110), freedom of religion and conscience (art 111), and the right to free primary education all parallel our own cherished constitutional freedoms.

Unhappily, neither the rights proclaimed by the 1791 or 1921 documents ever got the chance to be developed juridically by the courts, as Poland was overrun shortly after their commencement, first by Germany and then by the Soviet Union during World War II, after which Poland became a Soviet satellite.

first of those was delivered by Bríd Moriarty, who spoke on the assimilation by the Irish legal system of the *aquis communautaire*. The talk ranged over a broad range of European constitutional topics, in particular the primacy of EU law in areas of community concern, summarised by Blaney J in *Meagher v Minister for Agriculture* ([1994] 1IR 29), when he said: 'It is well established that community law takes precedence over all domestic law. Where they are in conflict, it is community law which prevails'.

The lecture also covered the legal necessity for constitutional amendment to allow EU competence over what would otherwise be exclusive Irish law. This feature of the Irish constitution is of direct relevance to the Poles, as they also operate a dualist (or pluralist) approach to foreign law, evidenced by the necessity for a recent referendum to authorise the reception of EC laws by the Polish system.

Now that the Polish people have agreed to become part of the European Union, their legal practitioners, like other European lawyers, will have a right not only to provide services but, more significantly, to practise outside their own country and within other member states. Irish lawyers, of course, have the same reciprocal privileges to ply their trade in Poland.

Indeed, the lecture on the Irish legal system set out the rules applicable in Ireland to lawyers from other member states, particularly Polish legal advisors. It will therefore be interesting to Irish lawyers to learn that the Polish government (in contrast to the Irish authorities) has already prepared legislation to transpose the *Establishment directive* (98/5/EC) into law. The Polish approach, seen in their July 2002 act, is to embody the *Services directive* (249/77/EC), the *Mutual recognition directive* (89/484/EEC) and of course the far-reaching *Establishment directive* (98/5/EC) into one piece of legislation. In Poland, the *Establishment*, *Mutual recognition* and *Services directives* will not be triggered until Poland becomes a member of the EU. But now that accession is only a matter of course following the recent referendum, we might look, for comparison purposes, at the Polish requirements.

First, the lawyer in question must be a national of, or entitled to pursue a recognised professional qualification in, one of the EU states. Second, he must know Polish. Third, he must pass an aptitude test to 'evaluate the skills needed to practise the profession of advocate or the profession of legal counsellor'. The test is in two parts, all conducted in Polish. One part examines the candidate's knowledge of the civil law; the candidate himself selects the other. The oral part tests the lawyer's knowledge of Polish professional rules and ethics. Candidates can only enter the oral exam if they first pass the written. Should a candidate not succeed at first, he may repeat the process one more time after an interval of six months from the first attempt.

An important exemption from the need to do the aptitude test is extended to candidates who can prove that for three years they 'pursued effectively and regularly' a practice in the law of the Poland. 'Regular pursuit', according to the legislation, is considered to consist of exercising the practice of law without interruption, other than those resulting from the events and requirements of everyday life.

A shared temperament and outlook, and a common tradition in human rights, make the Poles and Irish compatible allies, as well as being likely master builders of the emerging constitutional European Union. The recent initiative by the Warsaw bar and the Law Society was a significant first step in that process. G

Hugh O'Donoghue is the principal of the Cork law firm HV O'Donoghue and a member of the Law Society's EU and International Affairs Committee.

The CAT's

MAIN POINTS

- Changes in CAT administration explained
- Benefits to practitioners
- *Finance Act, 2003*

The administration of capital acquisitions tax (CAT) is currently undergoing the biggest shake-up since self-assessment was introduced in 1989. Declan Rigney explains the rationale behind the Revenue's modernisation programme and outlines the benefits to practitioners

The reason for modernising the administration of capital acquisitions tax (CAT) is to provide a quicker turnaround service to practitioners (and their clients) and to make it easier for the compliance requirements of the tax to be met. Revenue wants to see CAT become a modern, fully self-assessed tax:

- Which is increasingly filed and paid over the internet using the Revenue Online Service (ROS)
- Which is easier for the customer to understand
- Where forms are processed quickly and non-judgementally for the compliant customer
- Where the non-compliant customer is swiftly targeted and penalised
- Which joins the other taxes in the Revenue-wide Integrated Taxation Processing information technology system, and
- Which is audited using Revenue audit norms.

It is a vision that brings CAT administration into the 21st century. It will mean a move away from paper-based, judgemental forms processing into computer-based, self-assessed processing where new computer systems will help speed up the turnaround time for a case. For those filing through ROS, the system will provide prompts, do all the calculations required and give the bottom-line tax payable.

Self-assessment

The ideal self-assessment system – which applies to all taxes – is to have a very simple return form (with no supporting documents) that would be sent in by the customer along with the payment of tax. The return and payment would be correct and would be processed quickly and non-judgementally and, ideally, both would be received in electronic form. The computations and supporting documents would be retained by the customer for a finite length of time in case of an audit. Information about every customer's taxes and duties would be linked, so that the complete Revenue picture (including all taxes and duties) for each customer would be managed.

pyjamas

While there are certain constraints that preclude us from achieving this ideal, we feel that the changes being introduced deliver substantial efficiencies for both practitioners (and their clients) and for the Revenue.

In the past, a significant Revenue resource was tied up in judgementally examining each return, issuing queries and, in a high proportion of cases, 'repairing' or perfecting the returns following consultation with the customer and/or his agent.

CHANGES IN THE *FINANCE ACT, 2003*

Section 146 of the *Finance Act, 2003* introduced a number of changes to the *CAT Consolidation Act* which will help to underpin the administrative changes, particularly the move to true self-assessment for gift and inheritance tax returns. The features introduced in the *Finance Act* are found in the other self-assessed taxes. The changes, brief details of which are set out below, were signed into effect by ministerial order in September.

Strengthened penalties regime

Section 58 of the *CAT Consolidation Act, 2003* is amended to increase the penalty for failure to deliver a return from a flat €2,565 to that amount plus an additional 100% of the tax due in respect of the return where the person acted negligently in not delivering the return. A higher penalty applies if the person acted fraudulently.

Obligation to retain records

A new section 45A has been inserted into the *CAT Consolidation Act* which imposes an obligation on an accountable person to retain certain specified records (themselves or by someone on their behalf) in connection with a gift/inheritance tax return for a period of six years from the date the return was received by the Revenue.

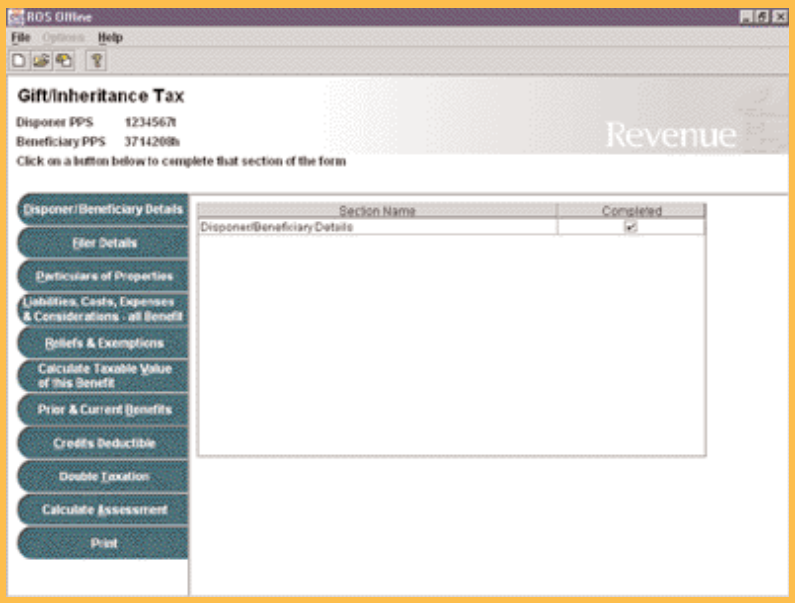
Expression of doubt

A new section 46A has been inserted into the *CAT Consolidation Act* which enables an accountable person to indicate on the IT38 return that he has some doubt as to the appropriate tax treatment of a particular item which is to be included in the tax return. The accountable person files the return and makes the payment based on his interpretation of the law. If any additional tax arises following a consideration of the matter at issue, the accountable person has 300 days after the resolution of the point to pay any balance of tax without incurring any interest penalty on that additional tax.

BENEFITS OF USING ROS

There are many compelling reasons to file the IT38 and pay tax via ROS. The benefits for practitioners include:

- All the calculations are done automatically, including business relief, the farmer test for agricultural relief, double-taxation credits (a notoriously difficult area) and the value of limited interest or joint life interest (the practitioner merely inputs the date of birth and the calculation is done immediately)
- When claiming any reliefs or exemptions, supplementary forms are not required
- On-screen prompts build the form dynamically in accordance with the beneficiary's individual circumstances (for example, if business relief is being claimed, then the relevant fields are shown but, if not, these fields do not appear)
- In terms of the territoriality rules for capital acquisitions tax, ROS clarifies the CAT implications for gifted/inherited property where both the disponer and beneficiary are non-resident
- Every field has associated help text (this is based on the *Guide to completing the gift/inheritance tax return (IT38)*).
- It apportions the liabilities and/or consideration between various benefits
- It saves time in a case where more than one beneficiary is taking the same share of an estate
- The print feature allows the practitioner to get a hard copy of what exactly was filed for his records
- It calculates the bottom-line tax and interest
- It is guaranteed accurate and secure.



This undoubtedly was a drain on the resources required to process affidavits, returns and issue certificates of discharge. Under the new approach, this will change and we will accept the payment and the details on the return as filed by the customer. This change in approach, together with the development of computer systems to do much of the routine processing, will enable us to:

- Issue certificates of discharge more quickly where the gift/inheritance tax return and payment are in order
- Move resources away from the current judgemental checking of forms to more focused compliance and audit of high-risk cases
- Notify customers of returns selected for audit (and to complete these audits) more quickly.

Overall, this will give an improved service to compliant customers. For IT38 forms returned using ROS, because there is less manual intervention involved, the turnaround will be quicker than where IT38 forms are returned in paper format, and this should encourage the use of ROS. Nevertheless, the validation checks will be the same whether the customer returns the IT38 form on-line or on paper. Identical audit selection processes will apply to paper returns and ROS returns, so filing under ROS will have no impact on the probability of an audit.

The non-compliant customer will be identified quickly and will receive more detailed scrutiny. The audit policy will be designed to target the cases of greatest risk.

Benefits for practitioners

The benefits of the changes for practitioners include:

- When filing the IT38 return and paying tax using ROS, the system will provide prompts, do the calculations, lower costs, be quicker than filing the paper version of the return, and improve efficiency
- An expanded Lo-Call phone service (1890 20 11 04), which will be of particular use to sole practitioners who might deal with CAT only very occasionally
- Redesigned Inland Revenue affidavit and IT38 forms which are much easier to use
- An expression of doubt facility on the IT38 return which will enable genuine concerns to be identified
- Two completely new booklets, the *Guide to completing the gift/inheritance tax return (IT38)* and the *Guide to completing the Inland Revenue affidavit (CA24)*, which are fully comprehensive and provide detailed examples clarifying every area of complexity
- More decisive case-processing through moving to greater self-assessment coupled with prompt audit
- Much quicker turnaround of cases and the elimination of backlogs.

However, the modernisation will also mean that forms must be completed properly and the onus will be on the customer to get it right. Returns that are poorly or inadequately completed will not be accepted for processing; they will be returned to the filer, which will lead to delays in finalising the case and may give rise to the imposition of additional penalty charges. There will also be a more rigorous penalties regime for non-compliant customers.

Gift/inheritance tax return (IT38)

The IT38 has been redesigned to make it easier to understand and to complete. It now incorporates the old IT41 (agricultural relief form) and the IT5 (business relief form). The net effect is that three old forms totalling ten pages have been combined to give

CAT DIVISION CUSTOMER SERVICE BRANCH

The work of the Customer Service Branch of the CAT Division has now been divided into four regions (previously five) and a team for each region will deal with the following matters in relation to gift and inheritance tax:

- Processing of Inland Revenue affidavits
- Processing of CAT returns
- Issuing of certificates of discharge
- All matters relating to the collection of CAT.

These changes are immediately effective and are in anticipation of the wider Revenue restructuring project, whereby the administration of CAT will be divided up between four Revenue regions and a Large Cases Division next year.

The new regional structure is driven by the place of residence of the disponer, so, for example, if the disponer lives in County Cavan, contact the Border/Midlands/West region team.

Practitioners should also note that general queries in relation to gift tax and inheritance tax will continue to be dealt with by the Taxpayer Information Unit (tel: Lo-Call 1890 20 11 04) and should not be directed to the teams.

The four regional teams deal with the following counties:

East/South East region	Border/Midlands/ West region	South West region	Dublin region
Tel: 01 674 8196/ 674 8195	**Tel: 01 674 8439/ 6748 689**	**Tel: 01 674 8592/ 674 8594**	**Tel: 01 674 8585/ 674 8688**
catser@revenue.ie	**catmnw@revenue.ie**	**catswr@revenue.ie**	**catdr@revenue.ie**
Carlow Kildare Kilkenny Laois Meath Tipperary Waterford Wexford Wicklow	Cavan Donegal Galway Leitrim Longford Louth Mayo Monaghan Offaly Roscommon Sligo Westmeath	Clare Cork Kerry Limerick	Dublin Non-Irish domicile/ resident

one new IT38 form totalling six pages. In addition, forms used in the past to claim certain exemptions and reliefs will no longer be required. Instead, a claim for a relief or an exemption should be made on the IT38 return form and evidence supporting the validity of the claim to the relief/exemption should be retained for a finite period (generally, six years).

The Inland Revenue affidavit CA24 form has also been changed so that it is easier to complete; it now incorporates the revamped schedule of lands and buildings (CA6) for convenience.

On-line filing using ROS

The ability to file the IT38 and pay the tax on-line using the ROS facility on the Revenue website (at *www.revenue.ie*) represents a significant change in the delivery of customer service for CAT return filers. It is the first stage in providing full electronic services for CAT; the next stage, which we will embark on when this stage has bedded down, is to look at providing the certificate of discharge (CA11) and Inland Revenue affidavit (CA24) on-line.

This is a multi-faceted project embracing a number of different initiatives, but all aspects went 'live' in September. Our revised approach to the audit of CAT returns is fully operational and we have become more active in imposing penalties for certain categories of non-compliance.

While we appreciate that it will take time for practitioners and customers to become familiar with our new approach, and we acknowledge that the remainder of the year will be something of a transitional phase for all of us, we hope that that practitioners will embrace the new arrangements as soon as possible. G

Declan Rigney is responsible for the CAT modernisation project with the Revenue Commissioners.

Keeping it in

Solicitors are increasingly asked to advise personal representatives in cases where beneficiaries wish to redivide the will. In the second of three articles, Anne Stephenson discusses deeds of family arrangement and their sometimes unwelcome tax consequences

MAIN POINTS

- Deeds of family arrangement
- *Succession Act, 1965*
- Stamp duty and capital gains tax

'Creatures crawl in search of blood, to terrorise y'awl's neighbourhood' – but that's enough about probate lawyers

In the context of administration of estates, the phrase 'family arrangements' would apply to a situation where the beneficiaries in the will or the parties entitled on intestacy decide among themselves how the property is to be vested. Where such arrangements are being considered, it is necessary to be extremely careful, to be clear, and to document precisely what is taking place.

Before attempting to give advice or draft such a deed, it is important (as a minimum) to ask yourself the following questions, because if you don't know what action is required to effect their wishes, you cannot advise correctly:

- Will there be an assurance of all or any part of the property by the personal representative to persons who are not beneficiaries?
- Will there be an assurance of all or any part of the property by the personal representative and is that an appropriation under the will or under section 55 of the *Succession Act, 1965*?

POST-DEATH PLANNING

the FAMILY

PIC: SIPA PRESS/REX FEATURES

- Will there be an assent of all or part of the property by the personal representative?
- Will there be a gift by a person/persons entitled to all or part of the property to persons who are not so entitled?
- Will there be a sale by a person/persons entitled to all or part of the property to persons who are not so entitled?
- Will there be a tax liability by putting their wishes into effect?

Practitioners need to be absolutely certain of all the taxes that can arise, taking into account what the beneficiaries wish to do. Above all, you need to be certain who will fund the tax. The funding of the tax in itself can constitute an additional gift. A family, in reaching an agreement, frequently forgets the issue of tax – and when it is explained to them, they are horrified that their 'altruistic' agreement will cost money. It is not unheard of for the deal to fall apart at this point.

Tom, Dick and Harry

An example of a situation where a family arrangement might arise is where a testator leaves the family home to his five daughters as tenants-in-common in equal shares. One of those children is very successful, married, living abroad and decides to voluntarily release her share to three of the other beneficiaries. Another child wishes to sell her share to the same three beneficiaries.

Such an arrangement would necessitate a deed of family arrangement involving a sale by one beneficiary of her share and a voluntary disposition by another beneficiary of her share to the remaining three beneficiaries.

Under section 10 of the *Succession Act, 1965*, the personal representative will need to join in to assign the legal estate vested in him to the other three beneficiaries. Instead of joining the personal representative in the deed, the transaction could be effected by two separate deeds: first, a deed of family arrangement between the five beneficiaries; and second, an assent by the personal representative either in writing or under seal in favour of the three beneficiaries who, by virtue of the combined operation of the will of the testator and the deed of family arrangement, became entitled to the entire beneficial interest in the premises.

A deed along the lines of such a family arrangement would be kept off the title and any purchaser dealing with the people named in the assent referred to would be entitled to rely on the protection given by section 53(3) of the *Succession Act, 1965* and should regard the assent as conclusive evidence that the person in whose favour it was given was the person entitled to have the premises vested in him. The section states that 'an assent or

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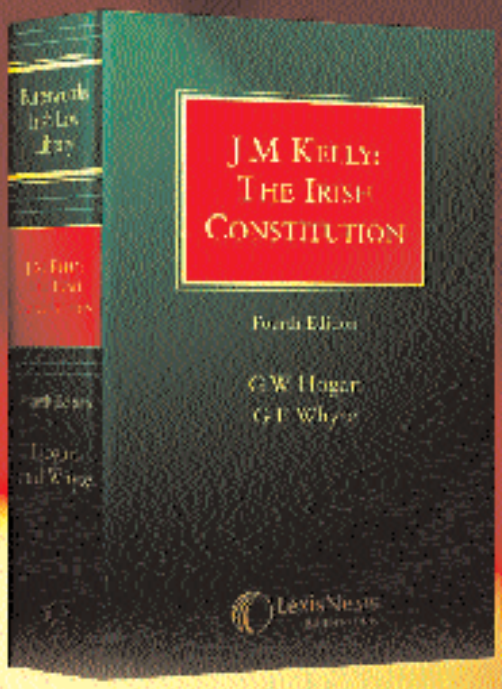

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CAPITAL GAINS TAX

A second tax that should be borne in mind when advising on a deed of family arrangement is capital gains tax (CGT). The CGT legislation is significantly more liberal than the capital acquisitions tax legislation in this area. The question that is most frequently asked by practitioners is whether the disposition by the various parties gives rise to a CGT liability.

Section 573(6) of the *Taxes Consolidation Act, 1997* provides the answer. It states that there is no capital gains tax liability where a deed of family arrangement is made within two years of the date of death or such longer period as the Revenue may agree in writing. There is a concession in such a case so that the dispositions made by the parties to the deed are deemed to be the deceased's dispositions (see the UK case of *Marshall v Kerr* [1991] STC686).

An example of this would be as follows: Helen Maguire dies on 1 January 2003, leaving her company and her investments and other assets equally to her two children, Patrick and Danielle. By deed of family arrangement dated 6 June 2003, it is agreed with Helen Maguire's personal representatives that Patrick will take the company and Danielle will take the shares and the other assets. This will not be regarded as a disposal for CGT purposes.

A CGT difficulty often arises when a family comes to the professional advisor many years after the date of death to seek to vary the terms of the will. In that event, CGT is a very real concern. Note that the Revenue may extend the period under section 573(6), but this is a concession of the Revenue and must be applied for and obtained.

conveyance of unregistered land by a personal representative shall, in favour of a purchaser, be conclusive evidence that the person in whose favour the assent or conveyance is given or made is the person who was entitled to have the estate or interest vested in him, but shall not otherwise prejudicially affect the claim of any person originally entitled to that estate or interest or to any mortgage or encumbrance thereon'.

Taxes to be considered in relation to deeds of family arrangements are stamp duty (discussed below), capital gains tax (see panel), and capital acquisitions tax and residential property tax (discussed in the final article in this series).

Stamp duty

The deed in the previous example would attract *ad valorem* stamp duty on the value of the one individual fifth share conveyed by way of gift, and, assuming that the consideration for the one undivided fifth share conveyed by the second beneficiary represents the full value of that share, stamp duty is payable on that consideration or alternatively on the full value of that share, if greater.

In each case, stamp duty will be payable at half the normal rate if the consanguinity certificate is included as per paragraph 15 in schedule 1 of the *Stamp Consolidation Act, 1999*. There is a simple consanguinity certificate in Revenue leaflet SD10, certificate 10. The deed will, of course, have to be adjudicated in the normal manner and so the requirements in relation to full disclosure to the Revenue Commissioners should be noted.

A duty is imposed on the practitioner to set out all the facts and circumstances affecting the liability of any instrument to duty, either in the instrument or in a statement attached to the instrument. Penalties are incurred by anybody who fraudulently or negligently executes any instrument not containing all such facts and circumstances, and anybody employed in or concerned in the preparation of any such instrument who fraudulently or negligently prepares it shall also incur the same penalties. So a professional advisor will be deemed to be negligent if he fails to take reasonable care. We must further note that section 15 of the 1999 act sets out a surcharge that will be imposed where a 'submitted value' is less than the value of the property.

Prior to the *Finance Act, 1991* (which first introduced the duty), some practitioners used to take the view that you had no obligation to stamp such deeds of family arrangement where a form of assent in favour of the nominated party/parties was lodged in the Land Registry, on the basis that the personal representative could be confident that the settlement would never need to be relied upon or, if relied upon, that it could be stamped at a late penalty.

This view was always questionable. The reason practitioners adopted this viewpoint in Land Registry cases (apart from not having to pay stamp duty) is because the Land Registry does not actually register the deed of family arrangement. It is only concerned with the form of assent duly executed by the person named in the grant of representation. In other words, the Land Registry does not look behind the deed of assent but accepts it at its face value. It will register the new owner in accordance with the terms of the assent (section 54(2) of the *Succession Act, 1965* and section 61(3) of the *Registration of Title Act, 1964*). This section provides that 'it shall not be the duty of the registrar, nor shall he be entitled to call for any information as to why any assent or transfer is or was made and shall be bound to assume that the personal representative is or was acting in relation to the application, assent or transfer correctly and within his powers'.

The fact that the deed does not have to be sent to the Land Registry persuaded some practitioners that it was not necessary to have it stamped. This practice still prevails among some practitioners.

It is clearly wrong now in the light of the provisions of part V of the *Finance Act, 1991* and subsequent legislation, and in particular the consequence of the duty of disclosure now imposed on professional advisors.

Remember that even though the deed of family arrangement, duly stamped, is not produced to the Land Registry, it still forms part of the title deeds to the property and must be retained. G

Anne Stephenson is the principal of the Dublin law firm Fallon and Stephenson.

Alternative

Business-to-business arbitration has a long and successful history. Inspired by this success, the European Commission has developed an arbitration service for business-to-consumer contracts. Susan Reilly explains

MAIN POINTS

- Alternative dispute resolution
- European Extra-Judicial Network
- European Commission recommendations

In October 2001, the European Commission and member states established the European Extra-Judicial Network (EEJ-Net). The network aims to help consumers resolve their cross-border disputes through alternative dispute resolution (ADR) schemes. It operates through clearing houses located in each member state, as well as in Norway and Iceland.

The euro, the internet and cheap travel make it easier to shop across borders. To ensure consumer confidence when shopping in the internal market, it is crucial that cross-border consumer disputes can be handled effectively. The EEJ-Net was born out of the need to ensure that consumers have access to appropriate mechanisms for settling disputes with traders, without incurring the costs of going to court.

The EEJ-Net aims to provide a communication and support structure to facilitate the work of ADR bodies across borders. It also addresses the practical obstacles that consumers face when using an ADR body in another country. Indeed, lack of information about foreign ADR bodies, linguistic and/or geographical barriers can make it difficult for consumers to introduce a case in the first instance.

The network covers any dispute concerning goods and services – for example, problems with deliveries, defective products, or products or services that don't fit their description. The clearing house provides consumers with information and support to introduce a case to an appropriate ADR scheme in the trader's country of business.

The network is made up of ADR bodies that comply with the recommendations on the principles for the bodies responsible for out-of-court settlement of consumer disputes (see **panel** overleaf).

If you're not in, you can't win

In Ireland, the Department of Enterprise, Trade and Employment is responsible for recommending ADR bodies to the European Commission. The Irish clearing house works closely with the department to nominate suitable ADR bodies.

The benefits of becoming a recommended ADR body are that it creates confidence for consumers and business in the ADR body which they choose to resolve their dispute, and the ADR body is recognised by the European Commission, which adds value to the body.

remedies

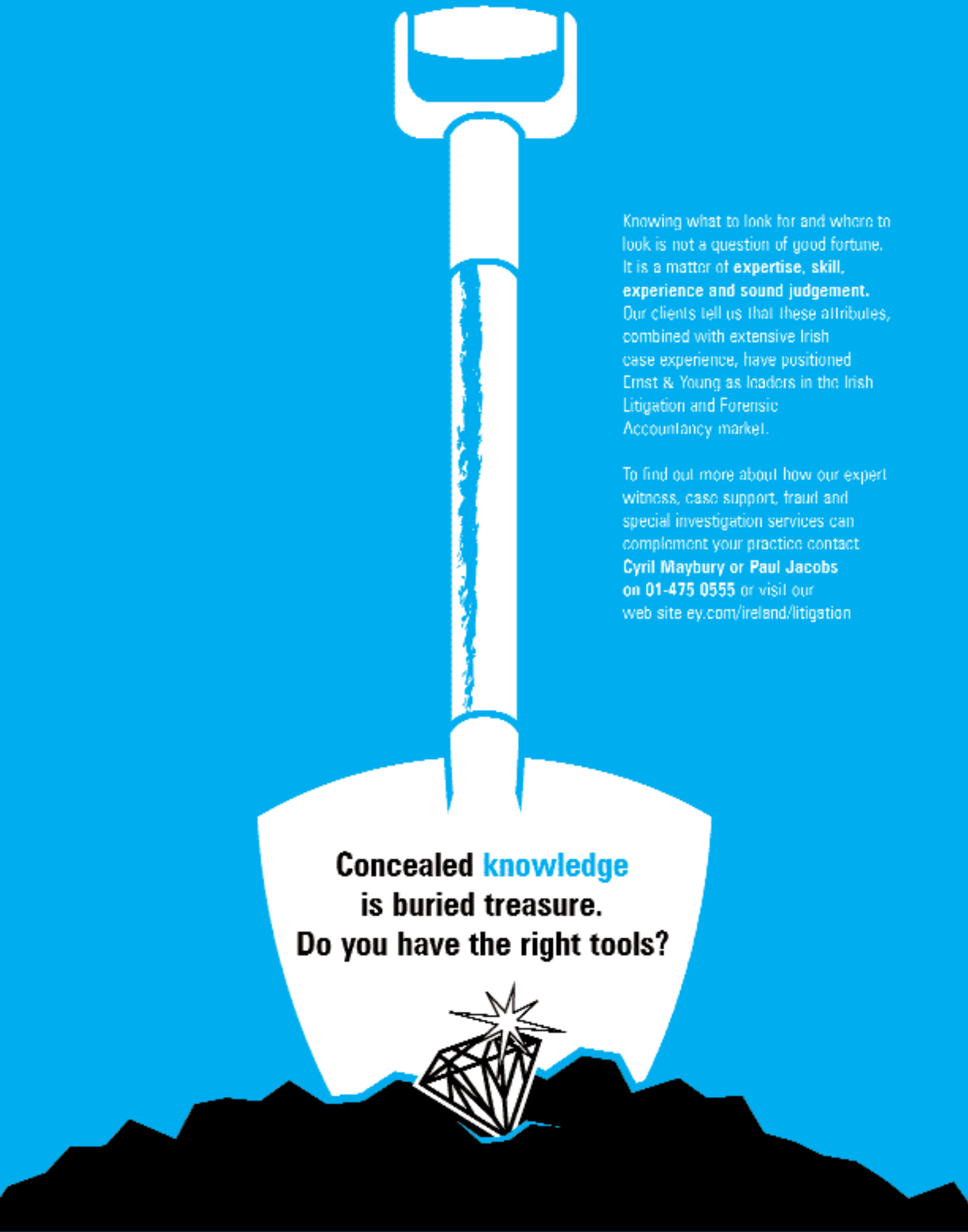
In Ireland, there are six nominated ADR bodies listed under the commission's recommendations:

- ELCOM, the Electricity Supply Board
- Arbitration scheme for tour operators (Chartered Institute of Arbitrators)
- Ombudsman for Credit Institutions
- Centre for Dispute Resolution
- Insurance Ombudsman of Ireland, and
- The Advertising Standards Authority for Ireland.

In all, there are 444 recommended ADR bodies throughout the European Union listed with the European Commission.

How has it worked?

In October 2002, the European Commission prepared an interim report on the activity of the clearing houses. At the time, over 1,100 complaints had been dealt with. On 31 March 2003, the number of



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THE COMMISSION'S RECOMMENDATIONS

In 1998, the European Commission adopted a recommendation on the principles applicable to bodies responsible for the out-of-court settlement of consumer disputes. The principles set out under recommendation 98/257/EC are:

- *Principle of independence*. The independence of the decision-making body is ensured in order to guarantee the impartiality of its actions
- *Principle of transparency*. Appropriate measures are taken to ensure the transparency of the procedure. Provision of information, whether in writing or any other form, should be made available to all parties involved on request
- *Adversarial principle*. The procedure to be followed allows all the parties concerned to present their viewpoint before the competent body and to hear the arguments and facts put forward by the other party, and any experts' statements
- *Principle of effectiveness*. The effectiveness of the procedure is ensured through measures guaranteeing that the consumer has access to the procedure without being obliged to use a legal representative
- *Principle of legality*. The decision taken by the body may not result in the consumer being deprived of the protection afforded by the mandatory provisions of the law of the state in whose territory the body is established. In the case of cross-border disputes, the decision taken by the body may not result in the consumer being deprived of the protection afforded by the mandatory provisions applying under the law of the member state in which he is normally resident in the instances provided for under article 5 of the *Rome convention* of 19 June 1980 on the law applicable to contractual obligations
- *Principle of liberty*. The decision taken by the body concerned may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this. The consumer's recourse to the out-of-court procedure may not be the result of a commitment prior to the materialisation of the dispute, where such commitment has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute
- *Principle of representation*. The procedure does not deprive the parties of the right to be represented or assisted by a third party at all stages of the procedure.

In April 2001, the 98/257/EC recommendations were followed by recommendation 2001/310/EC, which clearly listed the principles for out-of-court bodies involved in the consensual resolution of consumer dispute. The principles set out under this recommendation are:

- *Impartiality*. This should be guaranteed by ensuring that those responsible for the procedure be appointed for a fixed term, have no conflict of interest with either party, and should supply information with regard to their impartiality to both parties prior to the commencement of the procedure
- *Transparency*. Information on ADR bodies, their procedures and the cost of the services should be made available to the consumer
- *Effectiveness*. The effectiveness of the procedure should be guaranteed
- *Fairness*. The participants should be informed of their right to withdraw from the procedure at any time. They should be able to freely and easily submit arguments, and both parties should be encouraged to fully co-operate in the procedure. The consumer should be informed in clear and understandable language before both parties accept the suggested solution.

complaints and enquiries received by all clearing houses had already reached 2,182. In six months, there had been a 100% increase.

In June of this year, the commission held a conference in Brussels to mark the end of the EEJ-Net's pilot and consolidation phase. An activity report was presented to representatives from the European Commission, clearing houses, European consumer centres, government officials, ADR bodies, business associations and the accession countries.

The report took 1,336 cases into consideration and, of this number, 956 were closed. Of these, 11% (107) were enquiries to the clearing house and resulted in no further action. Over half resulted in settlement: 7% (66) resulted in a final solution reached by an ADR and 44% (422) were settled without an ADR resolution but by the direct intervention of the EEJ-Net. Unfortunately, 38% (361) remain unsolved. There are various reasons for this – for example, no ADR body was available and no amicable settlement was found or the consumer simply did not want to pursue the case.

The luck of the Irish

Since the Irish clearing house started up in May 2002, it has handled 102 cases, ranging from Irish consumers with disputes against Spanish holiday resorts over non-refund of deposits, to Norwegian consumers with complaints against an Irish airline over ticket refunds. Eight cases were sent to ADR bodies, four were closed unresolved when the consumers decided not to pursue the issue further, 32 were resolved through direct contact with the company by the clearing house, two were referred to FIN-Net (the financial services network), and 56 cases were closed unresolved due to the lack of relevant ADR bodies.

It is clear from these statistics that there is a distinct lack of recommended ADR bodies in Ireland. The European Commission wants consumers and businesses to be made aware of the existence and added-value of ADR to help the greater resolution of disputes and increase confidence in shopping in the internal market.

The commission is also driving the network to bring awareness of the EEJ-Net and promote the clear benefits of the commission's recommendations to the ADR bodies themselves. It is for this reason that the Irish clearing house would like to invite any legal professionals involved in ADR schemes who maybe interested in becoming a recommended ADR body to contact it. G

Susan Reilly is the Irish clearing-house co-ordinator. *Contact details for the ADR bodies are available on the European Commission's website at* www.europa.eu.int/comm/consumers/redress *and will also be on* www.eej-net.org *and on the Dublin European Consumer Centre website* www.eccdublin.ie.

Tech trends

Ape-pocalypse now!

Now they've gone and done it. How many times did we tell them? 'Don't wire up a monkey's brains to robotic arms', we said. 'They'll kill us all', we warned. 'Get your hands off me, you damned dirty ape', we screamed, as the gardaí dragged us away. But did they listen?

Now comes the news that scientists in North Carolina have built a brain implant that allows monkeys to control a robotic arm with their thoughts. Read that sentence back to yourself again. Monkeys controlling robotic arms. With their monkey minds. Don't these people watch TV?

According to an American scientific journal, the 'breakthrough' at Duke University Medical Centre could some day allow people paralysed through spinal injury to operate machines or tools with their thoughts. It might even allow quadriplegics to move their own arms and legs by transmitting orders from the brain to the muscles in the paralysed limbs.

The journal *PLoS Biology* says this is the first time that any animal has learned to use its brain to use robotic devices in all directions and perform a series of inter-related movements, such as reaching for an object, grasping it and adjusting the grip strength depending on the object's weight.

The process involved ten hours of surgery on the monkeys to implant 320 tiny electrodes, each of them thinner than a human hair. The holes in the monkeys' skulls were then filled with 'a substance resembling dental cement'. The wires were linked up to a computer and connected to a large mechanical arm. The monkeys were rewarded with juice when they performed their tasks successfully.

Duke University hopes to get permission to begin testing on humans next year. A spokesman for the college denied that the monkeys were in any way put out by the experiments. 'If anything, they're enjoying themselves', he is quoted as saying. 'It enriches their lives'.

As a result of this scientific marvel, citizens of downtown Tokyo might well find their lives enriched in the coming years by giant monkey-controlled robots hurling faeces at them. Plans are reportedly afoot in Japan to develop a race of genetically-enhanced super-dinosaurs to counter the perceived threat from the simian cyborgs.

PIC: ROS BYRNE/GAZETTE STUDIO, SHOT IN BOOZARAMA™

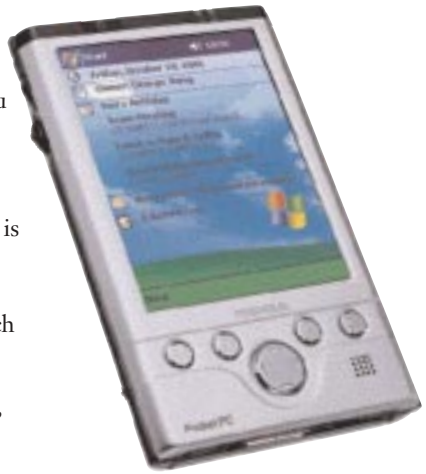
Top boffins predict the future could look something like this

Business or pleasure?

The EP725 from Optoma claims to be one of the world's smallest and lightest digital projectors. Despite its diminutive size, it is more than capable of handling all your presentational needs, with a brightness of 1,150 lumens and a contrast ratio of 2000:1. But that's not the good bit: if you can persuade your boss to spring for the EP725, you can use it as a home cinema by linking it up to your DVD, video, laptop or PDA. *Available from Noltech Ltd in Naas for around €2,999.*

Anytime, anyplace, anywhere

The insatiable appetite for PDAs (personal digital assistants) shows no sign of abating, with Toshiba launching a new range of *Pocket PCs*. The company describes its Pocket PC e740 range as 'revolutionary' and setting 'a new benchmark for top-end PDA technology'. Well, they would say that, wouldn't they? But there's no denying that the e740 is a very impressive piece of kit indeed, with an extremely powerful 400Mhz Intel PXA 255 processor. There are three specific products in the range, and you can choose between integrated wireless LAN or Bluetooth connectivity. Don't worry about the technobabble: what it means is that you will get hassle-free access to e-mail, the internet and office networks, no matter where you are. All three models feature integrated infrared, allowing cable-free data exchange. But what will really catch your eye is the full colour screen, which makes it a pleasure to run all your old familiar programs such as Pocket Word, Pocket Excel and Pocket Internet Explorer. *Prices range from €649 to €768 (ex VAT).*



On the game

It had to happen, I suppose. We've had mobile phones that play music, mobiles that take pictures, and even mobile phones that you can use as a telephone. Now, Nokia has trumped the lot by introducing the N-Gage, a mobile phone that is really a miniature Playstation. In fact, Nokia doesn't even bother to describe it as a phone; instead, it's a 'game deck'. As well as playing classic video games such as *Tomb Raider*, the N-Gage also contains a radio, an MP3 player for playing or recording music files, and a web browser with e-mail facilities. You can also download Microsoft and Lotus software so that you have a functioning PDA. And you can make calls on it, if you're not too busy playing.

When Nokia gets around to adding a camera and a mobile monkey-alert system (MMAS), the future will really have arrived.

The Nokia N-Gage will be launched shortly, prices are to be announced.

Sites to see

Knowledge at your fingertips (*www.questia.com*). You know how there's something on the tip of your tongue, but you can't quite get it? Well, this site is guaranteed to put you out of your misery. Questia claims to be the world's largest on-line library, boasting over 45,000 books and 360,000 articles: legal, historical or just about anything you want. For a fee, you no longer have an excuse not to be your best mate's 'phone a friend'.

Racing (*www.horseracingireland.ie*). It's the sport of kings, apparently, though you don't see too many of them down in Paddy Power's of a lunchtime. This site provides comprehensive information on race meetings, festivals, results, race cards, courses, sponsorship and corporate hospitality. 'Wherever you are in Ireland', they say, 'you're never far from a race meeting'. And that's straight from the horse's mouth.

Financial facts (*www.finfacts.com*). This finance and business portal should help even the most avid stock-watcher keep up with the times. The Finfacts Finance Centre represents an on-line financial resource – or so they say – with links to news, share prices, mortgage rates, pensions, currency prices and comparative salary surveys, among other things. Go ahead: impress your accountant!

Keeping up appearances (*www.awfulplasticsurgery.com*). A site that will let a smug smile creep across your face as you congratulate yourself on growing older gracefully. *Awfulplasticsurgery.com* is filled with pictures of celebrities who can no longer smile smugly for fear that their face will split. An interesting glimpse at the results of excess vanity, this could be your feel-good site of the week.

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Report of Law Society Council meeting held on 5 September 2003

Motion: delegation of functions

'That the following functions shall be and are hereby delegated to the Compensation Fund Committee and to the Registrar's Committee and that regulation 16 of the Regulations of the Council, 2002-2003 *be amended to include the following: "The functions of the society under sections 58 and 59 of the* Solicitors (Amendment) Act, 1994".'

Proposed: John O'Connor
Seconded: Simon Murphy

John O'Connor and Simon Murphy noted that the power to suspend a practising certificate during the currency of a practice year and the power to impose conditions attaching to a practising certificate during the currency of a practice year had not yet been delegated by the Council to the regulatory committees. The Council approved the amendment of the Council regulations to reflect the delegation of functions, as requested.

Motion: referral scheme to provide counselling and guidance

'That this Council approves the establishment of a referral scheme to provide counselling and guidance for solicitors at risk from occupational stress or similar health problems.'

Proposed: Gerard Griffin
Seconded: John O'Connor

Gerard Griffin outlined the background to the proposed scheme and noted the support of the independent adjudicator and the lay members of the Registrar's Committee for the initiative.

John O'Connor said that a number of members of the profession were suffering from stress and other health-related problems and there was a need to establish a system of counselling and support for such colleagues. Following discussions with an eminent psychologist, agreement had been reached on the establishment of a referral service on the basis of payment by the society of an annual retainer and the initial consultation fee, with the cost of further consultations being met by the individual solicitor. The scheme would be highly confidential and would operate outside the structures of the regulatory functions of the society. The scheme would provide immediate access to a counsellor for individual solicitors within two days of contact being made, with a panel of counsellors being available on stand-by.

James McCourt said that the scheme represented a response by the society to the needs of its vulnerable members, although he believed that the society should remain vigilant and identify further ways to improve its support structures. Gerard Griffin said that he intended to establish a task force to review and co-ordinate all of the society's support structures during the coming year.

Moya Quinlan suggested that the review should also encompass the support structures provided to trainee solicitors, so that the society could develop an on-going pattern of support and assistance for its members and prospective members.

Implementation of the second *Money laundering directive*

The president reported on meetings with the minister for justice, equality and law reform held in July and September to discuss the society's concerns regarding aspects of the regulations giving effect to the *Money laundering directive*. The two principal concerns were: a) the fact that the regulations provided for two, rather than three, exemptions from the reporting obligations, and b) the fact that solicitors were prohibited from informing their clients that a report had been made.

As a result of the society's representations, the minister had agreed to introduce amending regulations reflecting the three exemptions from the reporting obligations. In addition, he had provided a letter to the society indicating his view, formed on the basis of advice from the attorney general, that there was nothing in the act or the regulations that would prohibit a solicitor from informing his client that he was ceasing to act for the client or, indeed, that he was ceasing to act for a client because he was unhappy with any transaction in which the client was involved.

The director general said that the reporting obligations for solicitors under the *Money laundering directives* had been an issue for the previous seven years. The society had opposed the designation of solicitors vigorously from the outset and had persuaded the former minister, John O'Donoghue, not to designate solicitors, pending the enactment of the second *Money laundering directive*. This was now in place and, consequently, it was not open to the society to challenge the obligation to report.

James MacGuill said that the minister's letter introduced a formula that ameliorated the circumstances for solicitors faced with making a report to the authorities. The expansion of the two exemptions to three meant that a significant proportion of any solicitor's dealings with a client would be exempt from any reporting obligation.

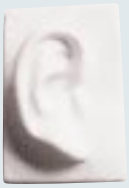
Donald Binchy said that it was important to inform and educate the profession on the matter, both by mailshot via the *Gazette* and through CPD seminars. He noted that there was a meeting of the bar association PROs to be held on 15 September and he suggested that they should be briefed on the content of the regulations.

Personal Injuries Assessment Board

The president reported on the society's meeting with the Joint Oireachtas Committee on Enterprise and Small Business on 16 July. The Council discussed the contents of the society's submissions on the *Personal Injuries Assessment Board Bill* and the *Civil Liability and Courts Bill*. The director general noted that there were certain aspects of both bills about which the society had grave concerns, and it was intended to bring these matters to the attention of both opposition and government TDs.

Gerard Griffin noted that, arising from a recent decision of the judiciary, it appeared that certain medical reports in High Court actions might be passed to the PIAB. These reports would contain sensitive information in relation to the medical condition of plaintiffs, who might not wish such information to be circulated to third parties. The Council agreed that solicitors should be advised to inform their clients that their medical reports might be copied to the PIAB and to seek the client's authority to hand over those reports in such cases.

The director general noted that, while insurance companies had shown significant profits recently and the level of awards had fallen, premiums for employer and public liability had not matched these reductions. G



Practice notes

REGULATIONS FOR PROFESSIONAL NAMES, NOTEPAPER AND NAMEPLATES

The Guidance and Ethics Committee frequently receives queries from solicitors in relation to what is permitted on a solicitor's professional notepaper. Queries are also received in relation to professional names for solicitors' firms. These matters are regulated under SI no 178 of 1996. As seven years have passed since the enactment of this statutory instrument, the committee has decided to publish the full text again for the assistance of solicitors.

Statutory instrument no 178 of 1996

The Law Society of Ireland, in exercise of the powers conferred on it by sections 4,5 and 71 of the *Solicitors Act, 1954* (no 36 of 1954) as amended by the *Solicitors (Amendment) Act, 1994*, hereby makes the following regulations:

1. i) These regulations may be cited as the *Solicitors (Professional Practice, Conduct and Discipline) Regulations 1996*
   ii) These regulations shall come into force on the first day of October 1996
2. i) In these regulations, unless the context otherwise requires:
   - 'The society' means the Law Society of Ireland
   - 'Solicitors' has the meaning assigned to it in section 3 of the *Solicitors (Amendment) Act, 1994*
   - 'Practice' means the professional practice of a solicitor
   - Other words and phrases in these regulations shall have the meanings assigned to them by the *Solicitors Acts, 1954 to 1994*
3. The *Interpretation Act, 1937* applies to the interpretation of this regulation as it applies to the interpretation of an act of the Oireachtas
4. i) The name of a practice under which a solicitor or a firm of solicitors carry on business shall consist only of the name or one of the names of the solicitors or one or more of the present or former principals of the firm as the case may be, or such other name as is approved in writing by the society
   ii) Section (4)(i) will not apply to any name which is in use on the first day of July 1996
5. The nameplate of a practice shall not include matters other than the following:
   i) The name of the practice
   ii) The names of solicitors and/or their qualifications
   iii) The date of establishment
6. The following provisions shall apply to the professional notepaper of a practice:
   i) Even if a practice is carried on under the true surnames of all the partners, the notepaper shall list their names
   ii) If the names of assistant solicitors are listed on the notepaper, a differentiation shall be made between their names and the names of the partners
   iii) Where the practice comprises a solicitor in salaried employment acting for his non-solicitor employer, the professional notepaper shall state the name of the solicitor and may list the names of other solicitors who assist that solicitor
   iv) All solicitors who are listed on the notepaper of a practice shall hold a current practising certificate issued by the society
   v) No names other than the names of solicitors holding current practising certificates issued by the society shall appear on the notepaper, unless their status is unambiguously stated
   vi) If one or more solicitors or firms practise in association with each other, their respective notepaper may refer to the solicitors or firms with whom they are in association.

Explanatory note

This statutory instrument should be read in conjunction with the *Registration of Business Names Act, 1963, which* also contains important provisions relating to professional names and notepaper.

Signed on behalf of the Law Society of Ireland this fourth day of June 1996

Northern Ireland solicitors

When a Northern Ireland firm wishes one partner to set up an office in this jurisdiction and use the partnership name, the following are the Law Society's requirements:

- The written permission of all the partners to the use of the name shall be furnished to the Law Society of Ireland
- The office letterhead to be used in this jurisdiction shall show only the name of the solicitor who holds a practising certificate in this jurisdiction and he/she shall be shown as 'principal'
- If the partners in the Northern Ireland firm wish to be shown on the letterhead, they must be admitted to the Roll of Solicitors here and hold a current practising certificate from the Law Society of Ireland.

It should be noted that the *Solicitors Acts, 1954 to 2002* prohibit a solicitor practising in this jurisdiction from sharing profits with an 'unqualified person', that is, within the meaning of the legislation, anyone not holding a practising certificate from the Law Society of Ireland.

Registration of Business Names Act, 1963

Section 3(I) (a) of the act provides that every firm having a place of business in the state, and carrying on business under a business name which does not consist of the true surnames of all partners who are individuals, shall be registered in the manner directed by the act. Section 4 provides that every person required under the act to be registered shall furnish, by sending by post or delivery to the registrar, a statement in writing in the prescribed form containing, among other things, the list of partners of the firm.

In addition, section 18(1)(b) requires all business letters, circulars and catalogues on or in which the business name appears, and which are sent by that person to any person, to state in legible characters, in the case of a firm, the present christian names or the initials thereof and the present surnames, and former christian names and surnames, the nationality, if not Irish, of all partners in the firm or, in the case of a body corporate being a partner, the corporate name.

Thus, the act requires:

1) That all solicitors list the names of partners on their notepaper
2) That solicitors using other than their own name as the name of the firm should register those names as business names under the act and must provide details of the partners of the firm, when registering same.

A statement on the notepaper saying that a list of partners is available on request would not be sufficient to comply with the act.

Guidance and Ethics Committee

MILK QUOTA AMENDMENT REGULATIONS 2003 (SI NO 123/2003)

A number of changes have been made to the milk quota regulations by the above statutory instrument.

Family transactions

Regulation 6, which deals with family transactions, has been amended to provide that, subject to the approval of the minister for agriculture, a beneficiary may lease land to a relative of the deceased owner. (Up to now, the lessee had to be a relative of the beneficiary.)

Partnerships

The partnership regulations (SI no 97/2002) have been amended in a number of ways and anyone involved in setting up a partnership arrangement would need to be aware of these amendments. In particular, a new category of milk production partnership has been created. This allows for a partnership between a parent and his or her child, where the child 'has received an allocation of milk quota under New Entrant Farming in Partnership'.

Purchase of milk quota by lessee

There has been a substantial amendment to regulation 9 of the 2000 regulations. A lessee can now purchase the lessor's quota if the lease existed prior to 1 April 2000 (the previous cut-off date had been 13 October 1999).

Where the lease is to a member of the family (as defined), the lessee may now purchase the milk quota where the lease existed prior to 1 April 2001. (The regulation appears to relate to family leases as defined by regulation 6(2) of the regulations. As such leases would have come into existence pursuant to the 2000 regulations, it is presumed that the right to purchase the quota would arise only in respect of leases which came into existence after 1 April 2000.)

Farm retirement leases

The new regulations provide for a new regulation 11 to be inserted in the *Milk Quota Regulations*. This new regulation replaces regulation 10 (paragraphs 3, 4 and 5). Regulation 10 of the 2000 regulations (paragraphs 3,4 and 5) had allowed the minister to grant new leases of land and quota where a farm retirement lease of land and quota had been entered into but the lessee no longer wished to continue the lease.

Under the new regulations, the new lease to the new lessee must be signed within six months of the ending of the previous lease.

Conveyancing Committee

PLANNING CONDITION REQUIRING RESIDENCE OR EMPLOYMENT OF APPLICANT IN PLANNING AUTHORITY AREA

A planning condition in the following terms has been brought to the attention of the Conveyancing Committee:

'5) a) Houses to be restricted to persons who have been resident in County Wicklow for at least one year and/or those currently in full-time employment in County Wicklow or other such class of persons that the planning authority may agree to in writing

b) Confirmation from a solicitor or other suitable qualified professional with indemnity insurance that the dwellings have been sold in accordance with this condition shall be submitted to the planning authority upon the sale of the dwellings.

Reason: To ensure that the dwellings are suitably restricted to meet local growth needs as opposed to regional needs, to ensure the development meets with the requirements of the strategic planning guidelines and the county development plan with respect to development in the hinterland areas, in the interest of proper planning and sustainable development.'

The committee unanimously agreed that it is not acceptable that solicitors would be asked to certify matters in relation to the residence or place of work of their clients. These are matters on which the clients/applicants for permission can easily satisfy the local authority directly by way of completing their own certificate or statutory declaration.

The planning condition brought to the attention of the committee was accompanied by a draft certificate which was to be typed on a purchaser's solicitor's headed notepaper. This certificate is addressed openly 'To whom it concerns' and is required to confirm, *inter alia*, that the solicitor currently holds professional indemnity insurance, that the purchasers' purchase with full knowledge of the provisions of the planning permission and the limitations imposed by conditions 5(a) and (b) thereof, that the solicitor certifies that house number X in the development has been sold in compliance with the provisions of conditions 5(a) of the relevant planning permission by virtue of the fact that the purchasers/one of them have/has been resident in the county for at least one year and/or the purchasers/one of them currently are/is in full-time employment in the county. The certificate is to be signed by the solicitor for the purchasers and dated. There is no requirement that the matters referred to in the certificate should be co-signed or endorsed by the purchasers. The certificate is not stated to be based on information supplied by the purchasers.

The committee noted the format of the certificate required by the local authority and in particular noted that there is no provision for the purchasers themselves to certify relevant matters to the local authority. Rather, the local authority seeks to hold purchasers' solicitors liable for the veracity of the statements contained in the certificate. The committee said it could only speculate as to what the reasons are for the requirement that a solicitor has professional indemnity insurance, but it seemed to the committee that the most obvious reason would be that the local authority intends to sue solicitors on foot of their certificates should the need arise.

The committee was unanimously of the view that solicitors should not complete these certificates under any circumstances.

Purchasers' solicitors faced with requests to complete these certificates should:

1) Advise their clients/purchasers to write to the local authority applying for a waiver or a variation of this condition in the planning
2) Give the clients a copy of this practice note for enclosure with their application for waiver/variation
3) Advise the clients/purchasers to offer their own certificates and/or statutory declarations to verify the facts required by the local authority.

In addition, the committee would recommend to the bar associations in counties which regularly include conditions of this type in their planning permissions to engage with the planning authorities in those counties with a view to having planning conditions of this nature either removed from planning permissions or varied so as to require the appropriate certification from the clients/purchasers and not from their solicitors. The committee is prepared to assist any affected bar associations with such meetings with local planning authorities.

Conveyancing Committee

SIGHT LINES: NEW PROBLEMS FOR PROPERTY OWNERS AND THEIR CONVEYANCERS

A number of local authorities are imposing conditions in planning permissions requiring the applicant to secure sight lines at the entrance to a house site from the public road.

The following is an example of a condition imposed by a planning authority as a general condition:

Prior to commencement of development, vision lines of 68 metres shall be provided in each direction, at a point 3.05 metres back from the road edge at location of vehicular entrance. Said vision lines should be based on eye object height equal to 1.06 metres over height of 1.06 metres. Documentary evidence of consent for location of vision lines over third-party lands shall be submitted to the planning authority for written agreement prior to commencement of development.

Clearly, planning authorities are entitled to take into account the need for traffic exiting a site to have an acceptable view of traffic approaching and the need for that traffic approaching to have an adequate opportunity of seeing a car which might exit into its path.

The committee has seen a number of different conditions. It has also been informed that, in some cases, applicants anticipating the requirement have offered to provide the necessary sight lines in the application so that there was nothing on the face of the planning permission to alert anyone of the requirement.

In at least one case, the applicant had offered to reduce the height of a hedge (with the permission of a neighbour who owned the land on which the hedge in question was located) and no thought seemed to have been given to what was to happen when the hedge grew again. In another case, the applicant (again with the permission of a neighbour) confirmed that an arrangement had been made with a neighbour to provide an appropriate sight line. In that case, the neighbour did not really understand what was required of him and the planning authority in question did not clarify the position.

It is not satisfactory that planning authorities in some cases do not deal with the long- term implications.

It seems clear that conditions like this are going to cause problems for architects and engineers who may be asked to certify compliance. They will also clearly cause problems for people who buy sites subject to such conditions. Solicitors who are advising clients in relation to the purchase of a property subject to such a condition will have to advise their clients very carefully, particularly if the condition is not going to be properly dealt with. In such circumstances, solicitors should point out that they are likely to have a problem in certifying title and that there is a clear risk that there will be problems on re-selling. The committee advises that such advice should be confirmed in writing.

In addition, when acting for a client purchasing a site with the benefit of a planning permission, it is yet another reason to advise the client to have the position regarding the planning permission checked out by a competent person.

The committee doubts that it is wise for solicitors themselves to brief an architect or engineer on behalf of their client in such situations but recognises that, from time to time, solicitors will find that they have to do this. The committee feels that such briefing should be in general terms rather than trying to anticipate all the issues that could arise. However, the issue of sight lines and other easements could be addressed by asking the surveyor to review whether the house, its access and any facilities such as a septic tank or percolation area or water supply can be provided without passing over or acquiring rights over land in the ownership of any third party.

The practical problem is that an applicant who already owns a site and who has received a grant of planning permission subject to such a condition might not realise the full implications of such a condition and might have the house half-built before realising that there may be a problem. Compliance with the condition may be impossible because it would require the applicant to acquire land perhaps from both adjoining owners to provide the necessary lines of sight.

The current situation is creating problems for property owners and their solicitors and in some cases properties will not be saleable without the problem being regularised.

In the opinion of the Conveyancing Committee, the planning authority should not grant permission until the applicant satisfies it that the applicant has such legal rights or perhaps ownership necessary to enable it to comply with any such condition. Planning authorities already do this routinely in some areas in relation to easements for drainage if a site cannot be drained without a grant of easements over property in the ownership of third parties.

Alternatively, the planning authority should ask applicants to submit with a planning application (or seek further information formally of anyone who does not comply) confirmation of the position in relation to sight lines, and then elect to grant permission (other things being equal) if the sight lines are adequate and refuse them if they are not. Informal arrangements or letters from friendly neighbours are simply not acceptable.

Conveyancing Committee

CAT CLEARANCE CERTIFICATES

The Conveyancing Committee recently made inquiries with the Revenue Commissioners' Capital Taxes Division regarding the CAT clearance certificate and the status of the letter attaching CAT to the proceeds of sale rather than to the property. The committee had asked if, having obtained such a letter attaching CAT to the proceeds of sale rather than to the property, a purchaser would still require production of the CAT clearance certificate at a later date. The Revenue Commissioners have replied along the following lines:

'Section 60(1) of the Capital Acquisitions Tax Consolidation Act, 2003 *states that the tax due in respect of a taxable gift or inheritance shall be and remain a charge on the property of which the taxable gift or inheritance consists at the valuation date. If property is sold in the course of administration prior to the valuation date, Revenue will, on request, issue a letter discharging the property from the CAT charge and attaching the charge instead to whatever assets represent the proceeds of sale of the property at the valuation date.*

The issue of this letter is confirmation from Revenue that there is no charge to CAT attaching to the property disposed of. Therefore, any purchaser is fully protected and the production of a CAT clearance certificate is not required'.

In relation to such letters attaching CAT to the proceeds of sale, it is up to both vendors' solicitors and purchasers' solicitors to ensure that this letter is used only in appropriate circumstances, that is, where a sale of the property takes place in the course of administration prior to the valuation date.

Conveyancing Committee

INSURANCE COMPANY DELAYS IN ISSUING CHEQUES

In recent months, the Litigation Committee has received a number of complaints from practitioners regarding delays in the issuing of cheques by insurance companies. The problem primarily arises in relation to costs cheques, with some practitioners reporting delays of a number of months before payment is received.

Practitioners should note that section 30 of the *Court and Court Officers Act, 2002* provides for interest on the *costs* of a judgment at a rate of 2% from the time of judgment until same are agreed or taxed. A rate of 8% applies thereafter, until paid.

In the case of judgments, a rate of 8% (SI 12/1989) applies from the time of judgment until payment is made.

Litigation Committee

THE PRESUMPTION OF UNDUE INFLUENCE

Many practitioners are unaware that, in the voluntary transfer situation, there may be a presumption of undue influence in relation to the transaction. What this means is that if the transaction is challenged, it fails unless the donee is in a position to rebut the presumption of undue influence. In itself, the fact that there was no undue influence is not sufficient. The presumption must be rebutted.

Where a solicitor acts on both sides of a voluntary transfer, it has been held that, as he is not independent of either party, he can not give evidence which will rebut the presumption. In order to rebut the presumption, independent advice, usually, but not necessarily, independent *legal* advice, must be obtained.

Signed acknowledgements

Some solicitors get the transferor to sign an acknowledgement that the transferor has been offered independent advice but has declined the offer. This is not sufficient, as it does nothing to rebut the presumption of undue influence.

From the point of view of professional negligence, the solicitor is at risk if he has not ensured that he is in a position to rebut the presumption of undue influence. He is unlikely to be at risk in so far as the transferor is concerned. If a transferor gets back a farm he had transferred, he is not at a loss. However, the same cannot be said in relation to the transferee. If a transferee loses because the solicitor has not taken the necessary steps to rebut the presumption of undue influence, then the transferee will have his remedy against the solicitor.

Setting up the independent advice

When organising the independent advice, it is good practice to do a letter to the person giving the independent advice setting out all the facts relative to the transfer. In particular, the letter should set out details of the property being transferred (market value, which should be based on a professional valuation and so on), details of the transferor's other assets and full details of the family situation, identifying the educational and financial circumstances of each family member. When giving independent advice, a full attendance should be done and this attendance should be returned to the solicitor doing the transfer so that it can be stored on the main transfer file. (By doing this, the transferor's solicitor is setting out that he has knowledge of all the facts and it also shows that the person giving the independent advice has been made aware of these facts.)

Wills

This presumption does not apply to wills. Where a will is challenged on the basis of undue influence, then, in every case, that undue influence must be proved.

Actual undue influence

Actual undue influence is outside the scope of this practice note. However, in doing a voluntary transaction, a solicitor should take all steps necessary to minimise the risk of actual undue influence. For example, the transferee should not be present when the transferor is instructing the solicitor in relation to the proposed transaction.

Conveyancing Committee

LEGISLATION UPDATE: 18 SEPTEMBER – 20 OCTOBER 2003

SELECTED STATUTORY INSTRUMENTS

European Communities (Cableway Installations Designed to Carry Persons) Regulations 2003
Number: SI 470/2003
Contents note: Give effect to directive 2000/9/EC relating to cableway installations designed to carry persons
Commencement date: 3/10/2003

European Communities (Licensing and Inspection of Zoos) Regulations 2003
Number: SI 440/2003
Contents note: Give effect to directive 1999/22/EC relating to the keeping of wild animals in zoos
Commencement date: 19/9/2003

European Communities (Manufacture, Presentation and Sale of Tobacco Products) Regulations 2003
Number: SI 425/2003
Contents note: Implement directive 2001/37/EC on the manufacture, presentation and sale of tobacco products. Deal with health-warning labeling, new maximum yields of tar, nicotine and carbon monoxide in cigarettes, product description and further product information
Commencement date: Various – see SI

Finance Act, 2003 *(Section 146) (Commencement) Order 2003*
Number: SI 466/2003
Contents note: Appoints 1/10/2003 as the commencement date for section 146 of the *Finance Act, 2003* (amendments to the *Capital Acquisitions Tax Consolidation Act, 2003*, in relation to CAT returns)

Immigration Act, 2003 *(Approved Ports) Regulations 2003*
Number: SI 445/2003
Contents note: Specify the ports approved for entry into the state for the purposes of the *Aliens Act, 1946*
Commencement date: 19/9/2003

Immigration Act, 2003 *(Carrier Liability) Regulations 2003*
Number: SI 447/2003
Contents note: Set out the forms of notice to be given to carriers alleged to be in breach of section 2 of the *Immigration Act, 2003*
Commencement date: 19/9/2003

Immigration Act, 2003 *(Removal Direction) Regulations 2003*
Number: SI 446/2003
Contents note: Prescribe the form to be used by an immigration officer or a member of An Garda Síochána to give a direction in writing to a carrier to remove a person from the state
Commencement date: 19/9/2003

Immigration Act, 2003 *(Removal Places of Detention) Regulations 2003*
Number: SI 444/2003
Contents note: Specify the

places where a non-national being removed from the state following refusal of, or failure to obtain, leave to land may be detained
Commencement date: 19/9/2003

Intoxicating Liquor Act, 1962 *(Section 9) Order 2003*
Number: SI 442/2003
Contents note: Provides that, for the purposes of the *Licensing Acts* and the *Registration of Clubs Acts,* the minimum guideline price for a substantial meal will be €9 in substitution for the £2 provided in the Intoxicating Liquor Act, 1962 *(Section 9) Order 1979* (SI 211/1979), which order is now revoked
Commencement date: 29/9/2003

Occupational Pension Schemes and Personal Retirement Savings Accounts (Transfer) Regulations 2003
Number: SI 429/2003
Contents note: Provide for transfer payments from an occupational pension scheme to a personal retirement savings account (PRSA) and from a PRSA to an occupational pension scheme
Commencement date: 16/9/2003

Social Welfare (Consolidated Payments Provisions) (Amendment) (No 5) (Compensation Payments) Regulations 2003
Number: SI 427/2003
Contents note: Provide that any monies received by way of compensation, awarded by the Residential Institutions Redress Board, will be regarded in the assessment of means for social assistance purposes (in the same way as regulations currently apply in relation to compensation awarded to people who have contracted hepatitis C or HIV and to persons who have disabilities caused by Thalidomide)
Commencement date: 16/9/2003

Social Welfare (Consolidated Supplementary Welfare Allowance) (Amendment) (No 1) Regulations 2003
Number: SI 426/2003
Contents note: Provide that any monies received by way of compensation, awarded by the Residential Institutions Redress Board, will be regarded in the assessment of means for supplementary welfare allowance purposes (in the same way as regulations currently apply in relation to compensation awarded to people who have contracted hepatitis C or HIV and to people who have disabilities caused by Thalidomide)
Commencement date: 16/9/2003

Social Welfare (Employers' Pay-Related Social Insurance Exemption Scheme) Regulations 2003
Number: SI 452/2003
Contents note: Provide for amendments to the employers' PRSI exemption scheme in relation to employers who, on or after 16/9/2003, take on an employee who on the date of commencement of employment was in receipt of a payment under the back-to-work allowance scheme. Revoke SI 145/1996
Commencement date: 16/9/2003

Planning and Development Act, 2000 *(Certification of Fairground Equipment) Regulations 2003*
Number: SI 449/2003
Contents note: Deal with matters of procedure, administration and control in relation to applications for, and grant of, certificates of safety for funfair equipment
Commencement date: 1/10/2003

Planning and Development Act, 2000 *(Commencement) Order 2003*
Number: SI 450/2003
Contents note: Appoints 24/9/2003 as the commencement date for section 239 of the *Planning and Development Act, 2000* (control of funfairs)

Solicitors Act, 1954 *(Section 44) Order 2003*
Number: SI 459/2003
Contents note: Brings section 44 of the *Solicitors Act, 1954* (inserted by section 52 of the *Solicitors (Amendment) Act, 1994*) into operation on 1/10/2003 in relation to the profession of attorney and counselor at law in the State of California of the United States of America. The effect of the order is that an attorney or counselor at law qualified in California may be admitted as a solicitor in Ireland subject to the corresponding conditions under which solicitors whose names are on the roll in this state may be admitted to practice in the State of California

Social Welfare (Miscellaneous Provisions) Act, 2002 *(Section 16 (No 3)) (Commencement) Order 2003*
Number: SI 455/2003
Contents note: Appoints 25/9/2003 as the commencement date for section 16 of the act insofar as it relates to specified items in the schedule to the act relating to amendments to the *Registration of Births and Deaths (Ireland) Acts* and the *Marriages (Ireland) Acts* and the electronic registration of births and deaths in the civil registration office in Skibbereen. Appoints 29/9/2002 for the same purposes in relation to the civil registration office in Mallow

Taxes (Electronic Transmission of Capital Acquisitions Tax Returns) (Specified Provisions and Appointed Day) Order 2003
Number: SI 443/2003
Contents note: Applies the legislation governing the electronic filing of tax information to the principal capital acquisitions tax returns (that is, section 46 of the *Capital Acquisitions Tax Consolidation Act, 2003,* apart from subsections 3, 7, 13 and 15). Appoints 28/9/2003 as the appointed date in relation to these returns. G

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SOLICITORS DISCIPLINARY TRIBUNAL

In the matter of Brendan McManus, solicitor, who carried on practice under the style and title of Brendan McManus & Company, Solicitors, of 35 Beaufield Manor, Stillorgan, County Dublin and in the matter of the *Solicitors Acts, 1954 to 2002* [4089/DT360]
Law Society of Ireland (applicant)
Brendan McManus (respondent solicitor)

On 3 July 2003, the Solicitors Disciplinary Tribunal found that the respondent solicitor was guilty of misconduct in his practice as a solicitor in that he had:

a) Delayed in the administration of an estate and failed to administer same in a timely manner or at all
b) Failed to correspond with (named complainant) who was beneficiary to the estate
c) Failed to respond to letters sent to him by the Law Society of Ireland
d) Failed to attend at the Registrar's Committee meetings on a number of occasions despite being requested to do so
e) Failed to furnish progress reports to the society although directed to do so by the Registrar's Committee.

The tribunal ordered that the respondent solicitor:

a) Do stand censured
b) Pay the total sum of €3,000 to the Compensation Fund
c) Pay the whole of the costs of the Law Society of Ireland, including witnesses's expenses, as taxed by the taxing master of the High Court in default of agreement.

In the matter of Brendan McManus, solicitor, who carried on practice under the style and title of Brendan McManus & Company, Solicitors, of 35 Beaufield Manor, Stillorgan, County Dublin and in the matter of the *Solicitors Acts, 1954 to 2002* [4089/DT324]
Law Society of Ireland (applicant)
Brendan McManus (respondent solicitor)

On 3 July 2003, the Solicitors Disciplinary Tribunal found that the respondent solicitor was guilty of misconduct in his practice as a solicitor in that he had:

a) Failed to file an accountant's report in respect of his financial year ended 15 September 2000 in accordance with the provisions of regulation 20(1) of the *Solicitors' accounts regulations no 2* of 1994 with the society in a timely manner or at all
b) Failed to hold professional indemnity insurance cover from the commencement of the practice year on 1 January 2001 up to 20 June 2001 in breach of the *Professional indemnity insurance regulations* (SI no 312 of 1995, as amended).

The tribunal ordered that the respondent solicitor:

a) Do stand censured
b) Pay the sum of €3,000 to the Compensation Fund
c) Pay the whole of the costs of the Law Society of Ireland, including witnesses's expenses as taxed by the taxing master of the High Court in default of agreement.

In the matter of Thomas Flood, solicitor, carrying on practice under the style and title of Esmond Reilly Solicitors, Dargan House, Fenian Street, Dublin 2 and in the matter of the *Solicitors Acts, 1954 to 1994* [4412/DT306]
Law Society of Ireland (applicant)
Thomas Flood (respondent solicitor)

On 23 January 2003, the Solicitors Disciplinary Tribunal found that the respondent solicitor was guilty of misconduct in his practice as a solicitor in that he had:

a) Up to the date of the second referral by the Registrar's Committee to the Disciplinary Tribunal failed to comply with an undertaking given to (named complainants) in March 1996 in a timely manner or at all
b) Failed repeatedly to respond to the society's correspondence
c) Failed to attend at the Registrar's Committee meetings on various dates despite being requested to do so.

The tribunal ordered that the respondent solicitor:

a) Do stand censured
b) Pay the sum of €2,500 to the Compensation Fund
c) Pay the whole of the costs of the Law Society to be taxed by a taxing master of the High Court in default of agreement.

In the matter of James M Sweeney, solicitor, carrying on practice under the style and title of James M Sweeney at 14 New Cabra Road, Phibsborough, Dublin 7 and in the matter of the *Solicitors Acts, 1954 to 2002* [3572/DT381]
Law Society of Ireland (applicant)
James M Sweeney (respondent solicitor)

On 4 September 2003, the Solicitors Disciplinary Tribunal found that the respondent solicitor was guilty of misconduct in his practice as a solicitor in that he:

- Breached regulation 21 (1) of the *Solicitors' accounts regulations no 2* of 1984 in failing to deliver to the society an accountant's report covering his financial year ended 30 September 2001 within six months thereafter, that is, by 31 March 2002.

The tribunal ordered that the respondent solicitor:

a) Do stand censured
b) Pay the sum of €15,000 to the society's Compensation Fund
c) Pay the costs of the society.

The tribunal took into account that there appeared to be a persistent disregard by the respondent solicitor of his obligations under the regulations. The respondent solicitor had breached precisely the same regulation in failing to deliver to the society an accountant's report covering his financial year ended 30 September 2000.

In the matter of David Fagan, solicitor, carrying on practice under the style and title of Murphy Fagan Solicitors at 4 Talbot Street, Dublin 1 and in the matter of the *Solicitors Acts, 1954 to 2002* [7850/DT339]
Law Society of Ireland (applicant)
David Fagan (respondent solicitor)

On 4 September 2003, the Solicitors Disciplinary Tribunal found that the respondent solicitor was guilty of misconduct in his practice as a solicitor in that he:

- Breached regulation 21(1) of the *Solicitors' accounts regulations no 2* of 1984 in failing to deliver to the society an accountant's report covering his financial year ended 30 April 2001 within six months thereafter, that is, by 31 October 2001.

The tribunal ordered that the respondent solicitor:

a) Do stand admonished
b) Pay the sum of €500 to the society's Compensation Fund
c) Pay the costs of the society. G

Personal injury judgment

Negligence – issue of whether hysterectomy was necessary – *Statute of Limitations* – whether a claim was statute-barred – issue of when certain knowledge was ascertained – whether damages awarded were excessive

CASE

***Alison Gough v Michael Neary and Basil Cronin*, Supreme Court (Hardiman, Geoghegan and McCracken JJ), with separate judgments delivered by Hardiman J (dissenting) and Geoghegan and McCracken JJ, delivered on 3 July 2003.**

THE FACTS

Mrs Alison Gough was a 27-year-old woman in October 1992 and was awaiting the birth of her first child. The child was expected on 25 October 1992 and she was admitted to Our Lady of Lourdes Hospital in Drogheda, Co Louth. Various steps were taken to induce the birth. When these were unsuccessful, it was decided in the early hours of the morning of Monday 27 October 1992 that she should have a caesarean section. Her son was born by this procedure.

Dr Michael Neary had been the consultant obstretician and gynaecologist. Mrs Gough was in some pain and discomfort after the birth. While in hospital, Mrs Gough remarked to the nurses that if she were to have another child she would like to have a planned caesarean section. A nurse advised her to discuss this with the doctor who would be around to see her. When he came, she expressed her preference for a caesarean section to him and asked if it would be possible. He said 'no'. She asked what he meant, and he said: 'I had to remove your womb; you had a hysterectomy'. She was very disturbed and could not believe what Dr Neary had told her. Dr Neary said to her that he had saved her life. He said he could have sent her son out to her husband without a mammy, but he had saved her life. He said that she had lost so much blood that he had never witnessed anything like it. He said that he had used all the top drugs. He said he had left the ovaries and that she would come to terms with her situation.

She had no further significant conversation with Dr Neary while in hospital. On 23 December 1992, she attended him for her check up. He examined her. A nurse asked Mrs Gough to wait until the doctor was free so that she could ask him questions. Mrs Gough told him she was very upset over what had happened and asked: 'What did I do wrong?' She asked if he could explain. She added that, due to her distress, she could not sleep at night. She said that she could not come to terms with what had happened to her.

Dr Neary said that if he were to tell her what had happened on the night of the operation, she would never sleep again. He said she was better off not knowing and advised her to just go home and get on with her life.

Mrs Gough was subsequently attended to by her general practitioner who referred her for counselling, which she did not find helpful. She continued to be preoccupied with the fact of her hysterectomy. In 1996, she was in her solicitor's office in connection with a mortgage transaction and she said something to the solicitor along the lines of whether she (the solicitor) could explain what had happened, which, of course, she could not. Mrs Gough said: 'All I wanted was an explanation. That's all I wanted'.

Mrs Gough was employed in the kitchen of another hospital. In the course of 1998, she heard rumours in that hospital that there was a local medical consultant in trouble of some unspecified sort. Later that year, she saw media reports dealing with other patients of Our Lady of Lourdes Hospital in precisely her situation. She reacted very emotionally to these reports.

She heard a radio programme in 1998 which gave the phone number for the 'Lourdes Hospital Helpline'. This was a service provided by the hospital for anyone who had been affected by the media items which they had seen or read. She said that she contacted them because 'I wanted them to tell me that it wasn't true, it wasn't true … that Dr Neary wasn't the doctor being investigated' in relation to unnecessary hysterectomies. The helpline, however, told her that Dr Neary was the doctor being investigated for performing unnecessary hysterectomies.

Mrs Gough contacted her solicitor on the morning of her conversation with the helpline. The solicitor requisitioned the hospital notes, instructed an expert and generally took the necessary steps to investigate whether she had a statable action.

On 21 December 1998, proceedings were issued in the High Court by Mrs Gough for damages for personal injuries against Dr Michael Neary and Mr Basil Cronin, who was sued in his capacity as trustee of Our Lady of Lourdes Hospital in Drogheda, where the delivery took place. Mrs Gough alleged that the hysterectomy performed on her was unnecessary and that alternative treatments were not attempted or adequately attempted. It was claimed she did not know the relevant facts until 1998.

Dr Neary and Mr Cronin pleaded the *Statute of Limitations* among other defences. The *Statute of Limitations* provides for a three-year limitation period but important amendments made in 1991 related, among other things, to the limitation period commencing from the date of knowledge of the person injured.

Section 3 of the *Statute of Limitations (Amendment) Act, 1991* provides that 'an action … claiming damages in respect of personal injuries to a person caused by negligence, nuisance or breach of duty … shall not be brought after the expiration of three years from the date on which the cause of action accrued or the date of knowledge of the person injured'.

The meaning of the expression 'date of knowledge' is set out in section 2 of the act. That section reads as follows:

'2(1) For the purposes of any provision of this act whereby the time within which an action in respect of an injury may be brought depends on a person's date of knowledge, references to that person's date of knowledge are references to the date on which he first had knowledge of the following facts:

a) That the person alleged to have been injured had been injured

b) That the injury in question was significant

c) That the injury was attributable in whole or in part to the act or omission which is alleged to con-

stitute negligence, nuisance or breach of duty
d) The identity of the defendant, and
e) If it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.
(2) For the purposes of this section, a person's knowledge includes knowledge which he might reasonably have been expected to acquire:
a) From facts observable or ascertainable by him, or
b) From facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek.
(3) Notwithstanding sub-section (2) of this section:
a) A person shall not be fixed under this section with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice, and
b) A person injured shall not be fixed under this section with knowledge of a fact relevant to the injury which he has failed to acquire as a result of that injury'.

JUDGMENT OF THE HIGH COURT

Mrs Gough's action was heard in the High Court before Johnson J on 17, 18, 19 and 23 April 2002 and on 14 May 2002. Judgment was given on 15 November 2002.

Johnson J held that, in Mrs Gough's circumstances, a caesarean hysterectomy was an enormously rare event. Finding against both Dr Neary and Mr Cronin (as trustee of the hospital), Johnson J held the action was not statute-barred and the defendants had been negligent.

THE HIGH COURT AWARD

Johnson J awarded damages as follows:
1) General damage for loss and suffering to date of the trial – €150,000
2) Damage for loss and suffering in the future – €100,000
3) Special damages – €23,223.27.

Total: €273,223.27

JUDGMENT OF THE SUPREME COURT

Dr Neary and Mr Cronin (as trustee of Our Lady of Lourdes Hospital, Drogheda) appealed to the Supreme Court, claiming that the High Court had erred, that Mrs Gough's claim was statute-barred and that the damages awarded by the High Court were too high.

The case came before Hardiman, Geoghegan and McCracken JJ, who delivered judgment on 3 July 2003.

Was the claim statute-barred?

The Supreme Court examined considerable case law relating to the issue of 'knowledge of the person injured' and related matters in the context of the time within which proceedings must be instituted.

Geoghegan J, referring to sections 2 and 3 of the *Statute of Limitations (Amendment) Act, 1991* (set out above), stated that he was firmly of the view that the relevant knowledge of Mrs Gough included knowledge that the operation was unnecessary and that the knowledge did not exist more than three years before the commencement of the action.

McCracken J considered that Mrs Gough undoubtedly knew that a hysterectomy had been performed. The act of performing the hysterectomy inflicted an injury on her within the meaning of the *Statute of Limitations* and she undoubtedly knew that this injury had been inflicted as early as a few days after the operation.

The other aspect of the case was when Mrs Gough first had knowledge 'that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty'. McCracken J posed the question: 'what is the act or omission which is alleged to constitute negligence, nuisance or breach of duty?' He did not consider it could be the act of performing a hysterectomy *simpliciter*. Performing a hysterectomy where it is necessary could not be said to constitute an act of negligence, nuisance or breach of duty. The 'knowledge' which Mrs Gough had in the present case was that a hysterectomy had been necessarily performed. She was told that by her surgeon in graphic terms and had no reason whatever to disbelieve it. Therefore, the knowledge that she had was false knowledge. It was also knowledge of something, if it had been true, which would not have constituted negligence, nuisance or breach of duty.

McCracken J stated that what was in this action alleged to constitute negligence, nuisance or breach of duty was the unnecessary hysterectomy; there could be no allegation against Dr Neary had the operation been necessary. Therefore, McCracken J considered that the only normal and sensible meaning of the statutory provision as applied to the facts of the present case was that the requisite knowledge related to the fact that the operation had been unnecessarily performed. Mrs Gough had issued these proceedings within the statutory time limit dating from the time she had this knowledge.

Hardiman J (dissenting from Geoghegan and McCracken J) stated that Mrs Gough knew from late 1992 that she had had a hysterectomy. This represented, of course, a very significant impairment and she was deeply distressed about it. She did not know that it was unnecessary because she accepted the false information to the contrary given to her by the doctor.

That the most obvious way to set up an action on those facts, according to Hardiman J, would be to explore the possibility that Mrs Gough's cause of action was concealed by fraud within the meaning of section 71 of the *Statute of Limitations, 1957*, which would have prevented the period of limitation from expiring until she had discovered the fraud or could with reasonable diligence have discovered it. Since this contention had not been pleaded or argued, he would make no finding on it, but having regard to his findings about what the doctor said and the interpretation of it in light of the now-established facts, there was plainly a strong case for this view.

The kernel of the present case, according to Hardiman J, was that Dr Neary performed an unnecessary hysterectomy on Mrs Gough, made false representations to the effect that the operation had been necessary, and used his professional position in an overbearing and melodramatic manner to prevent her, until the limitation period had run out, from making further enquiries. Hardiman J stated that this amounted to concealing her cause of action from her, a state of affairs for which the law provides a remedy in the form of section 71 of the 1957 act.

Mrs Gough, however, pursued her remedy along other lines. It was not, in Hardiman J's view, a matter of merely technical significance whether she achieved her remedy by reason of section 71 or on the basis of what he regarded as a novel interpretation of sec-

tion 2(1) of the *Statute of Limitations (Amendment) Act, 1991*. The 1991 act resulted in considerable easing in the position of plaintiffs suing in respect of diseases or impairments which were latent in their nature or their true significance. Its wording was apt to meet the difficulties of such persons. It did not, according to Hardiman J, extend to circumstances where the disease or impairment was all-too-painfully patent but some qualitative aspect of it had been concealed. In such circumstances, the law provided a remedy in respect of equitable fraud, but not otherwise.

Hardiman J (dissenting) stated that he would allow the appeal by Dr Neary and Mr Cronin, as he considered Mrs Gough's claim to be statute-barred.

The issue of damages

As Geoghegan J and McCracken JJ held that Mrs Gough's claim was within the time period permitted by the *Statute of Limitations*, the issue of the damages awarded to Mrs Gough in the High Court arose for consideration.

Geoghegan J stated that the points on which Dr Neary and Mr Cronin primarily relied were that while Mrs Gough was undoubtedly upset by her loss of capacity to reproduce, coupled with a sense of guilt, she was nevertheless able to continue with her normal activities looking after her husband and her child and keeping down a responsible job. Although she had her operation as far back as October 1992, she never came under the care of a psychiatrist until October 1999. By that stage, she had issued High Court proceedings by a plenary summons dated 21 December 1998. She had undoubtedly been under the care of different general practitioners and had some counselling from a psychologist. In the written submissions to the court, it was pointed out that the evidence of Dr McCarthy, a competent psychiatrist, was to the effect that Mrs Gough was likely to make a full recovery when she perceived that 'justice had been done'. This seemed clear from Dr McCarthy's answers under cross-examination.

Mrs Gough, on the other hand, strongly challenged what she perceived as an underplaying of her injury. Geoghegan J reproduced a list of ill effects relied on by Mrs Gough and in respect of which transcript references were given in the written submissions. As listed in the written submissions, they are as follows:

a) She had major surgery unnecessarily
b) She thereby lost her ability to have children
c) She was devastated by this
d) She had a sense that this was caused by something she had done wrong
e) She was unable to sleep
f) She felt like crawling into a hole
g) She had irrational feelings that if she lost her womb she could lose her son
h) She could not think
i) She did not feel like a woman
j) She had a sense of guilt about the way she was feeling
k) The counselling she received was of no help to her
l) Her external appearance of getting on with her life masked an internal turmoil
m) She assumed a guilt about the patients of the defendant who had hysterectomies after hers
n) In 1998, when she heard that the defendant was being investigated for carrying out unnecessary hysterectomies, she just cried and cried
o) She had been on medication since 1998
p) She required psychiatric help
q) She was ashamed to admit depression in case she would be deemed unfit to mind her son.

Even if one were to view Mrs Gough's injuries and ill effects exclusively in the way she and her lawyers saw them, Geoghegan J did not consider it possible to justify an award of €250,000, having regard to the levels of awards in relation to different types of physical injuries. The High Court arrived at that figure by awarding €150,000 for general damages to date, together with another €100,000 for pain and suffering into the future.

Without in any way minimising Mrs Gough's injuries and ill effects, they did not, according to Geoghegan J, compare with physical injuries of a kind that would attract that kind of damages. Bearing in mind and paying respect to the view that the High Court took after having had the benefit of seeing Mrs Gough in the witness box, Geoghegan J would not interfere with the amount of €150,000 damages for pain and suffering to the date of the trial, but he considered that having regard to Dr McCarthy's evidence in particular, a figure of €50,000 was appropriate for pain and suffering in the future. Geoghegan J mentioned that in this case the special damages were relatively low, being a sum of €23,223.27. He would therefore allow the appeal on *quantum* to the extent of reducing the award for general damages of €250,000 to an award of €200,000. The total award would therefore be €223,223.27.

McCracken J stated there was no doubt whatsoever that Mrs Gough suffered serious psychological trauma from the time she realised what had happened to her. She suffered feelings of guilt that she should perhaps have realised earlier what the true situation was, and might have saved other women from that same fate. She suffered severe depression, and while she was able to look after her family and hold a job, this must have been with great difficulty for her. He was quite satisfied that the award of €150,000 for general damages to the date of the trial was correct.

McCracken J considered that the situation was somewhat different in relation to the future. Mrs Gough's own psychiatrist gave evidence, not just under cross-examination but also as an addendum to his report, that if Mrs Gough continued her current rate of progress, he expected her to make a full recovery from her clinical depression, and indeed would be able to stop taking anti-depressants a few weeks after the final judgment, as she would then perceive that justice had been done. He considered that all courts now accepted that there were many cases, particularly of psychological injury, where the condition of a plaintiff improved enormously after the final outcome of the case. He immediately stated that this was not to imply any form of malingering of the part of Mrs Gough in this case, as he was quite satisfied that her complaints were totally genuine. However, by the nature of psychological complaints, they can be, and frequently are, affected by the outcome of a case, and in the judge's view an award of €100,000 for general damages into the future was not sustainable in light of her own psychiatrist's evidence. She would, of course, still have to bear the burden of having gone through an unnecessary hysterectomy with all of its connotations, and this would last for the rest of her life. However, McCracken J considered that the award of €100,000 was not justified in the circumstances and reduced the general damages into the future to €50,000. G

This judgment was summarised by solicitor Dr Eamonn Hall.

THE SUPREME COURT AWARD

Geoghegan and McCracken JJ (Hardiman J dissenting on the basis that the claim was statute-barred) found that:

1) The award by the High Court of €150,000 for general damages to the date of the trial was correct
2) The award of €100,000 for general damages into the future was not sustainable; the award for damages into the future should be reduced to €50,000
3) Special damages – €23,223.27.

Total: €223,223.27

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Compiled by Karen Holmes for FirstLaw

COMPANY

Award, bias

Application to set aside award – grounds – misconduct – whether arbitrator misconducted himself – bias – whether plaintiff allowed to allege bias after award given – whether plaintiff acquiesced in procedure adopted by arbitrator – whether court should interfere with award – Arbitration Act, 1954

It was agreed that the fourth defendant be appointed arbitrator for the purposes of valuing shares which were to be bought by the third defendant from the plaintiff. This followed an application under section 205 of the *Companies Act, 1965* by the plaintiff, alleging that the affairs of the second defendant, of which he had been a member, had been conducted by the first defendant in an oppressive manner and in disregard of his interests. The plaintiff sought an order setting aside the fourth defendant's award on the grounds that he had misconducted himself and the proceedings in the manner in which he had decided the valuation of the plaintiff's shareholding by applying a minority discount thereto.

Lavan J dismissed the plaintiffs' claim and upheld the award of the arbitrator, holding that the arbitrator had not misconducted himself and that no mistake of law appeared on the face of the award. Any bias perceived by the plaintiff should have been asserted during the course of the arbitration and not subsequent to the making of the award. All questions of fact are within the sole domain of the arbitrator and only a limited control will be exercised over him in relation to questions of law.

***McCarthy v Keane*, *Éireann International Finance Brokers Ltd*, High Court, Mr Justice Lavan, 24/7/2003** [FL7891]

Case stated, planning and development law

Case stated – arbitration – planning and development – development plan – statutory interpretation – plain and ordinary meaning of words used – whether objective in development plan is land use objective – status of draft development plan – whether planning authority can refuse permission on grounds that proposed development would contravene land use objective in draft development plan – Local Government (Planning and Development) Act, 1963, *sections 2, 19* – Local Government (Planning and Development) Act, 1990, *section 12(1)*

Section 12(1)(b) of the *Local Government (Planning and Development) Act, 1990*, when read in conjunction with reason 11 of the third schedule thereto, precludes a property owner from claiming compensation in respect of refusal of permission for any development 'if the development would contravene materially a development objective indicated in the development plan'. Section 19(3) of the *Planning and Development Act, 1963* provides that 'a development plan may indicate objectives … for the use solely or primarily … of particular areas for particular purposes (whether residential, commercial, industrial, agricultural or otherwise)'. The claimant applied for planning permission to develop its property, which application was refused by the respondent on the grounds that the property in question was within an area of investigation in relation to the re-opening of a rail link set out in the respondent's draft development plan. The claimant then applied for compensation for the alleged reduction in value of the property, which claim was referred to an arbitrator for determination. In the course of the arbitration, the arbitrator referred the question as to whether, as a result of the decision of the planning authority to refuse permission, the claimant was precluded from claiming compensation by virtue of the reason for refusal falling within section 12(1)(b) and paragraph 11 of the third schedule to the 1990 act, as a case stated to the High Court for determination. The respondent submitted that the claimant was not entitled to compensation as the proposed development would contravene a land use objective in the draft development plan and accordingly fell within the ambit of section 12(1) of the 1990 act. The claimant submitted that reason 11 in the 1990 act referred to 'the development plan' and not to the draft development plan. The claimant further submitted that even if the words 'development plan' were to be construed as including a 'draft development plan' as contended by the respondent, the reason for the refusal relied on by the respondent was not a land use objective permitted by section 19(3) of the 1963 act but was a 'route selection corridor' similar to a road reservation.

In answering the question posed in the negative, Peart J held that use of the words 'or otherwise' in section 19(3) of the 1963 act meant that a broad interpretation was to be given to the words used in that section, and the retaining of a route selection corridor for a rail link must come with that broad interpretation as being an objective for the use of a particular area for a particular purpose – in other words, a 'land use' objective. However, it was important that the public and, in particular, people seeking to develop their property should have certainty and precision as to the relevant criteria by which any application for permission would be judged and the circumstances in which compensation may or may not be payable by the planning authority. Accordingly, a planning authority can have regard only to the development plan currently in force and not a draft development plan when considering whether a proposed development would contravene a land use objective set out in any such plan.

***Ebonwood Ltd v Meath County Council*, High Court, Mr Justice Peart, 30/4/2003** [FL7911]

CONSTITUTIONAL

Case stated, practice and procedure

Constitution – power to refuse to state case – limitations on power – whether proviso to section 4 of 1857 act inconsistent with constitution – Summary Jurisdiction Act 1857, *section 4* – Bunreacht na hÉireann, *article 50*

This was an appeal from a judgment and order of the High Court (Kearns J), which determined that the proviso to section 4 of the *Summary Jurisdiction Act 1857* was inconsistent with the constitution and had not remained part of the law by virtue of article 50 of the constitution. The proviso was to the effect that while a district judge may refuse

to state a case on the ground that the application was 'merely frivolous', he may not do so where the application was made on behalf of the DPP.

The Supreme Court (Keane CJ, Denham, Murray, McGuinness and Hardiman JJ) allowed the appeal and substituted for the order of the High Court an order dismissing the applicant's claim, holding that it was perfectly legitimate for the legislature to proceed on the basis that the law officers would not have the same motives for prosecuting specious and time-wasting appeals as others.

***Fitzgerald v DPP*, Supreme Court, 25/7/2003** [FL7966]

COSTS

Solicitors, taxation

Practice and procedure – taxation of costs – solicitors – litigation – principles of taxation – whether allowances made by taxing master unjust – Rules of the Superior Courts 1986 – Courts Act, 1981 – Courts and Court Officers Act, 1995

The plaintiff had initiated proceedings in the High Court for damages for personal injury. The claim also included alleged breaches of competition law. The proceedings were settled and the defendants undertook to pay the plaintiff's costs. The plaintiff's costs were assessed by the taxing master and the defendants issued proceedings contending that the taxing master had erred in his taxation of costs. A sum of £145,000 was allowed for the plaintiff's solicitor's instruction fee and £22,000 was allowed as the brief fee for senior counsel. It was submitted that the plaintiff's case was not one of great complexity and was essentially one that the plaintiff was subject to unreasonable pressure at work. In addition, it was contended that the taxing master had erred in principle in holding that there were no comparable cases and had failed to apply the applicable law in relation to comparator cases.

Ó Caoimh J reduced the amount of costs. The taxing master had erred in rejecting comparative evidence and erred in estimating the complexity of the plaintiff's case. The allegations raised in the case regarding anti-competitive practices did not raise issues of great complexity. Comparator cases were a valuable guide to the assessment of costs and the taxing master was in error in rejecting comparisons. The solicitor's instruction fee would be remitted to another taxing master for assessment. The brief fee would be reduced to £15,750.

***Doyle v Deasy and Company Limited and Guinness Ireland Group Limited*, High Court, Mr Justice Ó Caoimh, 21/3/2003** [FL7909]

CRIMINAL

Drug offences, sentencing

Sentence – appeal – drugs offences – exceptional and specific circumstances justifying departure from mandatory maximum sentence – whether trial judge erred – Misuse of Drugs Act, 1977 – Criminal Justice Act, 1999

This was an application for leave to appeal against sentence only. The applicant pleaded guilty to drugs offences involving cannabis worth £22,170 and ecstasy worth £10,608 and was sentenced to seven years' imprisonment. The applicant argued that two matters constituted exceptional and specific circumstances permitting the judge to depart from the mandatory maximum sentence of ten years' imprisonment, namely his plea of guilty and his provision of material assistance in the investigation of the offence. The applicant also addressed the court more generally on the severity of the sentence, having regard to his personal circumstances and his lack of previous convictions.

The Court of Criminal Appeal treated the application for leave as the hearing of the appeal and held that the trial judge had erred. The trial judge attached insufficient weight to the fact that the applicant should be treated as a first offender. The court imposed a sentence of seven years, with the last two years suspended on terms.

***DPP v Galligan*, Court of Criminal Appeal, Mr Justice Peart, 23/7/2003** [FL8022]

Extradition, statutory interpretation

Warrant – whether offences charged thereon correspond to offences known to Irish law – statutory interpretation – respondent charged with making false instruments with an intention to deceive – definition of 'false' – whether exhaustive – summary offences – whether respondent properly before court for extradition in respect of summary offences – Extradition Act, 1965, *sections 47 and 51* – Non-Fatal Offences Against the Person Act, 1997, *section 3* – Criminal Justice (Theft and Fraud Offences) Act, 2001, *section 30*

The applicant sought an extradition order for the rendition of the respondent to Northern Ireland to face trial on charges set out in 15 warrants on foot of which he had been arrested in this jurisdiction. The respondent submitted that his rendition to Northern Ireland should not be ordered in view of the fact that the offences with which he was charged did not correspond with offences in this jurisdiction. Warrants one to ten charged the respondent with making and using instruments which were false with the intention of using it to induce another person to act to their prejudice contrary to section 1 of the *Forgery and Counterfeiting Act, 1981*. The respondent submitted that the allegation of falsity contained in warrants one to ten did not correspond to the definition of 'false' in section 30 of the 2001 act, which definition was exhaustive, not being qualified by the words 'includes' or 'without prejudice to the generality of the foregoing' or such like. In respect of warrants 11 to 14, the respondent submitted that, being treated as summary offences, they ought to have been endorsed for execution in this jurisdiction only in the event that he was already before the court in Northern Ireland, or had failed to appear having been duly served with the summonses, pursuant to the provisions of section 51 of the 1965 act. It was submitted that there was no evidence of those matters before the court and therefore he was not lawfully before the court. The final warrant related to an offence of assault occasioning actual bodily harm contrary to section 47 of the *Offences Against the Person Act 1861*. The respondent submitted that that offence corresponded with the offence provided for in section 3 of the *Non-Fatal Offences Against the Person Act, 1997*, which required an element of *mens rea*, unlike the Northern Ireland provision.

In granting an order for the extradition of the respondent under section 47 of the *Extradition Act, 1965*, Peart J held that there could be situations where a legal entity could be an unlimited company or drop the word 'limited' from its title and the court could not assume that a mistake had been made in making out the charge. It would be a matter for evidence at any trial as to whether Lisburn Proteins was in fact the entity which suffered prejudice. The word 'false' in section 30 of the 2001 act had a specific meaning and the allegation contained in the charges set out in warrants one to ten did not come within any of the paragraphs of section 30 and the order sought in respect of those warrants would be, accordingly, refused. Given the provisions of section 31(1) of the 1997 act, the offences charged were summary offences, the DPP for Northern Ireland having certified that they were to be tried summarily, and accordingly the provisions of section 51(1) of the 1965 act were applicable. As the court had not been furnished with

evidence that the summonses had been served, or notice of such summonses, on the respondent, he did not come within sub-paragraphs (a), (b) or (c) of that sub-section and the court would therefore refuse the order sought in respect of those warrants. For the purposes of a trial of an offence under section 3 of the 1997 act, it was unnecessary to charge the respondent with intent on the charge sheet and, accordingly, the offence of assault under section 47 of the 1861 act corresponded to the offence in this jurisdiction contrary to section 3 of the 1997 act, and, accordingly, an order would be made in respect of warrant 15.

***Attorney General v Fay*, High Court, Mr Justice Peart, 22/7/2003** [FL7988]

DAMAGES

Housing, landlord and tenant

Judicial review – damages – land law – landlord and tenant – tort – negligent – state liability – controlled dwellings – determination of rent – whether applicants had right to recover damages – Housing (Private Rented Dwellings (Amendment) Act, 1982

The applicants had been granted an order of *certiorari* in judicial review proceedings in respect of the determination of the Rent Tribunal (the respondent) of the terms of a tenancy with regard to a property that the applicants owned. The rent had been set at £500 by the respondent and this determination was quashed by order of the High Court, owing to the procedures adopted by the respondent which had been found to be in breach of natural and constitutional justice. Some 18 months later, the respondent made its determination and this time set the rent at €1,004 a month. The applicants now sought to recover damages, contending that they had suffered a quantifiable loss as a result of the shortcomings in the procedures adopted by the respondent. It was contended that the respondent had frustrated the legitimate expectation of the applicants. On behalf of the respondent, it was contended that liability for damages in such circumstances arose only when it was established that a statutory body acted negligently or with malice, which had not been found in this case.

O'Donovan J awarded damages. The applicants had suffered a quantifiable loss which was directly attributable to the shortcomings in the procedures adopted by the respondent. This loss was readily foreseeable by the respondent in the event that the determination was not valid. The respondent had a duty of care to the applicants when making its determination, a duty that it had breached. Accordingly, in the absence of any compelling exemption based on public policy, the respondent was liable and a decree €5,817 would issue in favour of the applicants.

***Beatty and Beatty v Rent Tribunal*, High Court, Mr Justice O'Donovan, 16/5/2003** [FL7989]

FAMILY

Family home

Partition – family home – sale in lieu of partition – court's discretion to refuse order for sale if good reason to contrary — consent of spouse to sale of family home not forthcoming – appeal from order of Circuit Court – whether court should order sale of family home and dispense with consent of non-agreeing spouse – Partition Act 1868, *sections 3 and 4* – Family Home Protection Act, 1976

Section 4 of the *Partition Act 1868* provides that in 'a suit for partition, where, if this act had not been passed, a decree for partition might have been made, then if the party or parties interested … to the extent of one moiety or upwards in the property to which the suit relates, request the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between … the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly'. The plaintiff sought an order for sale of premises occupied by the defendant, her former husband, pursuant to sections 3 and 4 of the *Partition Act 1868*. The Circuit Court made an order that the premises be sold and that the proceeds be divided as to 40% to the defendant and 60% to the plaintiff. That order was appealed to the High Court by way of re-hearing. The premises in question had previously been occupied by both parties since 1966, after they moved in with the plaintiff's parents, until the plaintiff deserted the family in 1989. The property had been purchased from Dublin Corporation by the plaintiff's parents, who up to then had been its tenants, so as to obtain a 30% discount on the price, but the defendant thereafter discharged the repayments under the transfer order and under subsequent loans for its improvement. The plaintiff's father subsequently left the premises to the plaintiff and defendant jointly in his will. The defendant sought a declaration that he was entitled to the total beneficial interest in the property on the basis that the plaintiff had provided no consideration for it and on the fact of her desertion. He also pleaded that the court should exercise its discretion in refusing to order a sale on the grounds of the respective economic circumstances of the parties.

Peart J set aside the order of the Circuit Court and declared that both parties were entitled to be registered as joint owners of the premises on a 50-50 basis, holding that the plaintiff's parents held the premises in their name on a resulting trust for both parties and desertion could not disentitle a spouse to any pre-existing property rights. Section 4 of the 1868 act was the most appropriate provision to be applied to the circumstances of the case and the defendant had discharged the onus under that section of proving that there was a good reason why the court should not order the sale of the premises, being a family home within the meaning of section 2 of the *Family Home Protection Act, 1976* as, in the absence of an agreement between the parties, an order for sale could not be made under the *Partition Acts* unless the court was also satisfied that it should dispense with the consent of the non-agreeing spouse under section 4 of the 1976 act.

***BM v AM*, High Court, Mr Justice Peart, 3/4/2003** [FL7913]

TRIBUNALS

Child abuse, fair procedures

Statutory tribunals – practice and procedure – direction by commission to witness to attend before it – purpose for which direction issued – whether proper purpose – direction issued for purposes of discussing at public hearing witness's capacity to give evidence – whether direction ultra vires *– fair procedures – whether procedures adopted by commission observed constitutional requirements of natural justice – whether witness afforded fair procedures – whether direction should be quashed – application by commission to order witness to comply with direction – whether order compelling compliance with direction should be granted* – Commission to Inquire into Child Abuse Act, 2000, *section 14*

Following a series of correspondence between the parties concerning the applicant's ability to tender evidence to the Commission to Inquire into Child Abuse due to his health, the applicant had been issued with a direction to

attend at the commission in March 2003. The letter issuing the direction stated that it was for the purpose of investigating the applicant's capacity to give evidence at a public hearing of the commission and that the investigation into the applicant's health would itself be held in public. The prior correspondence between the parties concerning the manner of dealing with the question of his capacity to give evidence had indicated to the appellant a different procedure than the one ultimately adopted by the commission in its direction issued in March 2003. The High Court dismissed the applicant's claim for an order of *certiorari* of that direction and acceded to the respondent's application for an order pursuant to section 14(3) of the 2000 act requiring the applicant to comply with the direction. The applicant appealed that decision to the Supreme Court.

The Supreme Court allowed the appeal, quashed the direction and dismissed the application of the respondent pursuant to section 14(3) of the 2000 act, holding that section 14(1) of that act gave power to the commission only to issue a direction to attend at its public hearings for the purposes of giving evidence to it. Accordingly, the direction to the appellant to attend at a public hearing for the purposes of investigating his ability to give evidence had been issued for an unlawful purpose. As the applicant had not been treated fairly by the respondent, having regard to the course of dealings between the parties and the fact that the respondent was not entitled, without stating reasons, to discount the possibility that public examination of the applicant might be avoided, the exercise of the court's discretion was in favour of granting the relief sought.

***Meenan v Commission to Inquire into Child Abuse*, Supreme Court, 31/7/2003** [FL7866] 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

EU immigration and asylum law and policy

Last month's article (*Eurlegal*, page 49) outlined the current *EC treaty* framework for immigration and asylum law and policy, provided an overview of 'headline' developments, briefly outlined the position of Ireland with its opt-out protocol and considered the implications of the proposed treaty establishing a constitution for the EU.

This purpose of this article is to provide a snapshot of current and proposed EU measures based on the immigration and asylum provisions of the *EC treaty*, and to indicate where these impact on the Irish position. It attempts to be as comprehensive as possible in the space available. However, it does not address the pre-Amsterdam *acquis*, much of which continues to be relevant pending the adoption and entry into force of measures under the post-Amsterdam provisions, or the Schengen arrangements (to which Ireland has partly signed up), and it does not deal with measures taken under other *EC treaty* provisions (the 2000 *Equality directives*, for example).

Immigration

Article 61(1) of the *EC treaty* provides for the adoption of measures to ensure the absence of internal border controls. Article 62(2) of the *EC treaty* provides for measures on the crossing of the external borders of member states, covering the standards and procedures to be followed by member states in carrying out border checks as well as rules on visas for stays of less than three months. Article 62(3) provides for measures setting out the conditions under which nationals of third countries shall have the freedom to travel within the territory of the member states for up to three months. Article 63(3) provides for the adoption of measures covering conditions of entry and residence, procedures for the issue of long-term visas and residence permits, including for family reunion, and illegal immigration/residence. Article 63(4) provides for measures defining the rights and conditions under which third-country nationals legally residing in one member state may reside elsewhere in the union.

Last year, the council adopted decision 2002/463 on an action programme for administrative co-operation in the fields of external borders, visas, asylum and immigration (OJ 2002 L161/15).

Border checks. The development of a common and integrated policy for the management of external borders has been the subject of a commission communication in May 2002 (COM (2002) 233 final), which was endorsed by a council plan in June 2002 (council doc 10019/02). These and other initiatives were endorsed by the June 2002 Seville European Council.

Visas for short visits. Regulation 539/2001 lists the third countries whose nationals require visas or are exempt from this requirement (OJ 2001 L81/1). This has been amended by regulation 2414/2001 (OJ 2001 L327/1) and regulation 453/2003 (OJ 2003 L69/10). A temporary derogation from this regime for members of the 'Olympic family' taking part in the Greek Olympics/Paralympics in 2004 is provided in regulation 1295/2003 (OJ 2003 L183/1). Building on the Schengen *acquis*, there are common consular instructions on visas for diplomatic missions and consular posts (OJ 2002 C313/1, amended by regulations 415/2003 and 693/2003), the common manual (OJ C313/97, amended by regulation 693/2003), regulation 415/2003 on the issue of visas at the border to seamen in transit (OJ 2003 L64/1), and regulations 693/2003 and 694/2004 (OJ 2003 L99/8 and 15) on facilitated transit documents. Regulation 1683/95, laying down a uniform format for visas, was amended by regulation 333/2002 (2002 OJ L53/4) and is the subject of a proposed amending regulation to enable the integration of biometric identifiers into the uniform format (COM (2003) 558 final). The commission has been working on a feasibility study on a common identification system for visa data, and the council adopted guidelines for the further development of the visa information system (VIS) in June 2003. Ireland has decided to stay out of all of these and other short-term visa arrangements.

Freedom to travel for short visits. A 1995 commission proposal for a directive on the right of third-country nationals to travel in the community (COM (95) 346 final) remains on the council table.

Conditions of entry and residence. A proposal for a directive on the conditions of entry and residence of third-country nationals for paid employment and self-employed economic activity was presented by the commission in July 2001 (COM (2001) 386 final) and is currently being considered by the council. Ireland has opted in to this process. The council is also considering a commission proposal, presented in October 2002, on entry and residence for the purposes of studies, vocational training and voluntary service (COM (2002) 548 final). The commission is currently preparing a communication on entry and residence of research workers from third countries. In the longer term, it is working on proposals for a union-wide quota for immigrants.

In June of this year, political agreement was reached on the directive concerning the status of third-country nationals who are long-term residents (council doc 10214/03, MIGR 45). Formal adoption appears to depend on parliamentary scrutiny procedures in one member state being completed. The directive will address the conditions for obtaining (and losing) the status and the rights attaching to such status, including those of equal treatment with host nationals in a wide number of areas. The directive will not apply to Ireland, the UK or Denmark.

Residence permits. In June last year, the council adopted regulation 1030/2002 laying down a uniform format for residence permits for third-country nationals (OJ 2002 L157/1). The commission has proposed an amending regulation (COM (2003) 558 final) to allow the integration of biometric identi-

fiers. Ireland is not party to these arrangements.

Directive 2003/86 on the right to family reunification was adopted in September and is to be implemented by October 2005 (OJ 2003 L251/12). It determines the conditions for the exercise of the right by third-country nationals residing lawfully in the territory of member states. The directive does not bind Ireland, the UK and Denmark.

Illegal immigration and residence. In February 2002, the Council of Ministers adopted a comprehensive action plan to combat illegal immigration and the trafficking of human beings (OJ 2002 C14/23) and, in June of that year, the council adopted a plan for the management of the union's external borders (council doc 9620/02). Combating illegal migration has become a political priority, and this is reflected in the amount of current and proposed legislation. Ireland is party to many of these measures. It should also be noted that Ireland is participating in relevant parts of the Schengen *acquis* by virtue of decision 2002/192 concerning Ireland's request to take part in some of the provisions of this *acquis* (OJ 2002 L64/20). Ireland is currently undergoing a process of adaptation to these provisions.

In relation to trafficking, in July 2002 the council adopted a framework decision under the justice and home affairs (JHA) provisions on combating trafficking in human beings (OJ 2002 L203/1), which is binding on Ireland and is due to be implemented by August next year.

Following a French initiative in 2000, the council adopted in November 2002 directive 2002/90 defining the facilitation of unauthorised entry, movement and residence (OJ 2002 L328/17) and a framework decision 2002/946 (under the JHA provisions) on the strengthening of the penal framework to prevent such facilitation (OJ 2002 L328/1). Ireland is party to each. Following a French initiative, there has been a directive on carrier's liability, supplementing article 26 of the agreement implementing the *Schengen agreement*, in which Ireland participates and which is to be implemented by February 2003 (OJ 2001 L187/45).

Operational co-operation has been promoted by the February 2002 action plan, by the commission proposal in February 2002 for a directive on a residence permit issued to victims of trafficking (COM (2002) 71 final), and by the council adoption in May 2003 of the *Brussels declaration* on the prevention of trafficking in human beings and combating the phenomenon (OJ 2003 C137/1).

In relation to countries of origin and transit, co-operation networks to combat illegal immigration from China and the western Balkans have been set up. The council has adopted conclusions in November 2002 and May 2003. In June 2003, the commission proposed a regulation establishing a multiannual programme for financial and technical assistance to third countries in the area of migration and asylum (COM (2003) 355 final). Readmission agreements between the community and Hong Kong, Sri Lanka and Macao have been initialled or signed. Negotiations for such agreements are on-going with Albania, Algeria, China, Morocco, Pakistan, Russia and Turkey.

In relation to the development of common minimum standards on expulsion and return, the council in May 2001 adopted directive 2001/40 on the mutual recognition of expulsion orders (OJ 2001 L149/34), in which Ireland now participates. In February 2003, the commission presented a proposal for a decision setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of this directive (COM (2003) 49 final). The Council of Ministers adopted a return action programme in November 2002 (council doc 14673/02) and a specific return programme for Afghanistan (council doc 14654/02). In January 2003, Germany proposed a directive on assistance in cases of transit for the purposes of removal by air (OJ 2003 C4/4) and this has been followed by a Spanish proposal for a directive on the obligation of carriers to communicate passenger data (OJ 2003 C82/23). In September 2003, Italy made proposals for a directive on assistance in cases of transit in the context of removal orders taken against third-country nationals (council doc 12026/03) and for a decision on the organisation of joint flights for removals of third-country nationals (council doc 12025/03, MIGR 75). The commission is planning to present a proposal for a directive on minimum standards for return procedures before the end of the year.

Free movement of third-country nationals. Chapter 3 of the directive concerning the status of long-term resident third-country nationals (see above) sets out the conditions under which those who have acquired the status under the directive in one member state may reside in other member state for periods of more than three months. Ireland has not signed up to this directive.

Asylum

Article 63(1) of the *EC treaty* provides for the adoption of measures in relation to determining the member state responsible for considering an asylum application, minimum standards on reception, minimum standards on the qualification of a person as refugee and minimum standards on procedures for granting or withdrawing the status. Article 63(2) provides for measures on refugees and displaced persons to cover temporary protection and burden sharing.

Developing the *EC treaty* framework to some extent, the October 1999 Tampere European Council set out the objective of a common European asylum system, based on the full and inclusive application of the *Geneva convention* and maintaining the principle of non-refoulement. A two-step approach was set out. In the short term, there should be a clear and workable determination of the state responsible for examining an asylum application, common standards for a fair and efficient procedure, common minimum standards of reception of asylum seekers and the approximation of rules on refugee status. In the longer term, community rules should lead to a *common* asylum procedure and a *uniform* status for those granted asylum, which should be valid throughout the union.

Ireland has opted in to a large number of the adopted and proposed asylum measures.

The member state responsible. As from September 2003, the *Dublin convention* has been generally replaced by council regulation 343/2003 establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third-country national (OJ 2003 L50/1). Norway and Iceland have agreed to be bound by the regulation. The *Dublin convention* remains in force in relation to Denmark, pending an agreement to allow participation in the regulation. Ireland (as well as the UK) participated in the adoption of the regulation and section 22 of the *Refugee Act, 1996* has been amended by the *Immigration Act, 2003* to reflect the new regulation as well as to enable the conclusion by Ireland of agreements with 'safe third countries' such as Canada and Switzerland.

The application of the *Dublin convention* and the 2003 regulation has been facilitated by the introduction by regulation 2725/2000 of the 'Eurodac' sys-

tem for the comparison of fingerprints (OJ 2000 L316/1). This community-wide information technology system for comparing the fingerprints of applicants for asylum took some time to implement and entered into operation only in January 2003. Ireland and the UK have opted in to the arrangements, but Denmark is not involved.

Reception. In January 2003, the council adopted directive 2003/9 laying down minimum standards on the reception of asylum applicants in member states (OJ 2003 L31/25). The directive, which is designed to ensure that applicants be given a dignified standard of living in the member state of reception and to prevent secondary movements based on differences in reception conditions, is to be implemented by February 2005. The UK has opted in to the directive, but Ireland has, so far, remained out, as has Denmark.

Qualification as refugee. In September 2001, the commission proposed a directive laying down minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection (COM (2001) 510 final). The proposal sets out the framework for dealing with refugees in the strict sense and those seeking subsidiary (or complementary) protection; it defines refugees, addresses the issue of non-state agents where a state is unable or unwilling to provide protection, provides for the internal protection alternative and defines when a person is unable to avail of the status. It also includes provisions on the rights and benefits to be enjoyed. Ireland has opted in. The June 2003 Thessaloniki European Council called for adoption of the directive before the end of this year.

Procedures. The commission made a proposal in September 2000 for a directive on minimum standards on procedures in member states for granting and withdrawing refugee status (COM (2000) 578 final), which was amended in 2002 (COM (2002) 326 final). The proposal sets out a series of minimum standards covering matters such as procedural guarantees, the decision-making process and common standards for applying concepts such as 'manifestly unfounded applications' and 'safe third country'. The Seville European Council called for agreement by the end of 2003. Ireland has opted in.

Temporary protection. In July 2001, the council – driven by the effects of conflicts in the Balkans – adopted directive 2001/55 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between member states in receiving such persons and bearing the consequences thereof (OJ 2001 L212/12). Member states had to implement the provisions of this directive by 31 December 2002. Ireland has recently signed up to the directive and, under commission decision 2003/690 (OJ 2003 L251/23), has until the end of 2003 to make the necessary implementing provisions.

Burden sharing. The European Refugee Fund was established by council decision in September 2000 (OJ 2000 L252/12). The aim of this financial instrument, in which Ireland participates, is to support and encourage the efforts made by the member states in receiving and bearing the consequences of receiving refugees and other displaced persons. It covers measures on reception, on integration of refugees/other people seeking protection and voluntary return. The first phase of implementation of the fund ends in December 2004, and the commission is currently proposing to submit a proposal for a new instrument, to be operational from 1 January 2005. G

John Handoll is a partner in the Dublin law firm William Fry.

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Recent developments in European law

EMPLOYMENT

Case C-422/-01 *Försäkringsaktiebolaget Skandia and Ola Ramstedt v Riksskatteverket*, 26 June 2003. Swedish legislation distinguishes between pension insurance and endowment insurance. To be considered as pension insurance, a policy must be taken out with an insurer established in Sweden. The two types of insurance are subject to different taxation rules. The effects of these rules are less favourable for endowment insurance. Ola Ramstedt is a Swedish national employed by Skandia, a Swedish undertaking. Skandia took out an occupational pension for Mr Ramstedt with an insurance company established in another member state. The Swedish Council for Advance Tax Rulings determined that this policy should be classified as endowment insurance. Skandia and Mr Ramstedt appealed this ruling to the Supreme Administrative Court, which made a reference to the ECJ. It held that the treaty rules on the provision of services apply to such a situation. Tax rules such as those in Sweden restrict freedom to provide services. The rules are liable to deter Swedish employers from taking out occupational pension insurance with institutions established in a member state other than Sweden and to deter those institutions from offering their services on the Swedish market. The ECJ did not find a convincing justification for the rules.

Case C-34/02 *Sante Pasquini v Istituto Nazionale di Previdensa Sociale*, 19 June 2003. Mr Pasquini lives in Luxembourg. He had worked for 140 weeks in Italy, 336 weeks in France and 1,256 weeks in Luxembourg. The day before his 60th birthday, he received a retirement pension from the Italian institute of social insurance to which was added a further sum to bring it up to the level of Italian pensions, as he was not receiving either a French or Luxembourg pension. A year later, in 1998, the Italian pension was reduced on account of the award of a French pension. Later that year, he was granted a retirement pension by Luxembourg but was late in informing the Italian institute about it. In 2000, the institute recalculated the Italian pension and reduced it retrospectively from 1 July 1988. To offset the overpaid sums, all pension payments ceased. Mr Pasquini brought legal proceedings challenging the Italian legislation that permitted recovery of overpayment of pensions. He argued that the legislation was incompatible with the EC regulations on the protection of employed persons. Italian law did not provide a limitation period for the bringing of an action to recover such sums. The ECJ pointed out that the purpose of the EC regulations on social security schemes are to co-ordinate rather than harmonise national legislation in this area. For the calculation of limitation periods, it is national rules which are applicable. In relation to migrant workers, the member state must exercise the power of calculating such periods in accordance with EC principles of equivalence and effectiveness. Procedures regulating rights deriving from a freedom conferred by the treaty must not be less favourable than those laid down for internal situations. They must not make it impossible or excessively difficult to exercise rights conferred by the treaty. The court looked at Italian law on pensions and noted that for domestic schemes that there was a provision requiring the institute to review, once a year, the income received by pensioners and its effect on entitlement to, or the amount of, their pension. If a similar approach had been taken for migrant workers, any overpayment would have been limited to one year. Therefore, EC law principles of equivalence and effectiveness required the institute to review once a year the situation of migrant workers in receipt of a pension.

ESTABLISHMENT

Case C-246/00 *Commission of the European Communities v Kingdom of the Netherlands*, 10 July 2003. The EC directive on driving licences provides for the mutual recognition of driving licences issued by the member states. Member states are free to apply their own national provisions in relation to the duration of the licence, medical checks and fiscal provisions. Member states are also entitled to enter onto the licence matters essential for administrative purposes where the licence-holder takes up residence in a state other than the one that issued the licence. Dutch legislation requires holders of a licence issued in another member state to register with the Dutch authorities. In the absence of registration, the licence is deemed valid from one year of establishment in the Netherlands. For those who register, their licence is approximated to the position of a Dutch licence. The commission argued that the Dutch rules failed to fulfil the obligation of mutual recognition of driving licences set out in the directive. The ECJ indicated that there are no discretions left to the member states in the directive and that mutual recognition is to be carried out without any formality. The Dutch requirement for registration is a formality that runs counter to the provisions of the directive. The Dutch government justified its measure on public interest grounds in connection with road safety. However, the ECJ held that the measure was disproportionate.

FREE MOVEMENT OF PERSONS

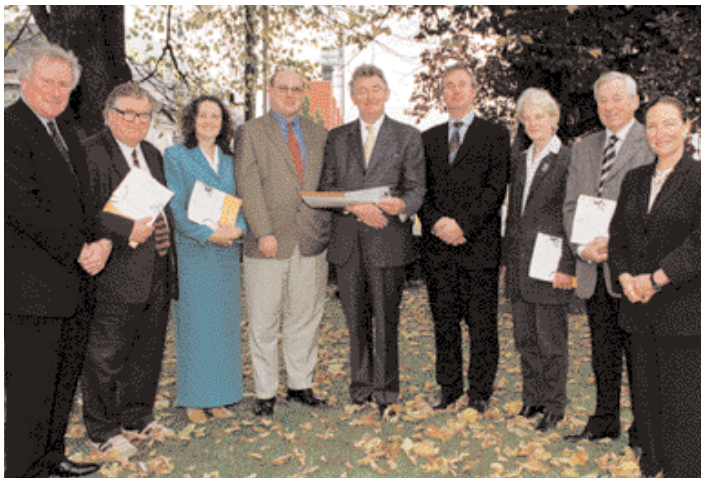
Case C-285/01 *Isabel Burbaud*, 9 September 2003. Ms Burbaud is a Portuguese national. She secured a qualification as a hospital administrator from the National School of Public Health, Lisbon, and worked in that capacity in Portugal. She sought admission to the hospital managers' corps in the French civil service and was refused on the basis that it was first necessary to pass the entrance examination of the French National School of Public Health. Ms Burbaud argued that this requirement did not recognise the equivalence of her Portuguese qualification and was thus in breach of the 1988 directive on mutual recognition of diplomas. The ECJ held that confirmation of passing this examination could be regarded as a diploma. It is for the national court to ascertain its equivalence to the Lisbon school of public health qualification. Requiring qualified candidates to pass the examination is an obstacle to the free movement of workers that is incompatible with the *EC treaty*. This requirement does not take into account qualifications in the area of hotel management gained in other member states and thus places nationals of those states at a disadvantage and makes it difficult for them to exercise their rights, as workers, to freedom of movement. The court could not find a justification for this restriction.

TORT

The commission on 22 July 2003 adopted a final proposal for a regulation on choice of law rules for non-contractual obligations. This is known as the 'Rome II' proposal – 'Rome I' refers to the proposal to convert the *Rome convention* on choice of law in contract into a regulation. The objective of the Rome II proposal is to ensure that courts in all the member states apply the same law to cross-border disputes relating to non-contractual obligations and thus facilitate mutual recognition of court rulings in the EU. The proposal focuses on civil liability for damage caused to others, particularly in case of accident such as traffic accidents or accidents caused by a defective product or in the case of invasion of privacy. It is hoped that the regulation will reduce forum shopping in these cases. The basic rule in the regulation is that the law applied will be that of the state where the damage is sustained. A number of exceptions are allowed to cover specific cases. G

Crystal clear
Pictured at a recent CPD seminar on conveyancing and taxation issues on farm disposals held in Waterford are: Brian Bohan of Bohan Solicitors, Dublin; John Purcell of Purcell & Cullen Solicitors, Waterford; and Owen Binchy of James Binchy & Son Solicitors, Co Cork

Word perfect
IT consultant Mark Hainbach *(second from left)* helping practitioners to master the core skills of word processing in the first of a series of five workshops organised by the CPD department in the Tipperary Institute, Thurles



Rights and wrongs
The Law Society and the Human Rights Commission (HRC) hosted a conference on new human rights legislation on 18 October at Blackhall Place. Pictured at the conference are: *(from left)* Mr Justice Brian Kerr, High Court of Northern Ireland; Lord Justice Laws of the Court of Appeal of England and Wales; Alma Clissmann of the society's task force on the *European convention on human rights*; James MacGuill, task force chairman; Chief Justice Ronan Keane; Michael Kealey of William Fry; Alpha Connolly, chief executive of the HRC; Dr Maurice Manning, HRC president; and Justice Rosalie Abella of the Ontario Court of Appeal

Donegal catch
The Donegal Bar Association held a dinner in July to honour the appointment of Geraldine O'Connor as the new county registrar. Pictured at the event are *(from left)* Mairin McCartney, Monaghan county registrar Josie Duffy, Circuit Court judge Matthew Deery, Geraldine O'Connor, bar association secretary Margaret Mulrine, Aideen Collard, assistant county registrar Anne McGinley and *(standing)* bar association chairman Niall Sheridan

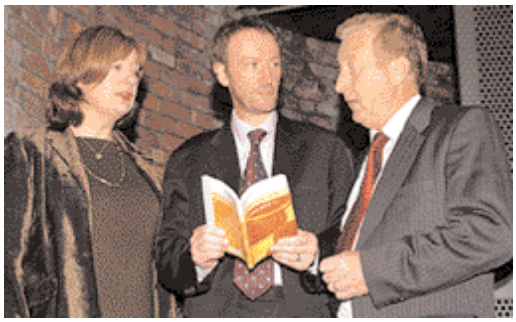
Head office
Pictured at the official opening of the new offices of Holmes O'Malley Sexton in Limerick are *(from left)* attorney general Rory Brady, managing partner Seán Hayes, chairman Gordon Holmes, justice minister Michael McDowell, and James Sexton

Down on the farm
Ballinabrackey was the venue for this year's National Ploughing Championships. Once again, the Law Society had a stand at the three-day event. Local solicitors helped out at the stand and were kept busy by a constant stream of people looking for advice on matters such as making a will and land law. The society would like to thank those solicitors – the stand would not have been possible without their support. Pictured are *(from left)* Anthony Murphy of Regan MacEntee & Partners, Co Meath; Claire O'Sullivan, Law Society members' services executive; and Michelle Nolan, information and professional development executive

Caring profession
The Law Society and the Institute of Professional Legal Studies at Queen's University, Belfast, recently held a client care workshop in Enniskillen. Pictured are *(from left)* the institute's Ruth Craig, Antoinette Moriarty, Law Society student welfare executive, and the institute's Anne Fenton

Arguing the toss
Judges, tutors and participants are pictured here at Blackhall Place on the final evening of the advanced advocacy for solicitors course, held from 15-19 September

The go-betweens
Pictured at the graduation ceremony for recipients of diplomas in mediation studies are Joanne Dwyer of the Chief State Solicitor's Office (who achieved first place) and William Devine of BCM Hanby Wallace



You're claimed
At the launch of *Small claims court in Ireland: a consumers guide* (2003), published by FirstLaw, were *(from left)* Carmel Foley, director of the Office of Consumer Affairs, FirstLaw's Bart Daly and the book's author Damian McHugh

Grand designs
The new offices of Dillon Mullins and Company have won the Royal Institute of Architects of Ireland's 2003 National Architectural Award. Pictured outside the Kinsale offices are architect Tom O'Sullivan, Patrick Mullins and Andrew Dillon

Counting the costs
Pictured in Limerick at the recent annual conference of the Institute of Legal Accountants are: *(from left)* Bart Mooney, secretary; Kay Webberley, treasurer; guest speaker Paddy Glynn; and chairman John Hogan

Working on the chain gang
Changing of the guard in the Dublin Solicitors' Bar Association on 29 October: John O'Connor receives the chain of office from outgoing president James McCourt

LOST LAND CERTIFICATES

Registration of Title Act, 1964
An application has been received from the registered owners mentioned in the schedule hereto for the issue of a land certificate as stated to have been lost or inadvertently destroyed. A new certificate will be issued unless notification is received in the registry within 28 days from the date of publication of this notice that the original certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the certificate is being held.
(Register of Titles), Central Office, Land Registry, Chancery Street, Dublin
(Published 7 November 2003)

Regd owner: John and Matthew Lacey, Drumcarey, Corlismore, Co Cavan; folio: 19003; lands: Dingins; area: 0.2276 hectares; **Co Cavan**

Regd owner: Sean Fennelly; folio: 4388; lands: Kilcarry, Clonegal in the county of Carlow; **Co Carlow**

Regd owner: Daniel Boland and Margaret Boland: folio: 25633; lands: (1) Kilballyowen, (2) Carrowmore South and barony of (1) Moyarta, (2) Ibrickan; area: (1) 0.3970 hectares (2) 0.2402 hectares; **Co Clare**

Regd owner: Frank Doherty; folio: 24047F; lands: townland of Lifford and barony of Islands; **Co Clare**

Regd owner: The Council of the Urban District of Ennis; folio: 19510; lands: townland of Lifford and barony of Islands; area; 1.2899 hectares; **Co Clare**

Regd owner: Michael Kennelly (deceased); folio: 17644; lands: townland of Leeds and barony of Ibrickan; area: 7.6232 hectares; **Co Clare**

Regd owner: Denis McInerney (deceased) and Mary McInerney (deceased); folio: 648; lands: townland of Lisduff and barony of Tulla Upper; area: 8.1038 hectares; **Co Clare**

Regd owner: Joseph Mulvihill (deceased); folio: 24080; lands: townland of (1) Killerk West, (2) and (3) Islandavanna Upper (Intake) and barony of (1), (2) and (3) Islands; area: (1) 10.0413 hectares, (2) 1.0825 hectares, (3) 1.0598 hectares; **Co Clare**

Regd owner: Francis O'Halloran (deceased) and Maura O'Halloran; folio: 6134F; lands: townland of Cahircalla More and barony of Islands; area 0.481 acres; **Co Clare**

Regd owner: Timothy Tuohy and Patrick Tuohy; folio: 1240; lands: Garryeighter and barony of Leitrim; area: 3.8825 hectares; **Co Clare**

Regd owner: Clodagh Gleeson; folio: 93552F; lands: a plot of ground being part of the townland of Castleredmond and barony of Imokilly in the county of Cork; **Co Cork**

Regd owner: Thomas Kenneally (deceased); folio: 59791; lands: a plot of ground being part of the townland of Glengarrif More and barony of Barrymore and county of Cork; **Co Cork**

Regd owner: Philip Murphy and Harriet Murphy; folio: 68411F; lands: a plot of ground being part of the townland of Trabolgan and barony of Imokilly in the county of Cork; **Co Cork**

Regd owner: Edmond O'Brien; folio: 14131F; lands: a plot of ground being part of the townland of Moydilliga and barony of Condons and Clangibbon in the county of Cork; **Co Cork**

Regd owner: Ellen Leslie Jacqueline Day, Moress Farm, Inch Island, via Lifford, Co Donegal; folio: 27362; lands: Bo Island; area: 1.9526 hectares; **Co Donegal**

Regd owner: Francis Drohan, 9 Beechmount Grove, Navan, Co Meath; folio: 10531F; lands: Cashelshanaghan; area: 0.500 acres; **Co Donegal**

Regd owner: Eamonn Byrne and Geraldine Byrne; folio: DN113743F; lands: property known as site no 32 Springlawn Road situate in the town of Blanchardstown and parish of Castleknock; **Co Dublin**

Regd owner: Oliver Canniffe and Mary Canniffe; folio: DN60017L; lands: property known as 32 Swilly Road situate in the parish of Grangegorman and district of North Central; **Co Dublin**

Regd owner: Alan Bennett; folio: DN115492F; lands: (1) property situate in the townland of Ballisk and barony of Nethercross (plan G5J2), (2) property situate in the townland of Ballalease North and barony of Nethercross (plan G5J3); **Co Dublin**

Regd owner: Marion Coyle; folio: DN65874L; lands: property known as no 47 Thornville Road situate in the parish and district of Kilbarrack; **Co Dublin**

Regd owner: Andrew Crichton; folio: DN141778F; lands: a plot of ground known as 1 Bramblefield Drive, Blanchardstown situate in the townland of Huntstown and barony of Castleknock shown as plan H43M; **Co Dublin**

Regd owner: Gerald D Furey and Philomena Furey; folio: DN5986F; lands: property situate in the townland of Rathmines Great and barony of Rathdown; **Co Dublin**

Regd owner: David and Bernadette Keith; folio: DN21042F; lands: property situate in the townland of Kellystown and barony of Castleknock; **Co Dublin**

Regd owner: Eamonn Peel and Karen Lafford; folio: DN137982F; lands: property known as site no 71 Fforster Park, Ballydowd Manor, Lucan, situate in the townland of Ballyowen and barony of Newcastle; **Co Dublin**

Regd owner: Tarig Mohamed and Eiman Salih; folio: DN128213F; lands: property situate in the townland of Porterstown and barony of Castleknock; **Co Dublin**

Regd owner: Kieran Murray and Margaret Murray; folio: DN33880L; lands: property situate on the east side of Crawford Avenue in the parish of Saint George and district of Drumcondra; **Co Dublin**

Regd owner: John O'Byrne and Fiona Foley; folio: DN8712F; lands: property situate in the townland of Priorswood and barony of Coolock; **Co Dublin**

Regd owner: Colm Christopher Perry; folio: DN19208; lands: property situate in the townland of Oldcourt and barony of Uppercross; **Co Dublin**

Regd owner: Bernard (senior) Williams and Mary Williams; folio: DN21410L; lands: property known as 26 Leighlin Road situate in the parish of Crumlin, district of Terenure; **Co Dublin**

Regd owner: the county council of the county of Dublin; folio: DN14005; lands: (1) property situate in the townland of Roebuck and barony of Rathdown plan no 143; (2) property situate in the townland of Roebuck and barony of Rathdown plan no 13, 16, 18; (3) property situate in the townland of Roebuck and barony of Rathdown plan no 5; **Co Dublin**

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

Regd owner: Patrick J Kerins (deceased) folio: 8033; lands: townland Ballinastaig (Kiltartan By); **Co Galway**

Regd owner: George Nelissen and Mary Nelissen; folio: 35709F; lands: townland of Ballinderreen and barony of Dunkellin; area: 0.164 hectares; **Co Galway**

Regd owner: Brian Noone; folio: 53384; lands: townland of (1) and (2) Gortnaboha, (3) Caraun More and (4) Cappaghnanool and barony of (1), (2), (3), and (4) Kilconnell; area: (1) 13.3684 hectares, (2) 1.5428 hectares, (3) 3.7028 hectares, (4) 0.9231 hectares; **Co Galway**

Regd owner: Michael Seoighe and Grainne Seoighe; folio: 39628F; lands: townland of Keeraunbeg and barony of Moycullen area; **Co Galway**

Regd owner: Patrick Spellman and Mary Spellman, Ballyglass, Ahascragh, Ballinasloe, Co Galway; folio: 20865F; lands: townland of (1) Ballyglass, (2) Fairfield, (3) Cool, (4) Cool, (5) Cool and barony of (1), (2), (3), (4), (5) Clonmacnowen; area: (1) 6.9930 hectares, (2) 0.5470 hectares, (3) 1.3030 hectares, (4) 1.7270 hectares, (5) 1.5120 hectares; **Co Galway**

Regd owner: Joan O'Callaghan; folio: 17999; lands: townland of Laharan and barony of Trughanacmy; **Co Kerry**

Regd owner: Jeremiah Joseph Lynch; folio: 18194 Kerry; lands: townland of Derreen and barony of Iveragh; **Co Kerry**

Regd owner: Michael and Majella Bermingham; folio: 12420F; lands: townland of Aghards and barony of North Salt; **Co Kildare**

Regd owner: Eamonn and Stella Hogan; folio: 11315; lands: townland of Garterfarm and barony of Kilkea and Moone; **Co Kildare**

Regd owner: Edward McBride and Mairead Rohan; folio: 32092F; lands: townland of Barnhall and barony of North Salt; **Co Kildare**

Regd owner: Patrick Murphy; folio: 1653; lands: townland of Brownstown Lower and barony of Offaly East; **Co Kildare**

Regd owner: Christopher Ward; folio 12381; lands: townland of Mulgeeth and barony of Carbury; **Co Kildare**

Regd owner: John Egan (junior); folio: 14479; lands Clonfinlough and barony of Garrycastle; **Co Kings**

Regd owner: Liam Davis; folio: 26526; lands: townland of Gortboy and barony of Glenquin; **Co Limerick**

Regd owner: Mary O'Brien, Rawleystown, Grange, Kilmallock, Co Limerick; folio: 25705; lands: townland of Rawleystown and barony of Smallcounty; area: 33.250 acres or thereabouts like measure; **Co Limerick**

Regd owner: Josephine O'Brien; folio: 2813F; lands: townland of Ballymartin and barony of Kenry; **Co Limerick**

Regd owner: Nicola O'Halloran and Patrick Frawley; folio: 3894L; lands: Co Limerick, Co Borough; **Co Limerick**

Regd owner: Jeremiah Ryan; folio: 5450; lands Moohane and barony of Smallcounty; **Co Limerick**

Regd owner: John and Lucy Walsh; folio: 4901 and 31079F; lands: townland of Bilboa and barony of Coonagh; **Co Limerick**

Regd owner: John Dermot and Briege McArdle, 'Hawthorn', Dublin Road, Dundalk, Co Louth; folio: 10285; lands: Marshes Upper; area: 0.1694

hectares; **Co Louth**

Regd owner: Samuel Strahan, Coolfore, Monasterboice, Drogheda, Co Louth; folio: 16010F; lands: Coolfore; area: 6.8510 hectares, 1.4860 hectares and 4.2900 hectares; **Co Louth**

Regd owner: Mary Gibbons (deceased) and Donal Gibbons; folio: (1) 10098F and (2) 10099F; lands: townland of (1) and (2) Boheh (Ed Knappagh) and barony of Murrisk; area: (1) 0.165 hectares, (2) 0.8854 hectares; **Co Mayo**

Regd owner: Michael Mulhearn; folio: 20224; lands: townland of Knockalegan and barony of Tirawley; area: 0.9535 hectares; **Co Mayo**

Regd owner: John Walsh, Errew, Castlehill, Ballina. Co Mayo; folio: 26319; lands: (1), (2) & (3) Errew and barony of Tirawley; area: (1) 30 acres, 3 roods 8 perches, (2) 14 acres, 1 rood 20 perches, (3) 5 acres, 2 roods, 4 perches; **Co Mayo**

Regd owner: William Davey, Johnstown Road, Enfield, Co Meath; folio: 21294; lands: Newcastle; **Co Meath**

Regd owner: Ian and Deirdre McKeown, 19 Abbeygrove, Navan, Co Meath; folio: 19091F; lands: Wyanstown; area: 0.2240 hectares; **Co Meath**

Regd owner: William John Harvey, Dernashallog, Emyvale, Co Monaghan; folio: 6545; lands: Derrynashallog; area: 6.8821 hectares; **Co Monaghan**

Regd owner: Patrick McCartney, Derryolam, Carrickmacross, Co Monaghan; folio: 20732; lands: Derryolam; area: 1.9424 hectares and 7.660 hectares; **Co Monaghan**

Regd owner: James O'Neill, Tirnadrola, Co Monaghan; folio: 4941; lands: Tirnadrola; area: 3.6421 hectares; **Co Monaghan**

Regd owner: Patrick Carey (deceased); folio: 9584; lands: Rusheen, Mucklone West and Glasshouse and barony of Clonlisk; **Co Offaly**

Regd owner: Raymond Mary Milne (deceased) and Teresa Milne; folio: 1565F; lands: Crinkill and barony of Ballybrit; **Co Offaly**

Regd owner: Christina Garvey (deceased); folio: 17316; lands: (1) Tonbaun and (2) Brierfield and barony of (1) and (2) Ballymoe; **Co Roscommon**

Regd owner: John Keenan (deceased); folio: 4432; lands: townland of Lung and barony of Costello; area: 6.2700 hectares; **Co Roscommon**

Regd owner: Beatrice Sexton; folio: 3866; lands: Kilrush-Eighter; **Co Sligo**

Regd owner: Brian Murray; folio: 21444; lands: townland of Cloghonan and barony of Ormond Upper; **Co Tipperary**

Regd owner: Sorcha Flannery; folio: 30353; lands: townland of Coolboreen/Gortshane Middle/Annaholty and barony of Owney and Arra; **Co Tipperary**

Regd owner: Cashel Cattle Mart; folio: 3082F; lands: townland of Wallers Lot and barony of Middlethird; **Co Tipperary**

Regd owner: Sean Loran, Milltownpass, Co Westmeath; folio: 11471; lands: Milltown; area: 0.9737 hectares; **Co Westmeath**

Regd owner; Kevin Philip Alcorn; folio: 8610; lands: townland of Ballydowling and barony of Newcastle; **Co Wicklow**

WILLS

Cavanagh, Catherine (deceased), late of 37 Upper Church Street, Tipperary Town, otherwise 37 Upper Davitt Street, Tipperary Town, otherwise New Road (or Limerick Road), Tipperary Town. Would any person having knowledge of a will made by the above named deceased, who died on 14 December 1992, please contact Fearghal Holmes, Solicitors, 8 St Michael's Street, Tipperary; tel: 062 52577 or fax: 062 52729; e-mail: fearghal-holmes@englishleahy.ie

Concannon, Thomas (deceased), late of 28 Allen Park, Stillorgan, Co Dublin. Would any person having knowledge of a will made by the above named deceased, who died on 17 August 2003 at St Vincent's Hospital, Dublin 4, please contact Michael Sheil & Associates, Solicitors, Temple Court, Temple Road, Blackrock, Co Dublin; tel: 01 288 1150

Corcoran, Margaret (deceased), last of Church Road, Carrigaline East, Co Cork. Would any person having any knowledge of a will made by the above named deceased, please contact Michael Quinlan of Murphy English & Co, Solicitors, Sunville. Cork Road, Carrigaline, Co Cork, tel: 021 437 2425, fax: 021 437 3978

Davidson, Claude (deceased), late of 136 Broadford Rise, Ballinteer, Dublin 16 and formerly of Flat 3, Castle Street, Ramelton, Co Donegal. Would any person having knowledge of a will made by the above named deceased who died on 31 August 2003 at Letterkenny General Hospital, Donegal, please contact Marie O'Brien, Sheedy & Co, Solicitors, 1 Upper Kilmacud Road, Dundrum, Dublin 14; tel: 01 298 9622

Downes, Kathleen (deceased) late of 10 Bowman Street, Limerick and also of Roseville House Nursing Home, Killonan, Ballysimon, Limerick. Would any person having any knowledge of a will made by the above named deceased who died on 17 September 2003 at Rosevillle House Nursing Home, Limerick, please contact: Johnson & Johnson, Solicitors, Ballymote, Co Sligo, ref: T116; tel: 071 918 3304, fax: 071 918 3526, e-mail: Johnson.Johnson@securemail.ie

Galvin, Desmond Joseph (deceased), late of 43 Hardiman Road, Drumcondra, Dublin 7. Would any person having knowledge of a will made by the above named deceased who died on 12 August 1980 at Jervis Street Hospital, please contact Bryan F Fox & Co, Solicitors, 46 North Circular Road, Dublin 7

Galvin, Ann (deceased), late of 43 Hardiman Road, Drumcondra, Dublin 7. Would any person having knowledge of a will made by the above named deceased who died on 3 March 2002 at Wexford General Hospital, please contact Bryan F Fox & Co, Solicitors, 46 North Circular Road, Dublin 7

McCabe, Eithne (otherwise Mary B, otherwise Mary Bernadette) (deceased) late of 50 Shanard Avenue, Santry, Dublin 9. Would any person having knowledge of a will made by the above named deceased who died on 25 September 2003, please contact PJ O'Driscoll & Sons, Solicitors, 179 Church Street, Dublin 7; tel: 01 872 8144, fax: 01 872 8425

Mooney, Edward Michael (deceased) late of Glencree, Co Wicklow and Kilnamanagh, Dublin 24 and also of Kiltulla, Co Galway. Would any person having any knowledge of a will executed by the above named deceased who died in or around 12 June 2003, please contact John O'Connor, Solicitors, Ballsbridge, Dublin 4; tel: 01 668 4366, fax: 01 668 4203

Redmond, Teresa (deceased) (housewife) late of 137 Mount Tallant Avenue, Harold's Cross, Dublin. Would any person having knowledge of a will made by the above named deceased who died on 19 November 1992, please contact O'Connor Buckley & Co, Solicitors, 22 Upper Ormond Quay, Dublin 7; tel: 01 872 6583; fax: 01 872 6579, ref: VB

O'Shea, Esther (deceased), widow, late of 67 Sperrin Road, Drimnagh, Dublin 12. Would any person having knowledge of a will made by the above named deceased who died on 25 December 1987, please contact Loraine Hanratty, Egan Cosgrove & Associates, Solicitors, 138 Sundrive Road, Crumlin, Dublin 12; tel: 01 473 0222/473 0223/473 0224, fax: 01 473 0225

O'Sullivan, Patrick J (deceased), late of No 2 Diswellstown, Castleknock, Dublin 15. Would any person having knowledge of a will made by the above named deceased who died on 8 August 2003, please contact Seamus Maguire & Co, Solicitors, 10 Main Street, Blanchardstown, Dublin 15; tel: 01 821 1288, fax: 01 821 1442

O'Toole, Andrew (deceased), late of 96 Mangerton Road, Drimnagh, Dublin 12. Would any person having any knowledge of a will made by the said deceased who died on 3 July 2002 at St James' Hospital, Dublin. The contact details are Cannons, Solicitors, 1-3 Sandford Road, Ranelagh, Dublin 6; tel: 01 497 6555, fax: 01 497 1409

Skelton, Margaret (deceased), late of Rowan, Clonee, Co Meath. The personal representatives are Noel and Michael Skelton. Would any person having knowledge of a will made by the above named deceased who died on 10 April 2002 at Rowan, Clonee, Co Meath, please reply to Oliver Shanley & Co, Solicitors, 11 Bridge Street, Navan, Co Meath; tel: 046 902 8333, fax: 046 902 9937

EMPLOYMENT

Locum solicitor required for general practice in Ennis, commencing January 2004 for four months – experience in conveyancing or litigation required. Newly qualified solicitor with experience in general practice will be considered. Please reply to Cahir & Co, Solicitors, 36 Abbey Street, Ennis, Co Clare

Equity partner required for busy commercial south eastern practice. Would suit somebody wanting to move away from Dublin. Please reply to **box no 90**

Experienced solicitor available for locum/part-time work in north Kerry area, please contact **box no 91**

Solicitors (two) required for established Killarney practice: (1) conveyancing and (2) litigation. Reply to **box no 92**

Solicitor required for a busy west Cork general practice. Please reply with CV to **box no 93**

Conveyancing and probate solicitor, very experienced, seeks position in Dublin or adjoining counties. Please reply to **box no 94**

Well-established Cork practice seeks ambitious solicitor with 2/3 years' PQE to work in litigation and commercial property. Candidate must be self-driven, aspire to partnership and possess high professional standards. Salary and excellent package negotiable. CVs to John McInerney, Personnel Division, Gorman Quigley Penrose, Chartered Accountants, 31 Greenmount Office Park, Dublin 6

MISCELLANEOUS

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

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

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

England & Wales solicitors will provide comprehensive advice and undertake contentious matters. Offices in London, Birmingham, Cambridge and Cardiff. Contact Levenes Solicitors at Ashley House, 235-239 High Road, Wood Green, London 8H; tel: 0044 2088 17777, fax: 0044 2088 896395

Solicitor wishes to acquire a general practice/block of clients in the Dublin area. May suit sole practitioner planning a phased retirement. Apply in strictest confidence to Michael J Joyce & Co, Chartered Accountants, Claregate Street, Kildare Town, Co Kildare

Wanted for purchase, full ordinary seven-day publican's licence. Contact: Ronan Connolly, Solicitor, Ennis, Co Clare. Tel: 065 682 3577

TITLE DEEDS

Philip McGuinness (deceased), and Gertrude McGuinness of 38 Gosworth Park, Dalkey, Co Dublin. Would anyone having knowledge of original title documentation relating to 38 Gosworth Park, Dalkey, Co Dublin, please contact John Henchion & Co, Solicitors, 2 Sunberry, Blarney, Co Cork, tel: 021 438 2870/ 438 2871, fax: 021 438 2876

In the matter of the *Landlord and Tenant Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978* and in the matter of premises situate at no 32/33 Stephen Street in the city of Waterford: an application by Edward Roles

Take notice that any person having any interest in the freehold estate of or the superior interest in the hereditaments and premises situate at nos 32 and 33 Stephen Street in the parish of St Stephen's Within and city of Waterford, which said premises are held under an indenture of lease dated 22 April 1965 and made between Ian Barclay Justly Wilson, Ann RH Weir, Margaret R Daniel and Audrey Nolan of the one part and Edward Roles of the other part for a term of 99 years from 25 March 1963 subject to a yearly rent of IR£36.

Take notice that the applicant, Edward Roles, being the person entitled under sections 9 and 10 of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978*, intends to submit an application to the county registrar for the county and city of Waterford for the acquisition of the freehold interest in the aforesaid premises (or any of them) and that any party asserting that they hold a superior interest in the aforementioned premises are called upon to furnish evidence of title to the aforementioned premises to the below within 21 days from the date of this notice.

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

Date: 7 November 2003
Signed: Nolan Farrell & Goff, Solicitors, Newtown, Waterford (Ref MOC)

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

Take notice that any person having an interest in the freehold estate in the following property: all that and those the hereditaments and premises known as number 5 St Ignatius Road, Drumcondra, Dublin 9, held under lease dated 14 October 1879 and made between Maurice Butterly of the one part and William Marmion of the other part for the term of 194 years from 29 September 1879 subject to the yearly rent of £6 (€7.62) and to the covenants and conditions contained therein.

Take notice that Gerard Butler intends to submit an application to the county registrar for the county of the city of Dublin for the acquisition of the fee simple interest in the aforesaid property and any party asserting that they hold a superior interest in the aforesaid property is 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, the applicant Gerard Butler intends to proceed with the application before the county registrar at the end of the 21 days from the date of this notice and will apply to the county registrar for the county of the city of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the aforesaid property are unknown or unascertained.

Date: 7 November 2003
Signed: Reddy Charlton McKnight, 12 Fitzwilliam Place, Dublin 2

In the matter of the *Landlord and Tenant Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rent) (No 2) Act, 1978*: an application by Liam McGill and respondent successors in title of Fletcher Moore

Take notice that the above named applicant is applying to acquire the fee simple interest in the property hereinafter described pursuant to the above acts. Further take notice that any person having an interest in the following property: part of the lands comprised in indenture of lease dated 15 November 1877 and made between Fletcher Moore of 12 Hume Street, Dublin, barrister at law of the one part and John Gillespie of West Port, Ballyshannon, Co Donegal of the other part, being premises located at West Port, town of Balyshannon, barony of Tyrhugh and county of Donegal.

Take notice that Liam Magill intends to apply to the county registrar of the county of Donegal for the acquisition of the freehold interest in the aforesaid property and any party asserting that they hold a superior interest in the aforesaid property is called upon to furnish evidence of title to the aforementioned premises to the below named within 21 days from the date of this notice. In default of any such notice being received, Liam Magill intends to proceed before the county registrar for the county of Donegal for direction as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the premises are unknown and unascertained.

Date: 7 November 2003
Signed: F Hutchinson & Company, Tirconnell Street, Ballyshannon, Co Donegal (solicitors for the applicant)

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

Notice to any person having any interest in the freehold estate of the following property – the plot of ground in Jail Street (formerly known as Crabb Road or Crab Road) in the town of Newport with the premises erected thereon and now known as The Hall, Newport, Co Tipperary.

Take notice that the applicant intends to submit an application to the county registrar for the county of Tipperary for the acquisition of the freehold interest in the aforesaid property and 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 at the date of this notice.

In default of any such notice being received, Thomas McCormack intends to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the county of Tipperary 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: 7 November 2003

Signed: Eamonn O'Brien (solicitors for the applicant), 98 O'Connell Street, Limerick

In the matter of the *Landlord and Tenant Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978*: an application by Patrick Thornton, 32 Avenue Road, South Circular Road, Dublin 8 (formerly 32 Bloomfield Avenue, South Circular Road, Dublin 8

Take notice that any person having an interest in the freehold estate of the following property: the premises known as 32 Avenue Road, South Circular Road, Dublin 8 (formerly 32 Bloomfield Avenue, South Circular Road, Dublin 8).

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

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

Date: 7 November 2003

Signed: Miley & Miley (solicitors for the applicant), 35 Molesworth Street, Dublin 2, ref 12/EC

In the matter of the *Landlord and Tenant Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978* and in the matter of property situate at the rear of 33 Thomas Street Dublin 8: an application by John Clohisey, Finbar Cahill and Andrew Madden

Take notice that any person having any interest in the freehold estate of the following property: all that and those the hereditaments and premises situate at the rear of 33 Thomas Street, Dublin 8, being part of the premises comprised in and demised by indenture of lease dated 12 June 1928 and made between Alnetta Jane Sawyer of the one part and Mary Anne Byrne of the other part.

Take notice that John Clohisey, Finbar Cahill and Andrew Madden intend 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, John Clohisey, Finbar Cahill and Andrew Madden intend to proceed with the application before the county registrar at the end of the 21 days from the date of this notice and will apply to the county registrar for the county of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest and that the person or persons beneficially entitled to the superior interest including the freehold reversion in the aforementioned property are unknown or unascertained.

Date: 7 November 2003

Signed: Cahill & Co Solicitors, 21 Winsor Place, Dublin 2