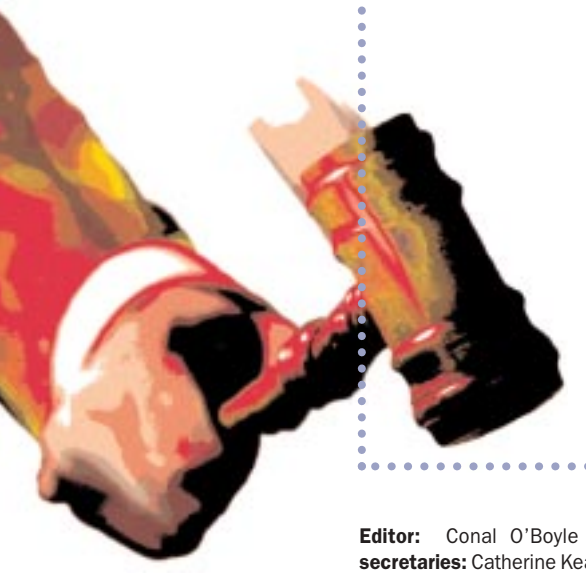
Law Society Gazette

Regulars

Cover Story



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LEGAL EXECS LAUNCH CPD PROGRAMME

The Irish Institute of Legal Executives has launched its own continuing professional development programme. Solicitors who attend seminars will be credited for their attendance if the subject is beneficial and relevant to their area of practice. The first two seminars, on tort/company law and conveyancing respectively, will take place on Thursday 16 October and Thursday 23 October from 7-9pm. For further information, contact Naomi Murphy on tel: 01 639 5398.

ADVANCED ADVOCACY COURSE IN IRISH

The King's Inns is offering a 14-lecture course in advanced advocacy and legal drafting in Irish. Open to solicitors as well as barristers, the course may benefit practitioners who already have a conversational working knowledge of Irish. The course runs on Monday evenings, starting 13 October, from 6.30 to 8.30pm. For further details, contact Dáithí Mac Cárthaigh at the Law Library on tel: 01 817 5251.

LAW SOCIETY OF IRELAND RETIREMENT TRUST SCHEME

Unit prices: 1 September 2003
Managed fund: 409.819c
All-equity fund: 96.052c
Cash fund: 251.779c
Long bond fund: 107.031c

New time limits 'will hurt real claimants'

Government proposals to shorten the time period within which people can bring personal injuries actions will penalise genuine claimants and lead to an increase in litigation, the Law Society has claimed.

The recently-published heads of the *Civil Liability and Courts Bill* aim to reduce the statute of limitations period for bringing PI claims from three years to one year. But in a written submission to justice minister Michael McDowell, the society argues that the proposal will make little difference to 'claimants who see an injury primarily as a way to make a "quick buck"', while genuine claimants 'often have to be persuaded by family and friends to assert their rights'.

'If the objective of the legislation is to discourage fraudulent or exaggerated cases', the submission says, 'this proposed amendment of the *Statute of Limitations* may in fact penalise many genuine claimants while making little difference to less meritorious claims'.

The society also notes that such a change would only serve to distort the *Statute of Limitations* itself. 'It is impossible to justify that a large corporation in a commercial dispute would have five times longer to decide whether it wishes to sue another party than a citizen who has suffered personal injuries'.

McDowell: his new proposals may penalise genuine claimants

Among many other points raised in its submission, the society argues that the proposed new requirement that plaintiffs swear a verifying affidavit in relation to the underlying truth of their pleadings should also apply to defendants. 'To provide otherwise would be to imply that only plaintiffs have the potential to lie or exaggerate and have an interest in doing so. The rules of court should not suggest that the evidence of one party is inherently more credible or incredible that that of another party'.

New hope for *Legal diary*

A new printer has been found to publish the *Legal diary*. Since the demise of Mount Salus Press, the diary's publisher for many years, there has been no broadsheet diary available to practitioners. But recently Cahill Printers contacted practitioners, asking those who would be interested in subscribing to a diary to let them know. The cost of the subscription will depend on demand. Anyone interested in subscribing should contact Cahill Printers on tel: 01 241 2000 or e-mail: printlegaldiary@cahill-printers.ie. Meanwhile, a downloadable version of the diary continues to be available on the Courts Service website at *www.courts.ie*.

ONE TO WATCH: NEW LEGISLATION

Licensing of Indoor Events Act, 2003

A committee chaired by Mr Justice Liam Hamilton reported in 1990 on public safety and crowd control at big public events, such as pop concerts. This act implements the recommendations of that report. According to environment minister Martin Cullen, speaking in the Dáil, *'the act will allow public authorities to prevent or control potentially unsafe concerts for the benefit of performers and the public alike. Currently there is no adequate mechanism in place to regulate public safety at indoor concerts and events. The gardaí, health boards and fire authorities have limited powers prior to an event. This legislation ... will require promoters and organisers to demonstrate to the fire authority in advance of an event that they can run the event safely. [The legislation] has the subsidiary purpose of strengthening the enforcement procedures of the* Fire Services Act, 1981*, as recently recommended by the report on the review of fire safety and fire services in Ireland. These proposed amendments, together with the enforcement provisions proposed in respect of the new indoor event licensing system, will enable a more immediate response to situations requiring enforcement action'.*

Part 3 was commenced by SI 291/03 on 10 July last. It deals with amendments to the *Fire Services Act, 1981*, such as extending the definition of building to include part of a building; giving an option to prosecute certain offences summarily and increasing the penalties; and empowering the fire authority to advise a planning authority. It puts beyond doubt the duty of those in control of premises to ensure people's safety, whether or not fire has actually broken out, and to institute fire safety measures and procedures. It also extends the powers of a fire authority to give 'advice', which includes warnings and recommendations, and to carry out precautionary assessments and work. A fire authority is given additional power in appropriate circumstances to

Society wants level playing field for PIAB

The Law Society has written to the tánaiste and all others involved in decisions on the proposed *Personal Injuries Assessment Board Bill*, urging, in the interests of fairness, that an unrestricted right of representation be given to every party dealing with the PIAB, *writes Ken Murphy*.

The anti-claimant bias that the society detects in the whole PIAB project is demonstrated once again in the explanatory note to the heads of bill, which says that 'the PIAB will communicate directly with claimants and will not be obliged to communicate via legal representatives'.

The government's own PIAB Implementation Group, in a report published less than a year ago, recognised unreservedly that claimants would need solicitors to represent them and their interests and that the cost of this should be borne by the PIAB. Initially, the government accepted this, but then changed its mind.

The Law Society believes that trying to avoid

Murphy: 'Justice requires equal treatment'

representation by claimants at the PIAB, with the likely result that the claim will not be formulated properly and claimants will lose out as a result, is unfair.

There is no doubt that well-resourced and experienced professional assistance will be available to insurance companies and the businesses whose negligence may have given rise to the claim. Justice requires equal treatment.

Warning on VAT and property transactions

The society's Probate, Administration and Taxation Committee wants to draw practitioners' attention to changes to section 4(3A) of the *Vat Act, 1972* brought about by section 113 of the 2003 *Finance Act*. Section 4(3A) has been in operation since 25 March 2002.

Failure to deal properly with VAT issues on the granting of a lease and the assignment or surrender of a lease of VATable property can have serious consequences for clients. Practitioners are advised to consider carefully matters relating to section 4(3A), and indeed other provisions dealing with VAT and property, and should seek assistance where appropriate.

An article on the implications of the *VAT Act, 1972*, section 4(3A) as amended, was published in the May issue of the *Gazette* (page 18).

NEW APPOINTMENT AT LRC

Barrister Raymond Byrne, former editor of the *Irish law times*, has been appointed director of research at the Law Reform Commission. Byrne, a law lecturer at Dublin City University, has written extensively on areas such as commercial law, criminal procedure and occupational health and safety.

MEDIATORS' CONGRESS

The Centre for Effective Dispute Resolution is holding its first mediators' congress in London on 20 November. CEDR says that the event should be of interest to mediators, lawyers, judges, policy makers and researchers. Further details can be found at *www.cedr.co.uk/congress*.

CORPORATE OFFENCES SEMINAR

The Law Society's Corporate and Public Sector Committee is holding a seminar on compliance with corporate offences legislation on 13 October at Blackhall Place. The seminar runs from 2-6pm and is followed by a reception. Speakers include John Fingleton, chairman of the Competition Authority, Joe Kelly, head of Goodbody's corporate offences unit, and Vincent Power of A&L Goodbody's EU regulatory and competition unit. The seminar costs €50 and provides 3.5 group study hours of CPD.

close a building. This may be appealed when the problem is remedied. It provides that the minister may draw up a code of practice to give practical guidance under the principal act, as amended.

Part 2 deals with indoor events and should be commenced before the end of the year. It is currently the subject of consultation and preparation, including the training of fire officers and work on guidelines and regulations.

The key provisions of the act are contained in section 5. It provides that a licence shall be required for the holding of an indoor event falling within a class to be prescribed by the minister. The Hamilton report recommended that events involving over 2,000 people should be required to be licensed. The act contemplates more than one class. The licensing authority is the local fire authority, and it may grant a licence for one or more events, with or without conditions, for up to one year. The minister may make regulations for the application and granting procedure. The licence must be displayed, and it is an offence to hold or to be materially involved in the organisation of an outdoor event requiring a licence without one. The owner or occupier may also be liable.

The fire authority must make a decision within 28 days after all requirements have been complied with, unless extra time is needed. There is provision for other emergency services, the gardaí, the health boards and ambulance services to be involved at the licensing stage and during follow-up inspections. Section 6 lists the considerations to be taken into account in arriving at a decision to grant or refuse an application, and the types of conditions that may be imposed. Section 7 makes it clear that having a licence is not necessarily sufficient to hold an indoor event; other regulations must also be considered. Appeals are heard by the District Court. The minister is empowered to draw up a code of practice to give practical guidance. A code of practice for safety at indoor concerts has

CLASS ACTION FOR OLD MATES

A celebratory dinner will be held for those solicitors who qualified in 1972/73 on Friday 7 November in the President's Hall at Blackhall Place. Full details will be sent to those solicitors within the next few weeks.

LAW FIRMS MERGE

Dublin law firms Eugene F Collins and George D Fottrell & Sons have recently merged their practices. As a result of the merger, Eugene F Collins will now have a complement of 30 solicitors and three consultants.

LICENSED TO THRILL

The Licensing Executive Society of Britain and Ireland is running a seminar on *Protecting your web identity: tips and pitfalls for on-line branding* on Thursday 9 October. Speakers include Brian McGurk of solicitors Bradley McGurk; Conor Moran of Irish Domains Ltd; Mary Bleahene of FR Kelly & Co; and Niall Rooney of Tomkins & Co. The seminar will be held in Dublin's Shelbourne Hotel from 9am to 2.30pm and costs €85, including lunch. For more details, contact Yvonne McNamara at yvonne.mcnamara@mccannfitzgerald.ie or Laura Scott at laura.scott@mccannfitzgerald.ie.

Society backs drive towards 'plain English'

The Law Society has thrown its weight behind the use of plain English in legislation and the courts. Speaking at the recent launch of *A plain English guide to legal terms*, director general Ken Murphy said that clients should no longer walk out of a courtroom asking 'what happened?'.

Murphy said that the use of 'legalese' by members of the profession was often unconscious but that, in its training courses, the society was placing great emphasis on the use of ordinary language. He added that 'the Law Society is committed to the elimination of unnecessarily obscure language which acts as a barrier to public understanding'.

Ken Murphy speaking at the launch of the plain English booklet, watched by NALA's Tommy Byrne and Inez Bailey and past-president Pat O'Connor

The booklet was published by the National Adult Literacy Agency (NALA) with the society's support, and was edited by Law Society past-president Patrick O'Connor. It is part of a national campaign to make the language of the legal system easier to read and more accessible to ordinary people.

According to NALA's director Inez Bailey, 'literacy is not just about reading and writing, but is about being able to take part on an equal footing'.

The guide explains over 1,400 legal terms in plain and accessible English and is available from NALA (tel: 01 855 4332, e-mail: literacy@nala.ie), price €20.

NEW DSBA FAMILY LAW AGREEMENT

The Dublin Solicitors' Bar Association relaunched its family law separation agreement last month. Judge Katherine Delahunt was the main speaker at the event, which included contributions from solicitors Helene Coffey, David Bergin, Brian Gallagher and Mary O'Toole SC on issues such as 'big money cases', pre-nuptial agreements and conveyancing aspects of family law.

'The huge attendance at the launch is indicative of the growing area of family law within the Irish legal system', said DSBA programmes director Orla Coyne. The agreement is available on disk and can be obtained from DSBA secretary Mary Rigney on tel: (01) 285 9758 or by e-mail at info@dsba.ie.

existed since 1998, and this will now be put on a statutory footing.

Section 10 requires a licensee to take all reasonable measures to ensure the safety of people attending, to provide reasonable safety measures and ensure they are applied, having regard to the care which may reasonably be expected by people attending for their own safety and those in their care. A duty is imposed on all people attending to conduct themselves in such a way as to not expose others to danger, and to ensure that others do not suffer injury or damage by reason of any danger arising out of the event or related activities, as far as is reasonably practicable, and without prejudice to any other duty.

Section 11 provides for a notice of cessation, which may require immediate cessation of the event. Failure to comply is an offence. A licence may also be revoked on application to the District Court by the fire authority. Authorised officers or members of the Garda are given powers of entry and inspection, the power to require information, plans and documentation and have tests carried out on the premises. Obstruction is an offence. The act provides for the limitation of liability on the part of the minister or fire authority, and related others. Penalties are realistically stiff at €3,000 and/or six months' imprisonment on summary conviction, €1,300,000 and/or two years' imprisonment on indictment and €500 (and/or six months) or €13,000 (and/or two years) a day for continuing offences, with the imprisonment terms capped at the maximum terms.

Authorised officers appointed by the fire authority are given considerable powers, including powers to require any person in charge of data equipment to assist them and to secure for later inspection any premises containing books and records. There are special provisions for events held by local authorities in section 23. G

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

It's legs eleven for court in Drogheda

Plans to move Drogheda District Court from the town bingo hall to a factory in a local business park last month have been scuppered by concerns that the presence of a courthouse would be bad for business.

The District Court has been sitting in St Mary's bingo hall since 1991, when the existing courthouse was declared unfit for use by the local authority, then closed down and later incorporated into the new local authority offices. The bingo hall was thought to be a short-term solution at the time.

According to Fergus Minogue, public relations officer of Drogheda Bar Association, 'Dundalk courthouse was officially reopened in March this year, but before this they used a factory as a courthouse.

Bingo: eyes down for Drogheda solicitors

Drogheda was supposed to get a similar facility'. The Courts Service sourced vacant factory premises in the town, but the IDA has overriding authority on the use of the building and expressed concern over the change of use.

Drogheda lawyers are resigned to another long wait. 'Over 60 family law cases are heard every month', says Minogue. 'There are no facilities for parties to talk to their representation. It causes trouble, with people looking at each other across the open hall while they wait. *In camera* applications are heard in a back room. The judge doesn't even have a toilet'.

The Courts Service says that it is seeking another temporary venue and is close to acquiring a site for a permanent courthouse.

DSBA GENERAL MEETING

The Dublin Solicitors' Bar Association's AGM will be held in the Law Society on 29 October, starting at 6pm. Members are asked to attend for the election of council members and to hear the reports from members of the various committees about their work during the year.

MCDOWELL TO ADDRESS HUMAN RIGHTS CONFERENCE

Justice minister Michael McDowell will be one of the speakers at a conference on new human rights legislation on Saturday 18 October in Blackhall Place. Other speakers include Michael Kealey of William Fry, Lord Justice Laws of the English Court of Appeal and Northern Ireland human rights commissioner Brice Dickson. The conference costs €25 and runs from 9.30am to 4.30pm. Further information and a booking form can be found in the CPD brochure included with this issue of the *Gazette*.

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ANNOUNCEMENT

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By Robert Pierse B.C.L., LL.B., Dip. S.S; Dip E.I.A, SOLICITOR

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Letters

Call for greater clarity on CPD requirements

From: Mark Pery-Knox-Gore, Beauchamps Solicitors, Dublin

The introduction of continuing professional development (CPD) is an extremely important milestone in the history of our profession, and one which perhaps deserves more of a fanfare than it gets in the July issue of the *Gazette* (page 5, *Society launches CPD scheme*). For those of us who missed the launch of the scheme in Blackhall Place in June, the rather cursory treatment in the *Gazette* sheds no light on the workings of the scheme and leaves some important issues unexplained:

- Who monitors the hours spent by solicitors on CPD?
- What is meant by 'group study' and what other form of CPD is it to be distinguished from?
- Can non-Law-Society lectures gain accreditation, including in-house training programmes run by law firms?
- What are the consequences of failing to achieve the required minimum number of hours?

Perhaps further clarification would help members of the profession.

VHI undertakings revisited

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

I refer to my letter published in the June issue of the *Gazette*. I have received quite a number of communications from colleagues on the matter. Most referred to the Law Society's recommendation that the undertakings should not be signed in their present format. That, unfortunately, does not progress matters one whit: at the time of writing this letter, I understand a meeting is to take place between the Law Society and the VHI. The most recent correspondence from the VHI would suggest, however, that it has no intention of relenting on the hard and fast position that it has adopted. It relies on clause 8 of its policy, which is an exclusion clause and which reads 'in addition to cover limitations mentioned elsewhere, we will not pay benefits for any of the following … expenses which you are entitled to recover from a third party' (clause 8(s)).

In its reliance on the clause, it says that, where a case is successful and settled for an amount in excess of VHI Healthcare's outlay, it will insist on a full reimbursement of the benefits it provided. In short, therefore, if the benefit paid is €1,000 and the amount recovered by the plaintiff is only marginally greater than that, VHI in effect takes all.

It is my view that VHI has misinterpreted rule 8(s) – to its own benefit, of course, and to the absolute detriment of its subscribers.

The problem has to be grappled with sooner or later, and the only positive way – in default of agreement between the Law Society and the VHI – is by way of arbitration or court proceedings.

The question is: who will run the gauntlet?

Economies of scale

From: Philip M Joyce & Co, Killenaule, Co Tipperary

I came across the enclosed letter recently. I don't know whether it is of any interest to you apart from its age. It is, of course, a perfect example of how a letter should be written in clear, and, dare I say, economical, language.

Dated: 24 May 1929
Britton to Doran
Dear Kennedy,
In order to satisfy Reilly, will you please let me have a cheque for the balance of the purchase money. I will undertake to comply with the terms of the conditions of sale so far as outgoings etc are concerned, and when I receive the transfer from Mr Reilly, I will send you on same, together with the statutory declaration and other documents agreed to be handed over. If necessary, I will not cash your cheque until you write and let me know that you are satisfied that the terms of the conditions of sale have, so far as your client is concerned, been complied with.

Dangers of unsolicited advertising

From: John P O'Malley, Dublin

Perhaps it is that time of year again? I recently received an 'application for registration' for the recording of electronic data about this firm. Presumably hundreds of solicitors' practices have received the same.

I am not in a position to comment on the legitimacy of the *Professional directory on-line*. However, this type of unsolicited mail has in the past been associated with scams of one sort or another. Indeed, Hamburg, Germany, seems to be a favourite haunt for these types of activities.

Hopefully, most – if not all – of my colleagues are sensible enough to be alert to these types of unsolicited approaches, but perhaps it is timely to insert a reminder in the *Gazette*.

For anybody interested in these matters, there is a very useful website at *www.stopecg.org*, and if somebody is not already aware of these types of activities, the site will certainly open their eyes. While the website principally relates to something called *European city guide*, it does also refer to something called *TVV Verlag fax directory on-line*.

Our colleagues should certainly be alerted about this.

Touting for

MAIN POINTS

- Voluntary and mandatory whistle blowing
- Whistle blowing in the professions
- Statutory provisions

Informers have had a chequered history in this country, but they play a vital role in modern Ireland in the battle against crime, particularly white-collar crime. Henry Murdoch spills the beans

In Ireland, there is a historical problem in relation to informing on a person, although this reluctance to inform is diminishing as we move further from our colonial past and as people see that it is in their collective interest to help uphold the law.

Informing and whistle blowing may be voluntary or involuntary. Voluntary whistle blowing refers to cases where there is no legal requirement to divulge information. It may, however, be done out of a sense of civic duty (as in the case of reporting child abuse) or for protection (as in reporting victimisation in the workplace). Increasingly, when reporting is voluntary, the informer is given protection by the law.

Informing and whistle blowing may be involuntary insofar as there is a legal obligation on people to report when they suspect a crime has been committed and where failure to report is itself an offence. This may arise in the case of treason or, increasingly, in relation to money laundering or corporate crime, where the person under the duty is in a unique position to know or suspect crime – for example, a solicitor or an auditor, receiver or liquidator of a company. These are the new 'statutory mandatory whistle blowers' of the 21st century.

Some professions, such as medicine, make it a professional responsibility to blow the whistle on a colleague whose professional competence is seriously affected by alcohol, drugs, physical or mental ill health or the ageing process. Other professions, including lawyers, do not have such specific provisions and rely primarily on complaints from clients for whistle blowing. However, a statutory duty of whistle blowing falls on accountants in certain circumstances.

There are increasing campaigns to encourage the public to give information to help the gardaí in the detection of crime. The *Crimeline* television programme is just one example. Some sectors of industry also encourage the public to report, for example, insurance fraud or software piracy. A reward is offered for information on software piracy and the Revenue Commissioners also reward informers.

The grass is always greener

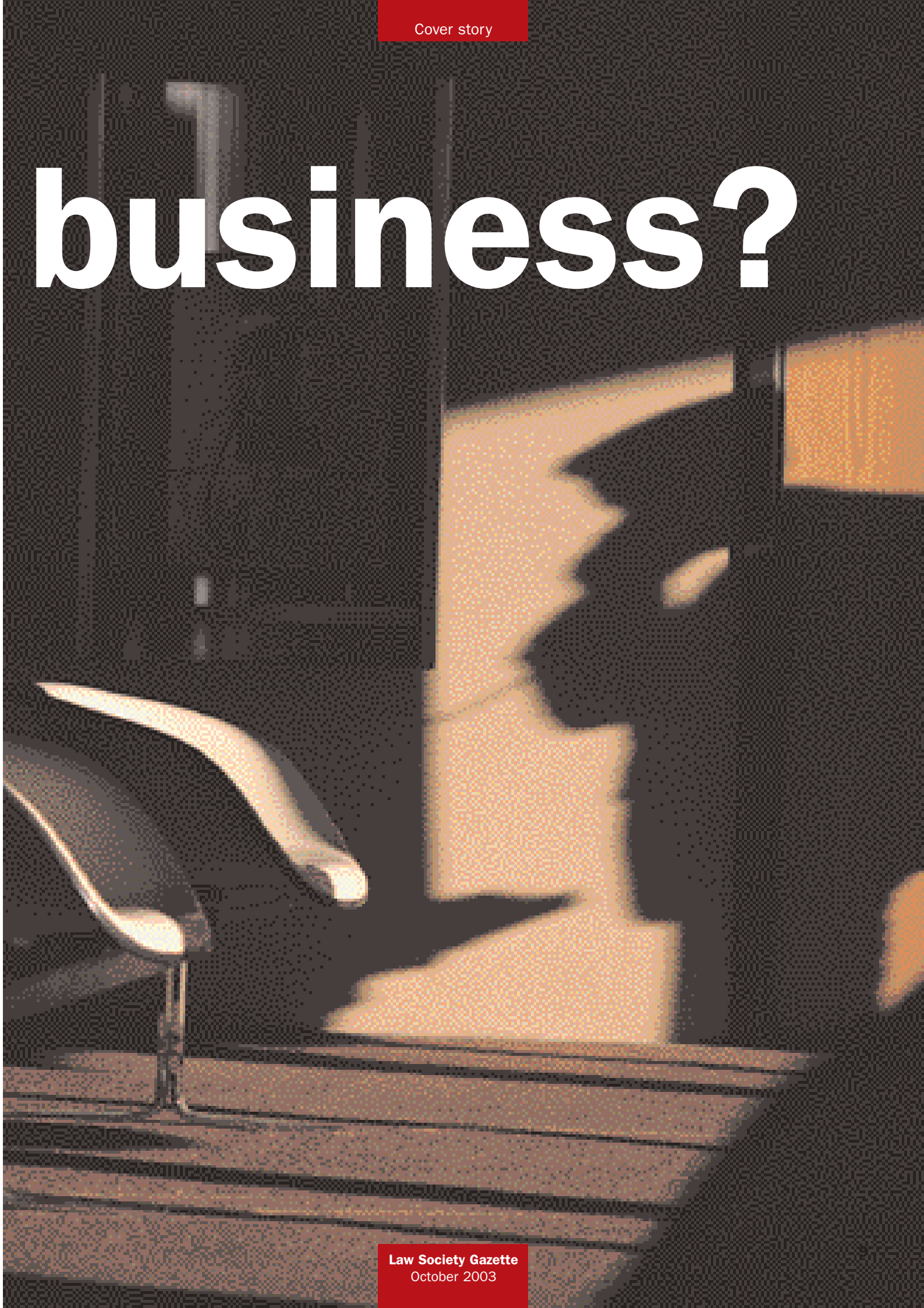
Far from being despised, modern informers and whistle blowers are increasingly seen as performing a civic duty in our increasingly complex society. The fact that some are now compelled by law to be whistle blowers is perhaps a transitional situation until there is universal acceptance of their role.

Whistle blowing in the professions, however, is an area of great sensitivity. When does a professional report a colleague to his governing body and when does the professional body blow the whistle on the member? Except in accountancy, it has been largely left to each profession to regulate itself, sometimes within a statutory framework. For example, under the *Medical Practitioners Act, 1978*, the Medical Council can inquire into the conduct of registered medical practitioners for alleged professional misconduct or fitness to engage in the practice of medicine.

The Medical Council has established fairly clear ethical guidelines about whistle blowing. For example, where a doctor is aware that alcohol or drug use is affecting the competence of a colleague, he is required to intervene with the colleague and advise that he seek professional help. If this approach fails, and where the interests of patients are or may be at risk, the facts must be given by the doctor to the Medical Council's Fitness to Practice Committee. The same guideline applies 'when other forms of physical or mental ill-health or the ageing process appear to seriously affect a doctor's professional competence' (the Medical Council's *Guide to ethical conduct and behaviour 1998*).

The 2000 code of professional conduct for nurses and midwives is even more direct, containing a clear

business?



Some moles find it difficult to use the telephone or even blow a whistle

whistle-blowing requirement where a patient or client might be put in jeopardy: 'Any circumstances which could place patients/clients in jeopardy or which militate against safe standards of practice should be made known to appropriate persons or authorities'. This goes even further than the guidelines for doctors.

In the legal and engineering professions, the system of control of professional misbehaviour or misconduct appears to be based primarily on acting on complaints from clients rather than on whistle blowing by colleagues. However, the Bar Council has in place a process to consider complaints of misconduct by one barrister against another. And the Law Society will act on a complaint from a client or from any person on behalf of a client (which might be another solicitor) in relation to alleged misconduct, inadequate professional services or excessive fees.

A fairly draconian mandatory statutory framework is now in place for accountants. Under section 73 of the *Company Law Enforcement Act, 2001*, a recognised accountancy body must report to the director of corporate enforcement whenever its disciplinary committee or tribunal has reasonable grounds for believing that an indictable offence has been committed by one of its members. This also applies where the body has reasonable grounds for believing that a member has committed an indictable offence during the course of a liquidation or receivership (section 58). Failure to make such a report is itself an offence committed by each officer of the body.

The Institute of Chartered Accountants in Ireland has a system in place to deal with complaints from members of the public (usually clients of accountants), but also from the institute's own regulatory committees as well as in relation to reports in the media that refer to its members.

Dirty money

There are now provisions for more mandatory reporting, directed at people in a particular position to suspect that a crime has been committed, coupled with protection for such people where they have reported in good faith.

Credit and financial institutions are required to take measures to prevent money laundering, such as establishing the identity of customers, retaining records and reporting to the gardaí when they suspect that any offence – not just money laundering – is being or has been committed (*Criminal Justice Act, 1994*, sections 32, 57, as amended by the *Disclosure of Certain Information for Taxation and other Purposes Act, 1996*, sections 2-3; *Criminal Justice (Miscellaneous Provisions) Act, 1997*, sections 14 and 15; and SI no 104 of 1995).

Under regulations that came into effect on 15 September 2003, the list of designated bodies required to report money-laundering transactions is being expanded to include solicitors, accountants, auctioneers, auditors, estate agents, tax advisors, investment business firms, providers of money transmission services, administration companies providing services to collective investment schemes, and dealers in high-value goods such as precious stones, and precious metals and works of art, where payment is made in cash for a sum of €15,000 or more. Surprisingly, bookmakers have not been included.

The obligations apply only to solicitors when participating in a limited number of activities, for example, when they participate by either a) acting on behalf of and for their client in any financial or real estate transaction or b) assisting in the planning or execution of transactions for their client concerning the:

- Buying and selling of real property or business entities
- Managing of client money, securities or other assets
- Opening or management of bank, savings or securities accounts
- Organisation of contributions necessary for the creation, operation or management of companies
- Creation, operation or management of trusts, companies or similar structures.

Also, the reporting requirements do not apply to solicitors, accountants, auditors or tax advisors with regard to information they receive from, or in relation to, a client in certain circumstances, such as when ascertaining the legal position of that client, when defending or representing a client in judicial proceedings, or when advising a client in relation to instituting, avoiding or defending judicial proceedings. This restriction applies whether such information is received or obtained before, during or after such proceedings (*see also* Filthy lucre *on pages 24 to 27*).

Certain people – auditors, actuaries, trustees, insurance intermediaries and investment business firms – are required to report to the Pensions Board where they have reasonable cause to believe that a material misappropriation or a fraudulent conversion of the resources of a pension scheme is occurring or is to be attempted (*Pensions Act, 1990*, section 83, as inserted by the *Pensions (Amendment) Act, 1996*,

THE BURDEN OF HISTORY

In Ireland, informers were often despised. A good example is to be found in the case of *Berry v Irish Times* ([1973] IR 368), where the plaintiff, who was secretary of the Department of Justice, claimed to have been libelled by a placard that was reproduced in a newspaper photograph and which bore the words 'Peter Berry – 20th century felon setter – helped jail republicans in England'. While the Supreme Court, by a majority, held that the words were not capable of bearing a defamatory meaning, as the plaintiff was clearly upholding the law, the two dissenting judgments articulated very well how 'informers' were seen in the context of Irish history:

- '*Felon-setter* and *helped jail republicans in England* were not words in respect of which one has to have recourse to a dictionary to know what they meant to an Irishman; they were equivalent to calling him a traitor' (Fitzgerald J)
- 'Put in other words, the suggestion is that this Irishman, the plaintiff, has acted as a spy and informer for the British police concerning republicans in England … thus putting the plaintiff into the same category as the spies and informers of earlier centuries who were regarded with loathing and abomination by all decent people' (McLoughlin J).

section 38). In 2002, the provisions regarding whistle blowing were extended to cover personal retirement savings accounts by the *Pensions (Amendment) Act, 2002*, sections 46-49.

Other mandatory reporting requirements for auditors, receivers and liquidators are contained in the *Company Law Enforcement Act, 2001*, sections 72-74, section 145; the *Criminal Justice (Theft and Fraud Offences) Act, 2001*, section 59; the *Companies Act, 1963*, section 299 as amended by the *Company Law Enforcement Act, 2001*, sections 51-52 and section 56; and the *Company Law Enforcement (Section 56) Regulations 2002* (SI no 324 of 2002). There are further mandatory whistle-blowing responsibilities for auditors proposed in the *Companies (Auditing and Accounting) Bill, 2003* in relation to the directors' proposed 'compliance with the law statement'.

Tout and about

Recent legislation has recognised that whistle blowing should be encouraged for the public good, but that this is unlikely to happen on a voluntary basis without providing some protection for informers who are in a vulnerable position. Examples are the reporting of competition law offences, reporting of child abuse, and employee or equal status victimisation.

Protection is given to people who report to the Competition Authority that, in their opinion, an offence under competition law has been committed. They are not liable for damages in respect of their report unless it is proved that they had not acted reasonably and in good faith in forming that opinion and in communicating it (*Competition Act, 2002*).

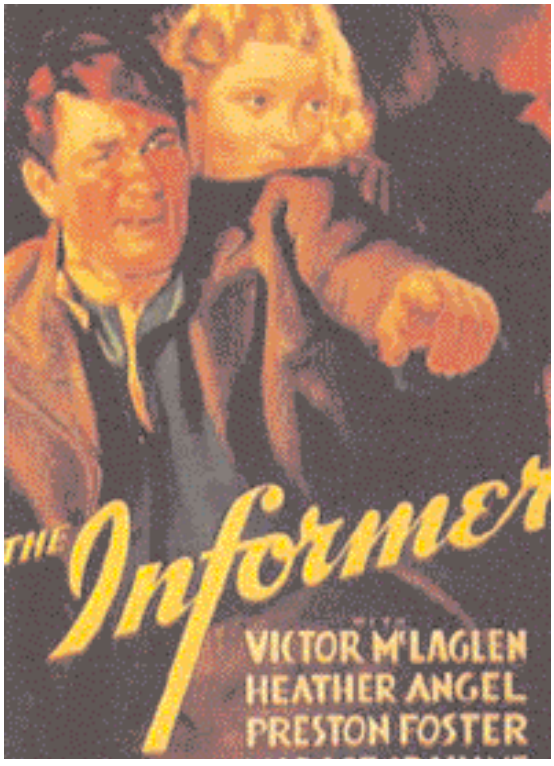
An employer is prohibited from penalising an employee in such circumstances. In any proceedings before a rights commissioner or the Employment Appeals Tribunal, it is presumed, unless the contrary is proved, that the employee acted in good faith.

It is not an offence in itself to fail to report child abuse, but people are encouraged to report it by providing them with protection. A person is provided with immunity from civil liability who, reasonably and in good faith, reports child abuse to a designated officer of a health board or to any member of the Garda Síochána (the *Protection of Persons Reporting Child Abuse Act, 1998*, section 3). A designated officer is any one of 17 categories of health board employees, including consultants, nurses, social workers and childcare workers.

Employees are also protected against dismissal or penalisation for reporting child abuse provided they acted reasonably and in good faith, which is presumed unless proven otherwise.

A person who reports child abuse to someone other than the gardaí or health board personnel may still be able to claim that the report was made on an occasion of qualified privilege, if the person receiving the report has a duty to receive it – for example, if the report is made to a sports organisation in respect of a member or participant, or if made to the Irish Society for the Prevention of Cruelty to Children.

There are some mandatory reporting requirements under the *Residential Institutions Redress Act, 2002*, secton 28(5)b, where the disclosure is necessary to prevent, reduce or remove a substantial



John Ford's 1935 film *The informer*

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HISTORICAL WHISTLE BLOWERS

As regards the legal obligation to report a crime to the authorities, the common law confined the legal obligation to serious crimes only – that is, felonies. If a person knew that a felony had been committed and could give information that might lead to the felon's arrest, but didn't do so, that person committed the misdemeanour of 'misprision of felony'. This offence did not relate to the failure of a legal advisor, a doctor or a clergyman to report a matter, or where the failure was in order to avoid inviting a prosecution against oneself. There was no offence of misprision of misdemeanour.

The offence of misprision of felony has disappeared with the abolition of any distinction between a felony and a misdemeanour and the requirement that the law and practice as regards misdemeanours applies to all offences (*Criminal Law Act, 1997*, section 3). However, the offence of misprision of treason remains an offence. This is the offence committed by a person who fails to disclose treason which is proposed to be, is being or has been committed (*Treason Act, 1939*).

The 1997 act created the new offence of 'concealing an offence'. In effect, the offence is one of accepting a bribe for concealing information. Consequently, there is now no general legal requirement on people to report an alleged crime, other than in the case of treason or in relation to aiding the commission of an offence. There are important exceptions, and these are relatively recent and relate to reporting money laundering and corporate crime.

risk to the life of, or to prevent the continuance of abuse of, a child.

Whistle-blowing employees who are penalised by their employer are protected where the dismissal or other penalisation is solely or mainly occasioned by the complainant having, in good faith, either sought redress for discrimination, opposed by lawful means anything that is unlawful under equality legislation, gave evidence under any proceedings under equality legislation, or gave notice of an intention to do any of these things (*Employment Equality Act, 1998*).

A snitch in time

The use of informers has always been a very important part of the prevention and detection of crime. This is why the law has protected informers who make a *bona fide* report, in some cases protecting their anonymity and in other cases protecting them from legal action such as defamation.

We now have statutory whistle blowers, primarily in the area of money laundering and corporate crime, with mandatory reporting requirements against the very people who pay their fees! Even the stock exchange is now a corporate policeman. And then we have the voluntary whistle blowers, who may be protected against false but *bona fide* reporting.

We also have particular sectors of industry that are actively encouraging whistle blowing in the interests of those sectors and their customers. In the state network, we have the gardaí actively engaging the public to help it to detect crime. But other sections of the state are less active in this respect: surely there is a case for a confidential reporting line to combat social welfare fraud?

We have come a long way from Liam O'Flaherty and his 1925 novel *The Informer*, subsequently made by John Ford into a powerful movie in 1935. While there is an acceptance that the law should be upheld and that the authorities should be helped in this task, there is still a certain reluctance in being labelled as an informer or whistle blower, particularly among accountants, who do not relish their recent compulsory role as policemen for the state on corporate crime.

But it is important that modern informers and whistle blowers are seen as performing a civic duty in aid of the civil power. This is in all our interest. G

Henry Murdoch is a barrister and author of Murdoch's Irish legal companion 2003 *on CD-ROM and on-line.*

BENCHM

In recent decades, the judiciary appears to have moved to a more central position in government, weakening the long-held notion of separation of powers. David Gwynn Morgan discusses the rise of judicial activism and asks who wins and who loses?

MAIN POINTS

- Literal interpretation of the law
- Separation of powers
- Judicial salaries

This summer, there were two news stories whose underlying message was the need to assign greater care to the selection of judges, commensurate with the importance of the political decisions that the higher judiciary now takes. One of these was based on the publication of the Judicial Appointments Advisory Board's (JAAB) first annual report. The report included the observation that the number of applications received since the board was established has 'in the case of vacancies in the High Court or Supreme Court … on occasions been relatively small', especially bearing in mind that the board must recommend seven candidates and may not rank them.

Second, one of the side issues in the termination of the ancient office of Lord Chancellor in Britain was the announcement that a judicial appointments commission is to be established. It was said that this was required because of the need for greater care and formality in the selection of judges, partly by virtue of the expansion of the judicial role following the domestic incorporation of the *European convention on human rights*. A British commentator in this field put the broad point pithily: 'this notion of Platonic guardians might seem to offer a brilliant short-cut to individual, if not social, progress … but Platonic guardians have to be people of exceptionally high calibre'.

Engine of change

In the context of judicial activism in this jurisdiction, two preliminary points are worth making. First, over the centuries, judges developed devices to at least restrict their involvement in areas regarded as broadly political. It is beyond dispute that over the past three decades – whether rightly or wrongly – these have weakened and that consequently the engine of judicial activism has been strengthened. We have seen, for instance, a significant diminishing of such traditional formulae of judicial self-abnegation as *locus standi* or mootness and the rules associated with the separation of powers. Also, the presumption of constitutionality has been given a new twist to widen the reach of the judges' authority. Finally – and of vastly greater significance than is often noticed by legal writers – there is the question of the award of legal costs: where the state is a successful defendant, it is seldom awarded its own costs (in contrast to the usual practice) and is sometimes even required to pay those of the unsuccessful plaintiff. This naturally increases constitutional challenges to laws.

The movement of the senior judiciary to a more central position in government (even if they only have the power to take negative decisions) raises the question of how legal craft – skills developed over several centuries to deal with, for instance, a dispute between neighbours over a right-of-way – has coped with questions about US armed forces landing at Shannon or whether married women should have their own tax bands. The standard approach to interpreting a legal text – that literalism is all, or almost all – was developed for acts of the Oireachtas. It does not fit a constitution that, as has been said, is 'first of all a layman's document, not a lawyer's shrivelled contract'. Thus, to interpret the constitution according to an inflexibly literal rule would be rather like trying to solve a code by using the wrong cipher key.

Judges have often taken an inappropriately literal approach to interpretation, but in the past decade a more discriminating approach to an admittedly difficult subject has been developed, and more appropriate principles laid down and followed. An example would be the notion of proportionality as a way of balancing a right against the exception to it.

Another consequence has been remarked on by John D Cooke (at the time a senior counsel and now a member of the Court of First Instance of the European Communities), who wrote: 'I have a sneaking suspicion that one of the effects of the

JUDICIAL ACTIVISM IRISH-STYLE

ARK

constitution upon the way in which the law is practised in this country has been to introduce an element of indiscipline, looseness and even laziness ... It is relatively rare nowadays that you see the fully-fledged performance of the intellectual exercise involved in arguing a point by reference to precedent'.

And professors McAuley and McCutcheon have written that there has been a 'virtual eclipse of substantive criminal appeals by the blinding star of constitutional justice. Although this development is to some extent a natural consequence of the overriding importance of fundamental rights and fair procedures under the constitution, it has had a disastrous effect on Irish criminal law, stunting its natural development and leaving those charged with its administration to fend as best they can on a diet of first-instance rulings and directions, as supplemented by English authority'.

One could add that the lion's share of even a reported High Court judgment often consists of an elaborate summary of all the arguments by counsel for the applicant on all points, followed by all of those of the respondent's counsel, with a relatively brief statement of the judge's own views. This can make it difficult or impossible to work out the principle in the case as it might operate in slightly different circumstances. Also, the fundamental duty of following precedent has not always been observed.

This brings us to the central question: what use has the judiciary made of this substantial power? Who wins and who loses from judicial activism Irish-style?

Calling the tune

Much of what has been done by judges to shape the modern Irish state is for the good. In the first place, a thorough job has been done in removing anomalies from the law, many of them centuries old and without any reasonable justification. Examples from the public law field include crown privileges such as the one barring action against the state in tort, the privilege against the disclosure of official evidence, and the presumption that the state was not bound by statute. And in the field of private law, there have been improvements in limitations law, or the removal of restrictions on court reporting.

Second, the most significant impact of all with regard to most people's everyday lives has occurred in relation to 'the administrative state'. Here, there has been great progress in ensuring fair procedure that makes a just result more likely. The judges' strong instinct for fairness has also led to a number of decisions protecting groups likely to be disadvantaged, among them women, travellers and (perhaps most likely of all) suspected criminals. In the area of religion, certain low-level instances of discrimination have been quashed.

Significant piece of nation building

In addition, there is no avoiding the fact that, in these and other ways, Irish judges have helped to establish a legal system that ordinary Irish citizens can feel that they 'own', rather than seeing it as something designed by foreign specialists. Given the drift towards alienation from the institutions of

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government, this must be regarded as a significant piece of nation building.

Against this, there have been a number of what I regard as silly decisions, in the sense that they serve no discernible purpose and give rise to the sort of comment made by an intelligent layperson in the mid-1990s: 'these days, I wonder whether our judges fully appreciate the impact of their actions, or do they think of the law as a thing apart which does not connect up with the real world?'

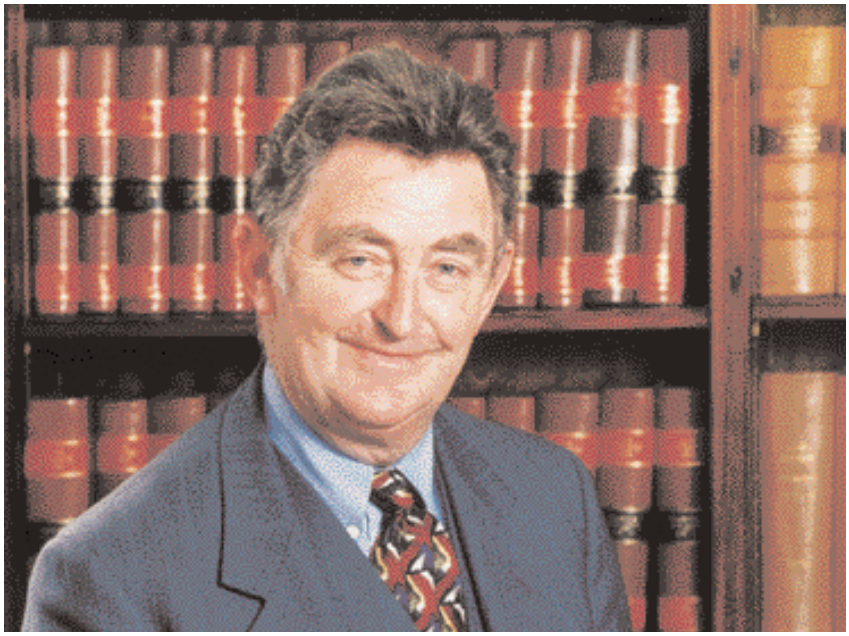
One of the examples my friend had in mind was the line of authority that cast a cloud over the constitutionality of certain functions of District Court clerks – administrators who play a crucial role in the running of the courts. This doubt flows from a line of cases centred on article 34.1 of the constitution, by which the judicial function may only be exercised by a judge. The argument that has found favour here is that, even though a clerk is merely issuing a summons to appear before a court, he is exercising the judicial function and, as he is not a judge, this arrangement may be unconstitutional. Given that most of our criminal cases proceed through the District Court, the ramifications of these rulings could have been immense.

Yet this line of authority overlooks a major point. A District Court clerk is under the court's control and so might realistically have been regarded (as is the case with the corresponding situation in US law) as an emanation of the judge and so protected by the judge's independence.

Dog eat dog

A second example that I believe does no-one any legitimate good is a line of authority by which the methods of disciplining professionals cannot be dealt with, unaided, by the independent professional body. Instead, where the matter goes against the practitioner, it must also involve the High Court, not merely on appeal but in the re-hearing of all the evidence that was already heard before the professional body (*Re Solicitors* [1960] IR 239; *M v Medical Council* [1984] IR 479).

This arrangement means that, before an erring professional person can be disciplined, two fairly high hurdles must be jumped. First, a finding of professional misconduct must initially be secured before the professional's peers, which will usually not be easy because, whatever about dog not eating dog, doctor certainly does not eat doctor. Then the process has, in effect, to be repeated before the High Court, which makes for further expense, delay and possibly embarrassment of the witnesses, who will usually be patients or clients of the practitioner. In short, the process of discipline is made very cumbersome. This creates some pressure against disciplinary proceedings, especially in a marginal case. The result of the invocation of the separation of powers by the judiciary is that great store is set on protecting the interests of the individual at substantial cost to the community interest of having competent, ethical practitioners.



The post-1999 Keane Supreme Court has held that 'sauce for the goose should be sauce for the gander'

'There have been a number of what I regard as silly decisions, in the sense that they serve no discernible purpose'

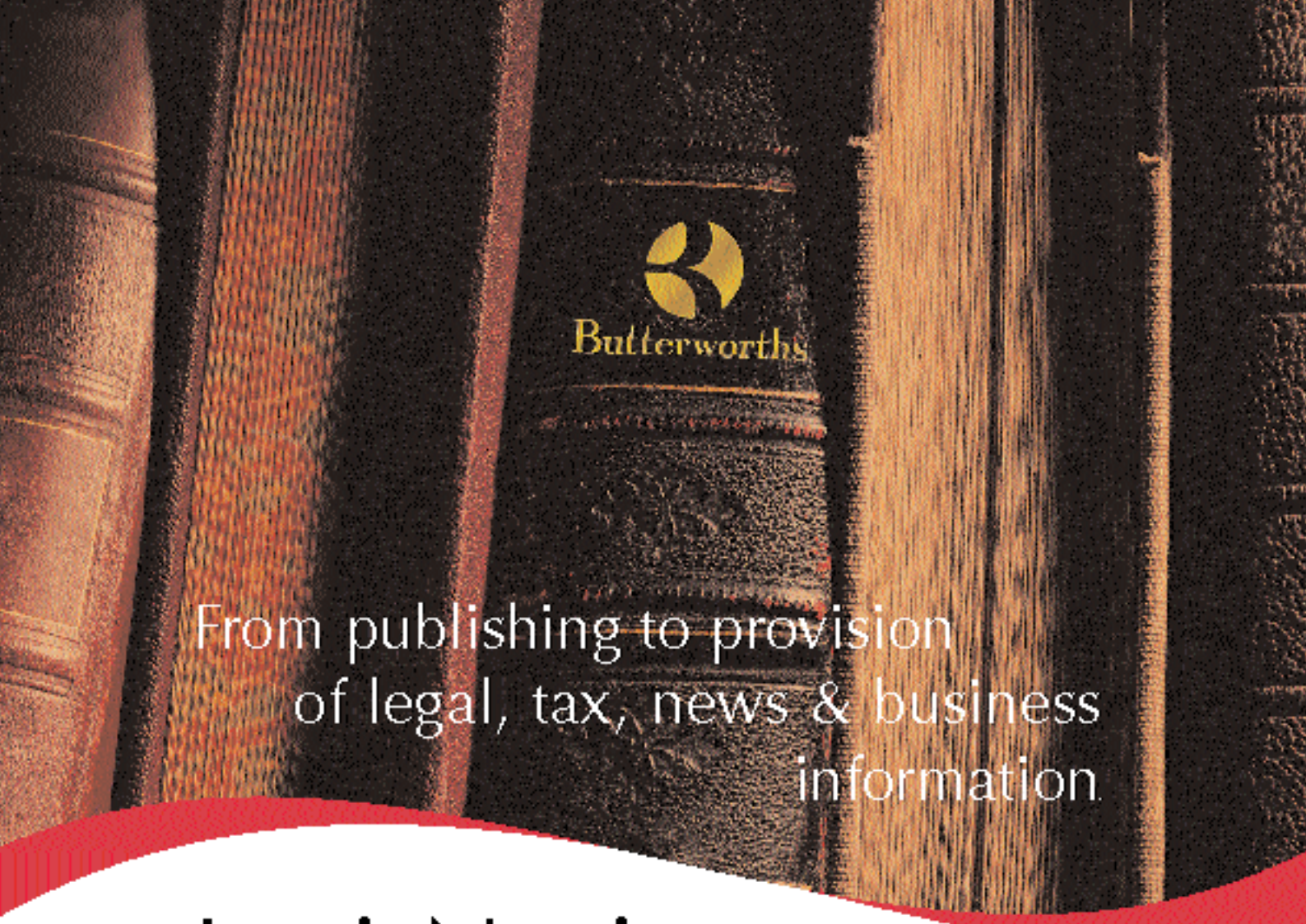
There are now some signs (*Keady v Commissioner of Garda Síochána* [1992] 2 IR 197) that *Re Solicitors* is no longer as popular with the judiciary as it was. But the fact remains that the entire structure of professional discipline in the medical, dental, nursing and veterinary professions – as well, of course, as solicitors – has been shaped, even distorted, by *Re Solicitors*.

There is a broader point too. Until recently, the separation of powers had been given a very 'judicial-centric' cast. In Ireland, it had been taken to mean that politicians should not interfere with the judiciary, not vice-versa, because when it came to intervention by judges in the business of politics (for example, in a case like *Crotty v An Taoiseach* [1987] IR 713), the separation of powers was held to be trumped by the supremacy of the constitution. One of the virtues of the post-1999 Keane Supreme Court is that it has held that 'sauce for the goose should be sauce for the gander'. In both *Sinnott v Minister for Education* ([2001] 2 IR 54) and the immigrants' children case early in 2003, it held in effect that a major socio-economic issue should be left to the politicians, who are in a position to see the problem from a wider perspective than a court.

The case going the other way – that is, against the political organs of the state – was the *Abbeylara* decision (*Maguire v Ardagh* [2002] IIR 385), but even here the restriction imposed by the Supreme Court majority on the Oireachtas committee's power left plenty of scope for a committee's normal field of investigation.

Community chest

A further range of cases centres on a basic question of values: collective versus individual interests. Typically, a case of this type will involve a challenge to social-reforming legislation; that is, a law designed to help the poorer or weaker members of the community. In each instance, there is a



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JUDICIAL ACTIVISM AND PROPERTY RIGHTS

The right to property is of perennial importance in many areas of widespread significance to the community.* In the planning area, the view was often expressed judicially that planning control could only be constitutional if compensation is paid to the disappointed developer. The important point here is that usually the value that land would have had if planning permission had been granted (which is the basis on which compensation is calculated) will depend on developments surrounding the land that have been funded by public finance (such as roads, water supply or sewerage schemes) and/or are due to changes in society, such as population movement into an area that was formerly rural. If planning permission were granted, either type of change would have the effect of substantially raising the value of land purchased at its agricultural value. Moreover – and this is the important point – each change will have come about without the would-be developer engaging himself in any expense or even lifting a finger to bring about the change in value.

Out of fear of the right to property, the *Local Government (Planning and Development) Act, 1963* gave landowners who are refused planning permission a fairly strong entitlement to compensation from the local planning authority. As McCarthy J remarked in *Grange v Dublin Corporation* ([1986] IR 246, 256), 'since the act of 1963 effects an interference with a personal right, it must be strictly construed: so much the more so where the interference is being lessened … by compensation must any exclusion … of the right to compensation be, itself, so construed'.

A related field is the question of the control of building-land prices, which has recently attracted from the taoiseach the unusually clearly-expressed view that something should be done, even up to and including a constitutional amendment.

But Mr Ahern's comment rather unfairly overlooked the article 26 reference, in which the Keane Supreme Court signalled a striking turn of the tide. In *Re Art 26 and of the Planning and Development Bill, 1999* ([2000] 2 IR 32), the statutory scheme set up by the bill envisaged that a landowner who developed his property for housing would, in general, be required to cede up to 20% of the land to the housing authority for the provision of houses for poorer members of the community. The price to be paid for this piece of land would be based on the existing use of the land (normal agricultural value) and would, accordingly, be significantly below the market value of the land.

Turning a blind eye to a good deal of authority the other way, the court began with the key assumption (at 353) that a landowner holds land 'subject to any restrictions which the general law of planning imposes on the use of the property in the public interest'. The court then quoted the observation that 'purchase of land for development purposes is manifestly a major example of a speculative or risk commercial enterprise' and went on to uphold the legislation.

* There are two pairs of cases in which essentially the same issue was adjudicated upon by both the European Court of Justice and the Irish High Court in one pair and the Supreme Court in the other. In each pair the European Court of Justice was on the collectivist side and the Irish courts on the property-owners' side (*Bhosphorus v Minister for Transport* [1994] 2 ILRM 551, 559-60; [1996] 2 CMLR 257; *Duff v Minister of Agriculture* [1996] ECR 1-535; [1997] 2 IR 22).

curtailment – usually at the expense of the richer or stronger members of the community – of constitutionally-established individual rights, such as property, privacy or the rights to carry on business or earn a livelihood. But the corollary of this deprivation is that some advantage is given to a disadvantaged group. Sometimes it is sought to do this directly, such as by altering rights between landlords and tenants or employers and employees. And sometimes the intention is to do it indirectly, by facilitating the state in helping a poorer or weaker section of the community. But whichever way the law is designed, where there is a constitutional challenge, it is usually the individual interest that the judges have preferred to the community or collective interest in marginal cases, and the law is struck down.

This may be demonstrated by considering the fate of legislation in constitutional challenges dealing with, for instance, equality, recognition, education, trade unions, property, and joint tenancy for both spouses in the marital home. Once again, however, the Keane Supreme Court decisions have taken a significant turn in favour of the community.

To go back to the JAAB annual report mentioned at the outset, why did more candidates not put themselves forward for the higher courts and so allow greater choice in the selection of judges? One reason seems to be the relatively low salary of the judiciary compared to the fees commanded by leading practitioners.

Paying the piper

A simple solution to this difficulty would be to increase the salaries of the higher judiciary. These days, the rule pegging the salaries of the judiciary to those of secretaries-general of government departments has gone. High Court judges are now paid over €170,000 (plus the equivalent of 35% extra in the form of non-salary remuneration, mainly in pensions), with Supreme Court judges being paid €190,000. While there are, of course, other reasons for being a judge apart from the salary, it seems that these amounts are insufficient compared to the fees of senior counsel (even as palely reflected, for instance, in the figures published in connection with the tribunals of inquiries).

When the stakes are as high for the polity as this brief audit of judicial activism seems to indicate, then the wise man's precept is best: 'the most expensive is the cheapest in the long run'. G

David Gwynn Morgan is professor of law at University College Cork and author of the recently-published book A judgement too far? Judicial activism and the constitution (*Cork University Press, 2003*).

Carved in s

Solicitors are often asked to advise on how an estate will be re-divided if a beneficiary declines his inheritance after the testator's death. In the first of three articles on post-death planning, Anne Stephenson examines the use of disclaimers – an area fraught with potential traps for unwary practitioners

Sometimes post-death planning can take an unexpected turn

From the date of the testator's death, solicitors operate within the confines of the will or the law on intestacy. The quality of the will depends very much on the experience of the person who drafted it. The will may be adequate in its construction, but its relevance to the circumstances as of the date of death is just as important. The provisions of a will cannot be altered or stretched to meet the circumstances that prevail when the testator dies. In the absence of specific legislation governing the variation of wills in this jurisdiction, we can struggle as advisors to a personal representative to make the will 'fit'.

The areas that are effective and tax efficient for post-death planning are limited. This article examines disclaimers, concentrating in particular on situations where they are not appropriate and on the traps set for unwary practitioners by section 72(a) of the *Succession Act, 1965*.

We are all familiar with the concept that no beneficiary can be compelled to accept an inheritance. But there is an opportunity to disclaim, which can have the desired effect in limited circumstances. In deciding whether or not to go the route of a disclaimer, it is vital to be absolutely sure that the effect dictated by the legislation is the effect that your client desires.

MAIN POINTS

- How disclaimers work
- *Succession Act, 1965*
- Can your client anticipate the outcome?

Disclaimers

To qualify as a disclaimer, the refusal of the inheritance must take place before the beneficiary accepts any benefit from it, so it is a question that should be considered as early as possible post-death. It is not possible to disclaim in favour of a particular person; the disclaimer cannot contain any element of direction to a third party. In that case, it would be a gift and there would be an assurance with stamp duty and gift tax implications. In effect, it would take the nature of a deed of family arrangement (which I will deal with in the next two articles).

While a beneficiary is free to disclaim one or more benefits, he may not disclaim part of a benefit. In other words, he may disclaim a specific bequest while taking the benefit of a share in the residue, but he cannot disclaim only part of the specific bequest or only part of the residue or the share on intestacy. However, if the will provides that the beneficiary is free to disclaim part only of a single inheritance,

POST-DEATH PLANNING tone?

PHOTO: EVERETT COLLECTION/REX FEATURES

POINTS TO CONSIDER IN THE EXECUTION OF A DISCLAIMER

1) A disclaimer gives rise to an effect by operation of law and therefore unavoidable consequences flow from a disclaimer, the consequences of which cannot be dictated. It is important to keep this in mind in taking any instructions in this area
2) Section 72(a) of the *Succession Act, 1965* now dictates the result of disclaimers that are made after the date of the *Family Law (Miscellaneous Provisions) Act, 1997* regardless of the date of death
3) If you are advising the legal personal representative, you cannot also advise a beneficiary. As in all cases in the administration of the estate, you can only advise one party and act in one capacity. Otherwise, you have a potential conflict of interest
4) In advising a client/beneficiary in any disclaimer, ensure that the following points are discussed and considered:
   - Establish the value of assets owned by the deceased and the value of the bequest being disclaimed
   - Consider any relevant tax liabilities that might arise if the disclaimer was not signed
   - Consider the tax liabilities on the signing of the disclaimer
   - Consider the effect of signing the disclaimer
   - Consider the effect on entitlement to take out the grant of the disclaimer.

then he may do so. In the absence of such a direction in the will – and, frankly, I have not come across many – a partial disclaimer as set out below cannot be effected.

Where an inheritance under a will or intestacy is disclaimed, the property will automatically pass to the person next entitled to it under the will or under the rules of intestacy respectively. Prior to the provisions of section 6 of the *Family Law (Miscellaneous Provisions) Act, 1997*, which inserted section 72(a) into the *Succession Act*, there was uncertainty as to the distribution of a disclaimed estate or part of a disclaimed estate on intestacy. Obviously, there was no problem in a testate situation, as any disclaimed benefit simply lapsed and fell into the residue.

The problem can essentially be summed up by saying there were and still are two schools of thought in relation to disclaimers prior to 15 May 1997. One says that they are effective to pass an interest in the property to those who are next entitled (or if the people who are disclaiming are in the same 'class' of next-of-kin to the remainder of that class). The second view holds that a disclaimer

DISCLAIMERS

In testate situations, a disclaimer:

- Falls into residue
- But if a residuary legatee and devisee disclaims, watch out! You have a partial intestacy.

In intestate situations:

- Section 72(a) of the *Succession Act, 1965* applies
- The disclaimer loses the right to extract grant as the grant 'follows the interest'.

of an intestate share is not effective because section 67(2) of the *Succession Act* states that certain portions of the intestate's property shall vest in the spouse and issue.

Obviously, subscribers to the first school of thought believed that part 6 of the *Succession Act* merely provides for the order in which the surviving next-of-kin of the intestate are entitled, and that the word 'shall' was not used in a mandatory sense. Those who followed the second school of thought held that the sections of the *Succession Act* (see below) that provided for who is entitled to an intestate's estate used mandatory language and, accordingly, there was no possibility of effectively disclaiming an intestate's share.

It was a common idea among many practitioners that an intestate's property vested automatically in the person specified in the *Succession Act* and therefore it was impossible for a beneficiary to decline to accept it. It could have been argued that, on a disclaimer by such a person, the interest did not revert back to the estate since, never having been accepted in the first place, it could not be re-vested.

Section 73 of the *Succession Act, 1965* provides: *'In default of any person taking the estate of an intestate, whether under this part or otherwise, the state shall take the estate as ultimate intestate successor'*. The second school of thought, therefore, held that it was impossible to disclaim a share on intestacy since the effect was forfeiture to the state.

Keeping it in the family

In the English case *Scottish Widows v Friends of the Clergy Corporation* ([1975] 2 AER1033), it was decided that where a member of a class entitled on intestacy disclaimed an interest, it passed to the remaining members of the class. And if the class was exhausted on disclaimer, it passed to members of the next class. This prevented property reverting to ownership of the crown *bona vacantia* – which means 'goods without an apparent owner' (see Mellows, *The law of succession* (fifth edition), paragraph 12.53).

To clarify the situation in Ireland, section 6 of the *Family Law (Miscellaneous) Provisions Act, 1997* was passed. It inserted a new section 72(a) into the *Succession Act, 1965*, which deals with the distribution of a disclaimed estate, and clarifies the issue of whether or not a deed of disclaimer in an intestate estate is effective to pass title. It reads as follows: *'Where the estate, or part of the estate, as to which a person dies intestate is disclaimed after the passing of the* Family Law (Miscellaneous) Provisions Act, 1997 *(otherwise than under section 73 of this act), the estate or part as the case may be shall be distributed in accordance with this part:*

a) As if the person disclaiming had died immediately before the death of the intestate, and

b) If that person is not the spouse or direct ancestor of the intestate, as if that person had died without leaving issue'.

It provides that where someone disclaims on intestacy after 5 May 1997, that person shall be regarded as having predeceased the intestate when distributing his estate. It further provides that if the person disclaiming is neither the spouse nor lineal ancestor of the intestate, he will also be regarded as having died without issue. However, this only applies to disclaimers after 5 May 1997, so for all deaths prior to this date the previous discussion is still relevant.

ANTICIPATING THE EFFECT OF A DISCLAIMER

Widower Tom dies, leaving two surviving children, Jack and Jill. One child, Mary, has predeceased him. Jack has one child, Joseph. Tom's predeceased child Mary had three children, John, Philip and Chris. Jill survived the intestate and has since died. Jack disclaims in 2003 and is deemed to have predeceased the intestate without issue.

Distribution:

- Jill's personal representative will inherit half of Tom's estate on behalf of Jill, as she survived her father and then died
- John, Phil and Chris will inherit the remaining one-half of Tom's estate in equal shares (one-sixth of the entire estate each)
- Joseph inherits nothing, as the effect of section 72(a) of the *Succession Act, 1965* is that Jack is deemed to have predeceased the intestate without leaving issue; therefore, Joseph is deemed never to have existed.

A person disclaiming is probably doing so to benefit another person (quite often his own child). It is important to read section 72(a) carefully to make sure that the disclaimer will operate as you and the disclaiming party expect.

In particular, note that if all children disclaim on the death of a surviving parent, the estate will not pass to the grandchildren but to the brothers and sisters of the deceased.

Ensure that a disclaimer is signed by all participating parities and that you do not find yourself in the position where you have an incomplete set of disclaimers. If a class of individuals has decided that they will all disclaim, ensure that the paperwork completes that agreement, otherwise you run the risk that if some parties have disclaimed but one ultimately has not, the latter person could scoop the pool. You could find yourself having to rely on a contractual arrangement between the parties and all that this implies.

DISCLAIMERS AND TAX

Section 12 of the *Capital Acquisitions Tax Consolidation Act, 2003* provides that if the benefit under a will or intestacy or an entitlement to settled property is disclaimed, or a claim under a purported will or an alleged intestacy is waived, or a right under the *Succession Act* is renounced, disclaimed, elected against or lapses, no tax liability will arise and it will be regarded that no disposition was made for CAT.

However, where a person receives money for a disclaimer, renunciation, election or waiver of a claim, he will be regarded as receiving a gift or inheritance of the amount paid to him as if he had received the gift or inheritance from the original disponer.

A simple deed of disclaimer does not attract stamp duty, unlike deeds of family arrangement, which do.

There was no controversy in relation to disclaimers in a testate estate because the disclaimer of a prior interest under a will would simply accelerate subsequent interests (subject to any contrary intention appearing in the will).

Grant of representation

It should be pointed out to any client intending to disclaim before applying for the grant that, in addition to losing any entitlement to a share in the estate, the person disclaiming will also lose any right that he has to extract a grant of representation to the estate. This is in accordance with rule 79(5) of the *Rules of the Superior Courts* as this right arises from the interest in the estate and, if a person disclaims interest, the right ceases.

If a disclaimer is signed after the person disclaiming has applied for a grant, but before the grant has issued, the application should be withdrawn. The applicant would no longer be one of the people '*having a beneficial interest*' as provided for in rule 79(5) of the *Rules of the Superior Courts*. Note that if an applicant's right to a grant arises from a disclaimer having been signed by a person who had a prior right, then the original of such a disclaimer must be lodged with the oath of administrator in the Probate Office.

Practitioners find little problem in correctly anticipating the result of a disclaimer where it is the spouse or a direct lineal ancestor who is disclaiming – for instance, the father of the deceased. A disclaimer is most likely to be misapplied where practitioners forget that if the person disclaiming is not the spouse or lineal ancestor of the intestate, he will also be regarded as having 'died without issue'.

If a person other than a spouse or direct lineal ancestor of the intestate (such as issue of the intestate or brothers and sisters or nieces and nephews) disclaim after 5 May 1997, that person is presumed to have predeceased the intestate and died without issue. Therefore, a child who disclaims cannot pass the disclaimed share to his issue as he is likely to assume that he can. The disclaimed share will pass to his brothers and sisters and to nephews and nieces, and to the children of a predeceased brother or sister who have actually predeceased the intestate (see **panel** opposite).

We must keep in mind that a disclaimer involves an election whether or not to take a benefit, and so the choice can only be made in the possession of full information. The person taking the benefit as a result of the disclaimer may bear the onus of proving that the disclaimer was free and voluntary if challenged at a later date. One way of displacing any presumption of undue influence is that the person disclaiming it had full information and was fully advised.

Provided a disclaimer serves to do what the client wishes to do, it is a very useful post-death planning device because it does not incur tax penalties. The second and third articles in this series will look at deeds of family arrangement and their sometimes unwelcome tax consequences. G

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

Filthy lucre

In its drive to combat money laundering, the government has introduced new regulations that will almost certainly have an adverse effect on the solicitor/client relationship. Mary Keane explains the genesis of the regulations and how they will impact on practitioners

MAIN POINTS

- History of the money-laundering regulations
- Law Society guidance notes
- Unprecedented intrusion by the state

On 15 September 2003, the Irish solicitors' profession became subject to a range of new statutory obligations that will have a lasting effect on the relationship between solicitors and their clients. From that date, solicitors must take steps to establish the identity of new clients, maintain records of their transactions, establish procedures to detect money laundering, train their staff to do likewise, and report suspicious transactions to the authorities.

The new obligations reflect commitments given by governments across the world to take strong measures to restrict the ability of criminals to use legitimate businesses to launder the proceeds of crime. In the late 1980s, concern about drug-trafficking and organised crime led to an international consensus that a co-ordinated approach should be adopted to target the proceeds of these illegal activities. As a result, a global campaign to restrict opportunities to launder the proceeds arising from these and other similar crimes was launched.

At the G-7 summit held in Paris in 1989, the Financial Action Task Force on Money Laundering (FATF) was established, with a total of 16 representatives from the G-7 member states, the European Commission, and eight other countries. Membership had expanded to 28 by 1992 and now stands at 33. The task force was given responsibility for examining money-laundering techniques and trends, reviewing measures already taken at national or international level, and identifying new measures needed to combat money laundering.

Forty shades of green

In April 1990, the FATF issued a report containing a set of *Forty recommendations* to combat the misuse of the financial systems by persons laundering drug monies. These *Forty recommendations* have been revised on a number of occasions, most recently in June 2003, and are now the agreed blueprint for international action against money laundering and terrorist financing (the latter being added to the mandate in 2001). They have been endorsed by

OBLIGATION TO REPORT A SUSPICIOUS TRANSACTION

Before any obligation to report a suspicious transaction arises, a number of criteria must be met:

1. The solicitor must be participating in the act of assisting the client in relation to a transaction or must be acting on behalf of the client in relation to a transaction (Article 2a.5 of 1991 Directive, as inserted by Article 1.2 of the 2001 Directive)
2. The transaction must come within the categories of specified activities (see paragraph 1.12 of guidance notes)
3. There must be a suspicion that an offence of money-laundering has been or is being committed in relation to the business of the solicitor (section 57(1)). (See paragraph 2.1 of guidance notes for a definition of "suspicion")
4. The information leading to the suspicion must arise in circumstances other than the exempted areas, i.e. NOT where the solicitor is either –
   - ascertaining the legal position for the client (see paragraph 6.2 of guidance notes), or
   - performing the task of defending or representing the client in or concerning judicial proceedings (whether the information is received/obtained before, during or after such proceedings), or
   - advising that client in relation to instituting, avoiding or defending judicial proceedings (whether the information is received/obtained before, during or after such proceedings)

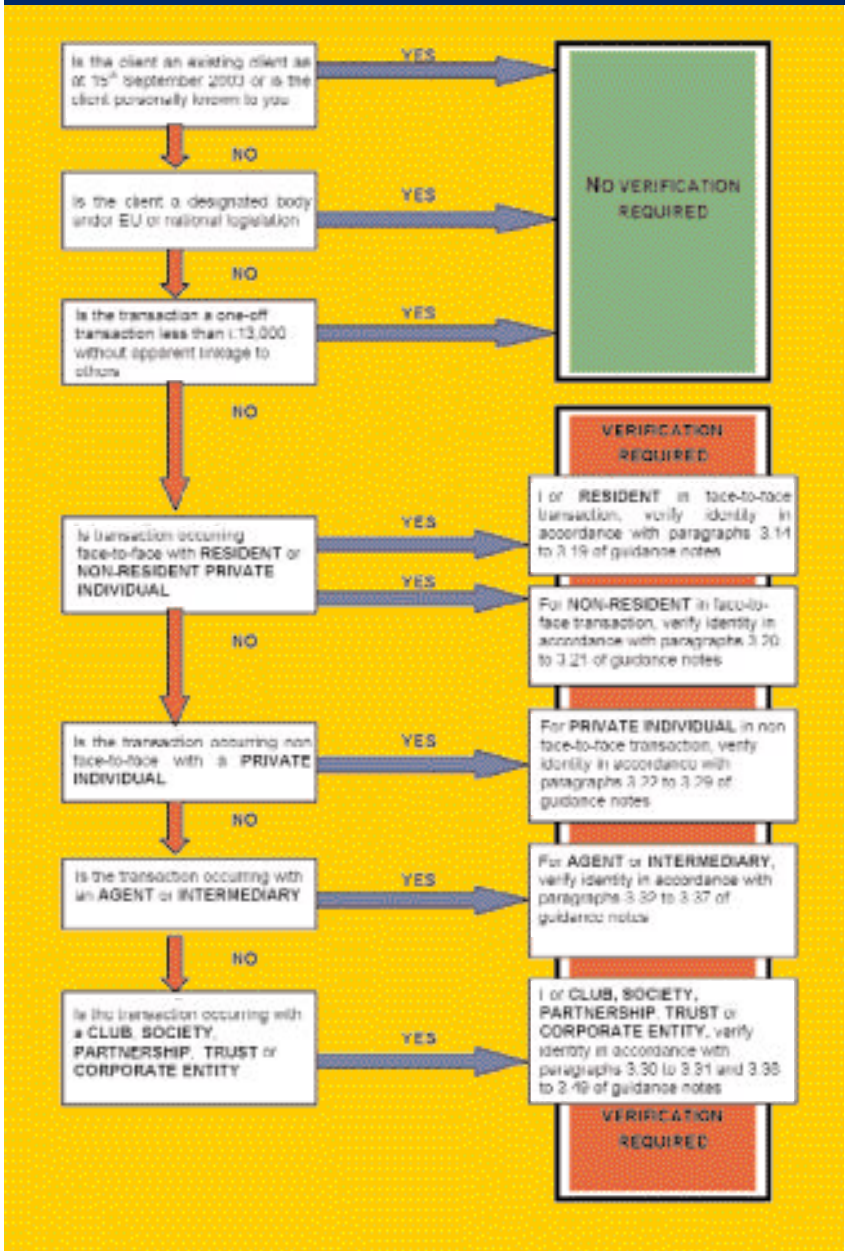
more than 130 countries and are the international anti-money-laundering standard. The most recent version of the *Forty recommendations* refers to 'the increased use of legal persons to disguise the true ownership and control of illegal proceeds, and an increased use of professionals to provide advice and assistance in laundering criminal funds'. Several of the recommendations relate to the introduction of identification, record-keeping and reporting obligations and their application to lawyers, among others.

The EU pattern on this issue largely mirrors the path followed by FATF, with the first EU directive in 1991 focusing on the financial sector and the 2001 directive expanding its remit to include 'independent legal professionals'. The 1991 directive found legislative form in the *Criminal Justice Act, 1994*, which was subsequently amended in 2001. The 2001 directive has been applied to solicitors via the dubious means of two statutory instruments (with another one in the pipeline), effectively 'shoehorning' the profession into the 1994 act provisions, which were designed for credit and financial institutions. This contorted means of implementing EU obligations shows little understanding of the phenomenal differences between the business of a financial institution and the profession of solicitor. It is also legally questionable, given the requirements of the *European Communities Act, 1972* and recent Supreme Court pronouncements on the proper manner of implementation of EU law.

The man comes around

The very fact that the EU saw fit to introduce the second EU directive is testament to an acceptance that the role of a lawyer is fundamentally different to that of a bank. This makes the failure of the Irish government to introduce lawyer-specific primary legislation, or even to implement the full range of discretions available in the second directive, deeply regrettable. On a practical level, lawyer-specific legislation could have served to clarify many of the anomalies that arise from the

VERIFICATION OF IDENTITY FLOWCHART



application of bank-specific legislation to a non-banking profession.

Through its guidance notes, the Law Society has sought to interpret the legislative provisions in a manner that makes sense of the obligations in the context of the overall objective of the legislation, but without imposing meaningless and cumbersome requirements on solicitors. This is particularly so in relation to the record-keeping obligations. The act is of little assistance in relation to the types of documentation to be maintained, with a reference only to 'documents relating to the transaction'. For a bank, the extent of the obligation to maintain all such documents would be manageable and limited. For a solicitor involved, say, in the transfer of unregistered land with title dating back to the 1800s, a requirement to maintain copies of all documents relating to the transaction would be a horrendous and pointless imposition. Consequently, the society's advice is to maintain copies of those documents that evidence the financial and ownership aspects of the transaction, being the matters of most relevance in any potential money-laundering investigation.

The obligation to verify the identity of new clients is a requirement that many people will have faced in their dealings with the banks over the past ten years and should not cause undue difficulties. The combination of the standard identification form at appendix 2 of the guidance notes, together with the flowchart should help solicitors to comply with this obligation in a reasonably easy manner (**see panels**). The society will shortly issue a leaflet for solicitors that can be displayed in their waiting rooms, explaining the new obligations and informing potential new clients of the requirements of the law.

Ring of fire

The new obligations raise sensitive and difficult ethical questions regarding the maintenance of client confidences and the solicitor's obligation of professional secrecy. Reporting requirements and a prohibition on informing a client that a report has been made can create inherent conflicts in the solicitor/client relationship. The concept of a 'suspicious transaction' is ambiguous and difficult to understand. Thankfully, notwithstanding recent newspaper reports to the contrary, the reporting obligation is not a simple matter of deciding that a client is acting suspiciously. A number of specific criteria must be met before any such obligation arises. The examples given at appendix 1 of the guidance notes are merely 'indicators' of potentially suspicious circumstances which, on closer examination, may prove to be completely innocent.

But surely the profession should embrace these obligations, designed as they are to frustrate the efforts of serious criminals and drug-traffickers to use legitimate businesses to launder the proceeds of crime? It would seem difficult to disagree with such a laudable purpose but, as ever, the devil is in the detail.

Probably the most insidious aspect of the new regime is to be found in an amendment to the *Criminal Justice Act, 1994*, introduced by way of a low-profile provision tucked away in part 17 of the first schedule to the *Central Bank and Financial Services Authority of Ireland Act, 2003*, whereby the obligation in section 57 to report suspicious transactions to the authorities was expanded to include the Revenue Commissioners. With a few short strokes of the pen and no parliamentary debate worth mentioning, the requirement to report suspicious transactions to the Garda Síochána became an obligation, as and from 1 May 2003, to report such transactions to both the Garda Síochána and the Revenue Commissioners. The extent of consultation by the Department of Finance with the Department of Justice, Equality

and Law Reform on this swingeing provision would be an interesting question to pose under the *Freedom of Information Act*. Certainly, this small but far-reaching amendment is a strong indicator of the fact that, from its genesis at EU level to its implementation in the legislation and its contorted application to solicitors by statutory instrument, the anti-money-laundering regime is essentially a finance, and not a justice, issue and is driven more by a desire to source information of benefit to the tax system than to the criminal justice system.

Folsome prison blues

On a practical level, it is difficult to imagine that a drug-trafficking criminal wishing to launder his ill-gotten gains would seek to do so through a solicitor's practice after 15 September 2003. The regulations cannot have gone unnoticed in the criminal underworld. It is more likely that their efforts will be employed in identifying other avenues for converting their criminal proceeds into legitimate funds rather than running the risk of a report to the authorities – proof, it might be claimed, that the initiative was an instant success in its purpose of restricting the avenues open to criminals to launder the profits of crime.

But a glance at the price tag for this instant success belies the bargain claimed. For every criminal who doesn't darken the door of a solicitor's office, there are hundreds of ordinary clients whose relationship with their solicitor is now overshadowed by this unprecedented intrusion of the state into their shared confidences. The right to obtain legal advice unimpeded by fear or suspicion is compromised by the very possibility of the compulsory disclosure of confidences or, worse, suspicions by a solicitor in relation to his own client. Free and untrammelled legal advice is an essential feature of the rule of law and the proper administration of justice. Even if no suspicion is formed or no report is made by a solicitor in relation to his client, the very fact that there is the possibility of such a course of action will have its own sinister impact on the confidence and trust that is an essential element of the solicitor/client relationship.

'The new obligations raise sensitive and difficult ethical questions regarding the maintenance of client confidences'

Meanwhile, our criminal brethren are very likely at the race track or in a betting shop placing a hefty wager on the chances of the minister for finance turning his anti-money-laundering sights to this particular activity in part 17 of the first schedule to the next finance bill. G

Mary Keane is director of policy, communication and member services and deputy director general of the Law Society of Ireland.

WEATHERING

In the second of her articles on pension planning, Olive Donovan discusses how the Law Society Retirement Trust Scheme has performed in the difficult market conditions of recent years

If it was a golf competition, most of the players in the pension fund industry would have bogeyed the last three holes, some would have been out of bounds, the wind would have been gusting and the greens bumpy. Most began 2003 with their handicap in much worse shape than previous years, and, in their clients' eyes, with quite a lot of ground to recover.

Some might say this is understandable on the back of three consecutive years of negative returns in world stock markets. It has been immensely difficult for investors across the globe. The average segregated pension fund in Ireland lost 18.7% of its value during 2002, making it one of the worst years in recent decades. Even over five years (to June 2003), the average fund is down 0.4% a year. Thankfully, 2003 has been much less demanding and most funds are now posting average gains of between 3% and 5% for the first half of the year. Indeed, the average fund in the second quarter delivered a very respectable 9.2% growth.

For investors in the Law Society of Ireland Retirement Trust Scheme managed fund (Law Society RTS), the news has been somewhat less worrying, as its performance has continued to be at or near the top of the leaders' board over the longer term. The table opposite describes the performance of the Law Society fund when compared with the segregated funds provided by some of the largest Irish investment managers. It shows that, despite a weaker than average one-year performance, the fund has been very consistent in delivering above-average performance over three, five and ten years.

The table shows that the Law Society RTS has weathered the storm well by comparison to its peers. In outperforming the average pension fund, the scheme has shown itself unusually adept in its consistent delivery of good relative performance for its members. Few funds can claim such consistency over such a long period, so, despite losses that are unpalatable in the short term, the performance achieved by the fund should be of some solace after such a difficult period for investors.

We can see what this means in euros and cents if we compare what happened to the average euro in the Law Society RTS over the last ten years (from June 1993) to a euro invested in the average pension fund. In simple terms, €1 in the Law Society RTS (excluding charges) grew to €2.59, whereas the average pension fund euro grew to €2.35 – a difference of 24 cents per euro invested.

In addition to the relatively strong performance shown by the Law Society RTS, the scheme is also among the most cost effective available in the Irish market. With up-front charges amounting to 2.5% and on-going fees of typically 0.5% a year, investors in the scheme start with something of an advantage when compared with many competing products available today – particularly when compared to fees of 1% to 1.5% a year that typically apply in the market.

ANNUALISED SEGREGATED MANAGED FUND PERFORMANCE RETURNS TO 30 JUNE 2003

Fund	One year	Three years (pa)	Five years (pa)	Ten years (pa)
Law Society RTS	**-8.0**	**-4.4**	**+1.3**	**+10.0**
AIBIM	-9.0	-8.6	-1.2	+8.3
BIAM	-6.1	-1.7	+2.7	+10.5
Eagle Star	-6.7	-7.0	n/a	n/a
Friends First (F&C)	-5.6	-7.5	-0.8	n/a
Hibernian	-7.2	-7.0	n/a	n/a
Irish Life	-6.6	-4.9	-0.1	+8.7
KBCAM	-9.2	-9.8	-1.6	+8.3
Setanta	-7.0	-8.0	n/a	n/a
Standard	-5.4	-7.3	-1.7	+8.5
Average	**-6.8**	**-6.7**	**-0.4**	**+8.9**

Source: Combined performance measurement service, August 2003.

MAIN POINTS

- **Law Society Retirement Trust Scheme**
- **Pension fund comparison**
- **Good performance despite negative markets**

Predicting recovery

While the Law Society RTS may have kept ahead of most of the pensions in the Irish market over the past decade, this doesn't detract from the fact that last year was a very disappointing year for investors. At the start of 2002, most fund managers appeared optimistic about the short term. The powerhouse of the world economy appeared to have turned the corner and begun recovery from recession. Markets had rebounded from the terrible events of 11 September and it looked as though the excesses of the late 1990s were behind us.

Our own view, which coincided with many of the fund managers at that time, was based on four assumptions. We believed that the US economy would grow in 2002, and we were proved correct. We believed that the US federal reserve would act speedily to ease monetary policy; again, we were right. And we correctly believed that the conflict in Afghanistan would be swift. So, with all this foresight, we might have been forgiven for assuming that our expectations would be met in 2002. But the market still had some surprises in store.

Our last assumption related to the transparency and veracity of reported earnings. We, and just about everyone else, were proved wrong. Nobody predicted the demise of Enron and Andersen and the immense uncertainty that corporate malfeasance engendered in the markets in the latter half of 2002. Yet this cast a very long shadow over the second half of last year and caused many losses in pension funds across the globe.

THE STORM

Those that kept higher weightings in equities suffered most, as did those who stayed too loyal to Europe and TMT (telecoms, media and technology). Those who focused more on traditional industries and bond markets fared better. This unpredictable environment was then followed in the first quarter of 2003 by the uncertainty that the Iraqi crisis engendered in world markets, making for a turbulent first quarter and further losses in world markets. Only with the resolution of this conflict and the prospect of a return to a more stable environment of growth in both the US and Europe have we seen markets stage a recovery.

Long-term prognosis

The fact remains that, while the period 2000 to 2003 was exceptionally difficult, the long-term returns from pensions are what counts. To return to the golfing analogy, the scores on individual holes are only a part of the game and what really counts is the performance over 18 holes. At 10% a year (excluding charges) over the past decade, investors in the Law Society RTS have been served well and should, over the long term, continue to benefit from the considerable growth potential from these levels. At the start of this year, the risks that were of concern for the global economy were clearly discernible: Iraq was one and deflation was another. While neither has passed entirely from the minds of investors, both now pose considerably less threat than was the case in January.

The longer-term prognosis for pension fund returns continues to be underpinned by recovery (however weak) in major global economies, historically low interest rates and inflation, and a return to growth in corporate earnings. But this potentially more benign environment should not be a cause for complacency. The losses of the past three years will take time to recoup and each individual will have to be increasingly mindful of his or her pension funding in the years to come.

To sum up, the Law Society RTS provides solicitors with one of the most cost-effective schemes available in Ireland. Coupled with its strong investment performance when compared to others in the marketplace, I believe that it should be top of the list of contenders for solicitors when making plans for a pension contribution. When combined with the Law Society approved retirement fund scheme, the profession has a very complete range of cost-effective investment schemes available to it.

All that remains is to invest some time in careful, individually-tailored retirement planning. G

Olive Donovan is a business development manager at Bank of Ireland Private Banking. Bank of Ireland Asset Management is one of the two investment managers of the Law Society's Retirement Trust Scheme.

LAW SOCIETY OF IRELAND **RETIREMENT TRUST SCHEME**

The Law Society Retirement Trust Scheme is the group personal pension scheme set up as a service to members.

Retirement scheme by the numbers

- Current value of the scheme: €115,000,000
- Number of solicitors in the scheme: approximately 800
- Scheme trustee: Gov & Co of the Bank of Ireland
- Investment managers: Bank of Ireland Asset Management manages the cash fund, the long bond fund, the all-equity fund and 67% of the managed fund; KBC Asset Management manages 33% of the managed fund
- Initial fee: 2.5% of each contribution
- Annual fee: 0.5%* (this includes all trust services and investment fees).

* Based on managed fund actual annual costs averaged over the past three years. These may vary from year to year. Different fee rates apply to each fund.

What you need to know

- All gains/losses on investments are passed on directly to scheme members – there is no discretionary element
- No member of the Law Society knows who the members of the Retirement Trust Scheme are. This information is strictly confidential to the trustee
- No charges of any kind are charged by or paid to the Law Society.

Tax relief information

The latest date for investing for the 2002 tax year is 31 October 2003. All cheques must be with Bank of Ireland Trust Services by 5pm on Friday 31 October 2003.

Full tax relief may be claimed annually on pension contributions up to the following limits:

- Under 30 years: 15% of net relevant earnings**
- 30 – 39 years: 20%
- 40 – 49 years: 25%
- 50 and over: 30%.

** There is a cap on earnings of €254,000 a year. For example, a 50-year-old can therefore claim full tax relief on contributions of up to €76,200 a year.

Law Society past-president Frank Daly, chair of the Solicitors' Retirement Fund

If you want to know more

For more information, log onto *www.lawsociety.ie* for a copy of the retirement scheme booklet or contact Brian King or Fiona Kiernan at Bank of Ireland Trust Services, Ferry House, 48/53 Lower Mount Street, Dublin 2 (tel: 01 435 8002/5, fax: 01 435 8020) for a copy, an application form or any details you might require. Bank of Ireland is regulated by the Irish Financial Services Regulatory Authority. G

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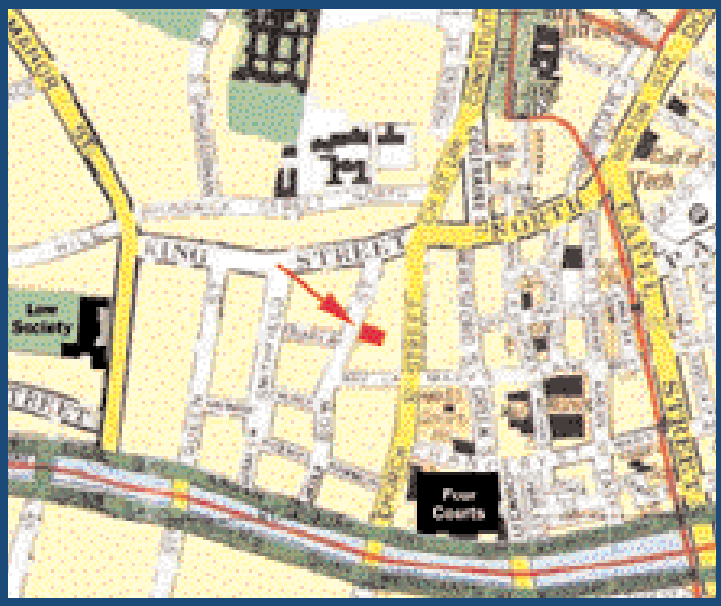

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The Law Society's website contains a wealth of information for the practising solicitor including:

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- An overview and updates on the work of the society's committees
- Contact names of Law Society personnel
- Comprehensive index of member services
- *Gazette* on-line: updated monthly
- Links to other legal sites on the net
- Legislation updates: updated quarterly
- Committee reports and publications
- Forthcoming conferences and seminars: regularly updated
- What's new: updated weekly

THE MEMBERS' AREA of the website contains practical information for solicitors such as practice notes, policy documents, precedents for practice, professional information, frequently asked questions and an interactive bulletin board

Have you accessed the Law Society website yet?

Davy
STOCKBROKERS

Seasons in the sun

For everything, there is a season. This may even apply to buying and selling shares, writes David Killen

Old adages like 'sell in May and go away' are cited in many an investment thesis. But is there really any good or bad time to buy or sell shares? Despite the fact that academic researchers were initially hostile to the notion that there could be such simple, calendar-related ways to identify recurring trends, many now support this view.

Several calendar-related investment effects are documented, though by no means proven. For instance:

- Summer effect: essentially, sell in May
- Halloween indicator: marks the end of the summer effect and is cited as the time to buy back into the market
- January or 'turn-of-the-year' effect
- Size effect: where small-cap companies outperform relative to larger caps within the same market (for an explanation of 'caps', see **panel**)
- Day effect: higher returns at the start and end of trading
- Presidential death effect: one of the more unusual influences!

Entire books have been dedicated to tracking and listing such statistics. With such a following, in some cases these trends can become self-fulfilling prophecies. This article will look closely at one of the more relevant of the above, the January effect.

What's another year?

The January effect is, without doubt, the most important and famous by far of all the seasonal anomalies. It is closely related to the size effect, since the historical out-performance of smaller stocks in the US is mainly due to their returns in January. Data has been compiled in recent years that makes it now possible to explore whether there is a similar effect in the UK and Ireland.

The theory most often cited for the out-performance of small caps in January is tax-loss selling. This is when investors sell stocks in December, which have fallen in the previous year, to realise a tax loss in an effort to minimise tax payments. After the year-end, with the selling pressure removed, prices revert back to their fair value. Another theory is that fund managers sell the poorly-performing stocks towards the year-end, again depressing prices.

Both theories are widely cited, though neither is fully supported by the evidence. The turn-of-the-tax-year is a factor worth considering when looking at this effect internationally. For example, the UK tax year for individuals starts on 6 April. Therefore, if there is a small-cap turn-of-the-year effect, it should happen during April as well as, or instead of, January.

Data running from the 1950s shows that January in the UK has the highest mean return of any of the 12 months at 3.2%, which positions it behind both April and December. (However, if you exclude January 1975, this falls to 2.2%.) But April's 3.2% average return would still tempt investors to interpret this as having something to do with the turn-of-tax-year, while both January and December could be attributed to the turn-of-calendar-year reporting for companies.

April showers

Looking at the UK micro caps between 1955 and 2000, there is actually no evidence of a January effect. Although January is positive, it only ranks fourth highest, while April is actually negative. This indicates that if there are any tax or calendar year-end seasonal trends in the UK market, they relate to the overall market, not individual sectors. This is reversed in the United States.

Data from as far back as 1926 for US micro caps reveals a very large January effect, with an average January premium of 7.1%. The mean for February to December is -0.5%, which indicates that without January, the US 'size premium' was actually negative over the last 75 years.

The January effect has gained acceptance as an explanation for the size premium in the USA. In the UK, although smaller companies have out-performed over the long term, there is no evidence of a similar effect. This may suggest that previous US research was somewhat misdirected, as it is clear that the turn-of-year effect has less weight in providing evidence on an international scale when it comes to the small-firm effect.

It seems that in the case of the UK, overall returns have been higher in January and April. However, this applies to the overall market so there is no sign of a size premium. In the US, despite the size premium reversing, there is evidence that the January size premium has persisted. But the evidence for both the UK and the US suggests that there is some form of summer effect, with returns for the UK markedly lower for the May to October period when compared to the November to April period.

There may be some truth to 'sell in May' after all. G

David Killen: 'January is by far the most important and famous seasonal anomaly'

CAPS EXPLAINED

Large cap: companies with market capitalisation of between €10 billion and €200 billion
Mid cap: market capitalisation of between €2 billion and €10 billion
Small cap: market capitalisation of between €300 million and €2 billion
Micro cap: market capitalisation of between €50 million and €300 million.

Note that classifications such as 'large cap' or 'small cap' are only approximations that change over time. The exact definition can vary between brokerage houses.

David Killen is a portfolio manager with Davy Stockbrokers' private clients unit.

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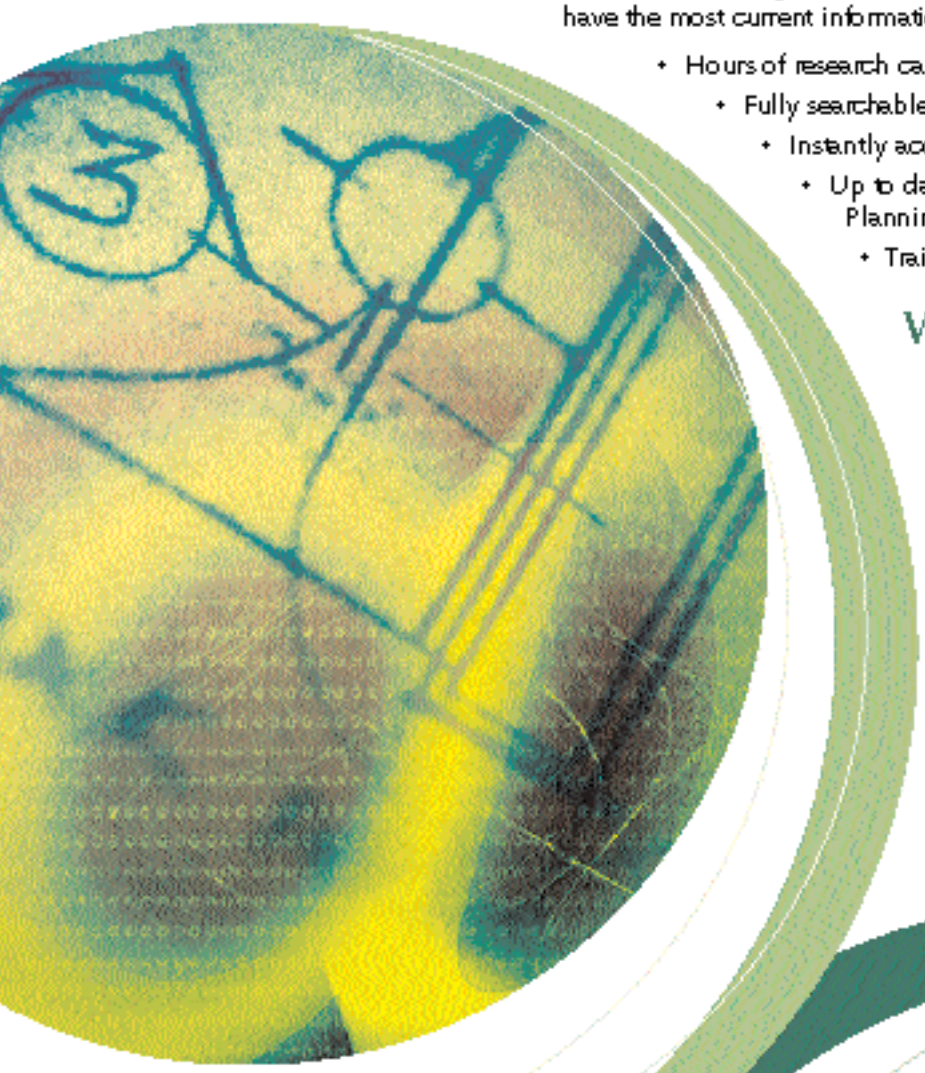

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Book review

Keating on probate (second edition)

Albert Keating. Thomson Round Hall (2002), 43 Fitzwilliam Place, Dublin 2.
ISBN: 1-85800-300-8. Price: €299.

Surprisingly, until relatively recently there was a dearth of books on probate practice for students and lawyers alike. This is all the more surprising given the rich heritage of Irish case law.

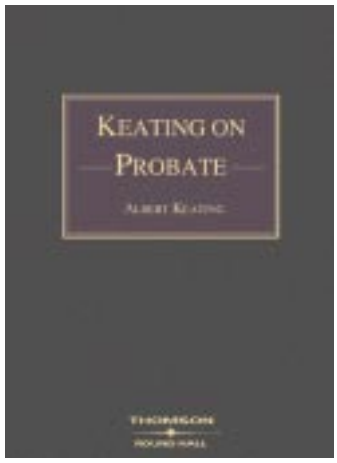
Albert Keating has done a good service to both the legal profession and students by producing a second edition of his textbook on probate law and practice, which he now has the confidence to rename *Keating on probate*. He has also produced a case book (*Probate law and practice case book*, published in 1999) and *Probate causes and related matters* (2000). The latter book concentrates on a number of significant practical problems encountered in probate practice.

Keating on probate is divided into four parts. The first part, on probate law, substantially deals with the area of succession law in Ireland, both testate and intestate. The second part deals with the construction of wills, and the third with probate practice and the jurisdiction of the courts, contentious and non-contentious applications. I have always found it curious that only the High Court has original jurisdiction for non-contentious probate jurisdiction. Mr Keating brings us through the area of special and limited grants, caveats and citations, and probate actions.

Both in this book and in *Probate causes and related matters*, Mr Keating quite rightly devotes a considerable amount of time to section 27(4) of the *Succession Act* 'where by reason of any special circumstance that appears to the court that it is necessary or expedient to do so the court may order that administration be granted to such person as it thinks fit'. This section has been a growth industry in Ireland in recent years.

Both *Keating on probate* and *Probate causes and related matters* bring us through the issue of costs in probate actions, the quality of the spouse's legal right (and a section made for lawyers), and section 117 of the *Succession Act*, which deals with the moral duty of the testator to his children. He also has a useful section in *Probate causes and related matters* on proprietary estoppels. The latter application might in future become more frequent, particularly bearing in mind the tight time-frame for the limitation of actions for a spouse's legal right.

The books do not deal with what judges generously call 'quantum merit'-type claims,



perhaps because they are more based on the generosity of the judge than on probate case law. Neither does he substantially deal with mutual wills, which is a large growth area in England, but – surprisingly – has not generated any reported case in Ireland. Perhaps Irish lawyers have more sense and regard such hybrids as unmeritorious.

I would like to have seen the solicitor's duty of care section expanded to include the explosion of cases that followed *White v Jones* ([1995] 2AC207) and Lord Gough's judgment. The English experience is of an increasing number of allegations of negligence and subsequent case law.

The case book deals with a substantial number of cases, both reported and unreported. Understandably, there is not an exclusive section, and practitioners need to be alerted to the far-too-many recent unreported cases in probate law.

The fourth part of *Keating on probate* reproduces forms from the *Rules of the Superior Courts* and, for reference purposes, the Inland Revenue affidavit. The probate self-assessment form is included, although the tax was abolished three years ago. It also produces sample applications to the Probate Office and sample wills that, although useful, are perhaps too limited for this type of book.

That said, however, *Keating on probate* is an excellent publication, much more attractive than the first edition, and with its companion books forms a valuable collection that should be in every lawyer's office, alongside the bible of Miller (1900), McGuire on the *Succession Act* and Mongey's *Probate practice in a nutshell*. G

John O'Connor is co-chairperson of the Law Society's Probate, Administration and Taxation Committee. He is also chairman of the Registrar's Committee and chairman of the Ireland Branch of the Society of Trust and Estate Practitioners.

BOOKS PUBLISHED

A judgement too far? Judicial activism and the constitution
David Gwynn Morgan
Cork University Press (2001), Crawford Business Park, Crosses Green, Cork.
ISBN: 1-85918-229-1.
Price: €15

Handbook on immigrants' rights and entitlements in Ireland
Immigrant Council of Ireland (2003), 42 Upper Dorset St, Dublin.
ISBN: 0-9545496-00.
Price: €30

Equity and the law of trusts in Ireland
Hilary Delany
Thompson Round Hall (2003), 43 Fitzwilliam Place, Dublin 2.
ISBN: 1-85800-346-6.
Price: €198 (hb)

Governance and policy in Ireland: essays in honour of Miriam Hederman O'Brien
Donal de Buitleir and Frances Ruane
IPA, (2003)
57-61 Lansdowne Rd, Dublin 4.
ISBN: 1902-448-97-9.
Price: €30

Arbitration: commentary and sources
Ercus Stewart
First Law (2003), Merchant's Court, Merchant's Quay, Dublin 8.
ISBN: 1-904480-06-3 (hb), 1-094480-03-9 (pb).
Price: €130 (hb), €90 (pb)

LEGISLATION UPDATE: 16 AUGUST – 17 SEPTEMBER 2003

SELECTED STATUTORY INSTRUMENTS

Arts Act, 2003 *(Commencement) Order 2003*
Number: SI 364/2003
Contents note: Appoints 14/8/2003 as the commencement date for the act, other than section 26(3)

Criminal Justice Act, 1994 *(Section 32) (Amendment) Regulations 2003*
Number: SI 416/2003
Contents note: Amend the Criminal Justice Act, 1994 *(Section 32) Regulations 2003* (SI 242/2003) (money-laundering regulations) by the substitution of a new regulation 4, which sets out in greater detail the circumstances in which the disclosure of information requirements in section 57 of the *Criminal Justice Act, 1994* will not apply to a person who carries on in the state the profession of accountant, auditor, solicitor or tax advisor insofar as he or she receives or obtains information from or relating to a client
Commencement date: 15/9/2003

European Communities (Recognition of Qualifications and Experience) Regulations 2003
Number: SI 372/2003
Contents note: Implement directive 99/42/EC establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the directives on liberalisation and transitional measures and supplementing the general systems for the recognition of qualifications. For the purposes of these regulations and the directive, FÁS is the competent authority in the state
Commencement date: 19/8/2003

Health (In-Patient Charges) (Amendment) Regulations 2003
Number: SI 348/2003
Contents note: Amend article 4(1) of the *Health (In-Patient Charges) Regulations 1987* (SI 116/1987) by the insertion of a new paragraph: 'i) persons who pursuant to s2 of the *Health (Amendment) Act, 1996*, in the opinion of the chief executive officer of a health board, have contracted hepatitis C directly or indirectly from the use of human immunoglobulin-anti-D or the receipt within the state of another blood product or a blood transfusion'. The categories of persons listed in article 4(1) of SI 116/1987 are exempt from the payment of in-patient charges
Commencement date: 25/7/2003

Health (Out-Patient Charges) (Amendment) Regulations 2003
Number: SI 349/2003
Contents note: Amend article 4(1) of the *Health (Out-Patient Charges) Regulations 1994* (SI 37/1994) by the insertion of a new paragraph: 'k) persons who pursuant to s2 of the *Health (Amendment) Act, 1996*, in the opinion of the chief executive officer of a health board, have contracted hepatitis C directly or indirectly from the use of human immunoglobulin-anti-D or the receipt within the state of another blood product or a blood transfusion'. The categories of persons listed in article 4(1) of SI 37/1994 are exempt from the payment of out-patient charges
Commencement date: 25/7/2003

Immigration Act, 2003 *(Commencement) Order 2003*
Number: SI 414/2003
Contents note: Appoints 19/9/2003 as the commencement date for the *Immigration Act, 2003*, other than sections 7 and 8 of the act

Immigration Act, 2003 *(Section 7) (Commencement) Order 2003*
Number: SI 415/2003
Contents note: Appoints 15/9/2003 as the commencement date for section 7 (amendment of *Refugee Act, 1996*) of the act

Immigration Act, 2003 *(Section 8) (Commencement) Order 2003*
Number: SI 363/2003
Contents note: Appoints 11/8/2003 as the commencement date for section 8 (exchange of information) of the act

Pensions (Amendment) Act, 2002 *(Section 3 (in so far as it relates to the insertion of sections 121 except in so far as that section is already in operation), 123, 124(1) and 125 into the* Pensions Act, 1990) *(Commencement) Order 2003*
Number: SI 389/2003
Contents note: Appoints 15/9/2003 as the commencement date for sections 121, 123, 124(1) and 125 of the *Pensions Act, 1990* as inserted by the *Pensions (Amendment) Act, 2002*

Pensions (Amendment) Act, 2002 *(Section 5 (except in so far as that section is already in operation) and Sections 8 and 58) (Commencement) Order 2003*
Number: SI 398/2003
Contents note: Appoints 2/9/2003 as the commencement

District Court (Estreatment of Recognisances) Rules 2003
Number: SI 411/2003
Contents note: Amend schedule B of the *District Court Rules 1997* (SI 93/1997) by the addition of form 27.6B and the substitution of new forms 27.7 and 27.8 in order to facilitate the estreatment of recognisances
Commencement date: 9/10/2003

District Court (Small Claims) (Amendment) Rules 2003
Number: SI 410/2003
Contents note: Amend order 53A (small claims procedure) of the *District Court Rules 1997* (SI 93/1997) by the substitution of amounts in euro and by the addition of rule 16
Commencement date: 9/10/2003

District Court (Terms of Employment Information) Rules 2003
Number: SI 409/2003
Contents note: Amend order 99B of the *District Court Rules 1997* (SI 93/1997) to allow applications to be made pursuant to section 9 of the *Terms of Employment (Information) Act, 1994* to any sitting of the court for the court district in which the respondent employer carries on any trade, profession, business or occupation. Such application shall be by notice of application in form 99B.3, schedule C, and shall be served on the respondent by prepaid registered post not later than seven days before the date of the sitting for which the application is returnable. An order made pursuant to section 9 of the 1994 act on such application shall be in form 99B.4, schedule C
Commencement date: 9/10/2003

District Court (Theft and Fraud Offences) Rules 2003
Number: SI 412/2003
Contents note: Amend order 34, rule 1, of the *District Court Rules 1997* (SI 93/1997) and delete forms 34.1 and 34.2 in schedule B and substitute new forms 34.1 to 34.2C in relation to proceedings and applications under the *Criminal Justice (Theft and Fraud Offences) Act, 2001*
Commencement date: 9/10/2003. These rules will not apply to any proceeding or application in respect of an offence alleged to have been wholly or partly committed before 9/10/2003 (per rule 5)

date for section 5 of the act (except in so far as it is already in operation) which inserts a new part XI into the *Pensions Act, 1990* to provide for a pensions ombudsman; appoints 2/9/2003 as the commencement date for sections 8 and 58 of the act which also deal with the office of the pensions ombudsman

Pensions Ombudsman Regulations 2003
Number: SI 397/2003
Contents note: Provide for the operation and jurisdiction of the office of pensions ombudsman
Commencement date: 2/9/2003

Personal Retirement Savings Accounts (Disclosure) (Amendment) Regulations 2003
Number: SI 342/2003
Contents note: Section 111 of the *Pensions Act, 1990*, as amended by the *Social Welfare (Miscellaneous Provisions) Act, 2003*, provides that the minister for social and family affairs may make regulations to provide for the disclosure of additional information relating to the consequences, including financial consequences, of replacing an existing PRSA contract or a retirement annuity contract with another PRSA contract. These regulations provide that this information must be provided before the initial statement of reasonable projection is issued and that it must be provided in the form of a declaration to be signed by the PRSA provider and the person concerned. Sections 111, 113 and 116 of the *Pensions Act, 1990*, as amended by the *Social Welfare (Miscellaneous Provisions) Act, 2003*, provide for the issue of a preliminary disclosure certificate, a certificate of comparison and a statement of reasonable projection respectively. These regulations provide that all of these documents must be prepared in accordance with the advice of a PRSA actuary and any guidance notes issued by the Society of Actuaries in Ireland for that purpose
Commencement date: 24/7/2003

Personal Retirement Savings Accounts (Operational Requirements) (Amendment) Regulations 2003
Number: SI 341/2003
Contents note: Section 119 of the *Pensions Act, 1990* provides that a PRSA actuary shall determine the extent to which a PRSA provider has complied with part X of the *Pensions Act*. Section 119 was amended by the *Social Welfare (Miscellaneous Provisions) Act, 2003* to require a PRSA actuary to comply with any guidance specified in regulations when preparing that determination. These regulations so specify. Section 119 was also amended by the *Social Welfare (Miscellaneous Provisions) Act, 2003* to provide that a PRSA provider must sign a declaration that he has given the PRSA actuary all the information requested and that it is accurate. These regulations prescribe the form and manner and content of that declaration and provide that it should be included in the determination of the PRSA actuary. The regulations also provide that the determination should include a statement by the PRSA actuary, if such is the case, that the PRSA provider has complied with the advice of the PRSA actuary and Society of Actuaries in Ireland guidance as required under the *Pensions Act*
Commencement date: 24/7/2003

Protection of the Environment Act, 2003 *(Commencement) Order 2003*
Number: SI 393/2003
Contents note: Appoints 8/9/2003 as the commencement date for the following sections of the act: sections 1(1), 1(3), 2, 4, 20(1)(c), 26(1), 26(2)(a), 26(2)(b), 26(2)(c), 27, 30, 32 and 52

Protection of the Environment Act, 2003 *(Commencement) (No 2) Order 2003*
Number: SI 413/2003
Contents note: Appoints 17/9/2003 as the commencement date for section 17 of the act and 1/10/2003 as the commencement date for sections 1(4), 56, 57, 58 and 59 (in so far as it relates to the *Litter Pollution Act, 1997*) of the act

Refugee Act, 1996 *(Appeals) Regulations 2003*
Number: SI 424/2003
Contents note: Supplement in detail the procedures set out in section 16 of the *Refugee Act, 1996* in relation to the determination by the Refugee Appeals Tribunal of appeals against recommendations of the refugee applications commissioner on applications for recognition as a refugee. The regulations take account of the amendments to the *Refugee Act, 1996* made by the *Immigration Act, 2003*. They replace the Refugee Act, 1996 *(Appeals) Regulations 2002* (SI 571/2002), which are revoked (but with a saver for certain applications that are to be dealt with under the pre-existing arrangements)
Commencement date: 15/9/2003

Refugee Act, 1996 *(Section 22) Order 2003*
Number: SI 423/2003
Contents note: Puts in place the arrangements necessary in the state to give full effect to council regulation (EC) no 343/2003. The council regulation sets out the rules and procedures for determining which EU member state is responsible for dealing with an asylum application made in one of them. The council regulation also applies to Iceland and Norway, but does not apply to Denmark. Arrangements in this regard with Denmark continue to be governed by the Dublin convention *(Implementation) Order 2000* (SI 343/2000). SI 343/2000 also continues to apply to certain applications made before 1/9/2003
Commencement date: 15/9/2003

Road Traffic (National Car Test) Regulations 2003
Number: SI 405/2003
Contents note: Consolidate the statutory provisions relating to the national car test, the suitability testing and periodic roadworthiness testing of small public-service vehicles. Revoke SI 550/2001 and SI 55/2002
Legislation implemented: directive 96/96; directive 2003/27
Commencement date: 15/9/2003

Social Welfare (Miscellaneous Provisions) Act, 2002 *(Section 16) (No 2) (Commencement) Order 2003*
Number: SI 395/2003
Contents note: Appoints 8/9/2003 as the commencement date for section 16 of the act in so far 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 Cork

Social Welfare (Miscellaneous Provisions) Act, 2003 *(Section 23) (Commencement) Order 2003*
Number: SI 399/2003
Contents note: Appoints 2/9/2003 as the commencement date for section 23 of the act. Section 23 provides for amendments to the *Freedom of Information Act, 1997* to bring the office of the pensions ombudsman, as established under the *Pensions (Amendment) Act, 2002,* within the scope of the *Freedom of Information Act*. Also provides that the *Freedom of Information Act* will not apply to any examination or investigation carried out by the pensions ombudsman under the *Pensions Act.* G

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SOLICITORS DISCIPLINARY

In the matter of Mary C Dillon, practising under the style and title of MC Dolan & Company Solicitors, Ridge House, 1 Conyngham Road, Dublin 8, and in the matter of the *Solicitors Acts, 1954 to 2002* [2890/DT358]
Law Society of Ireland (applicant)
Mary C Dillon (respondent solicitor)

On 19 June 2003, the Solicitors Disciplinary Tribunal found that the respondent solicitor was guilty of misconduct in her practice as a solicitor in that she had:

a) Breached section 68(1) of the *Solicitors (Amendment) Act, 1994* by failing to provide her (named) client with the particulars in writing prescribed by the section in relation to her personal injury action – (€500)
b) Breached section 68(1) of the *Solicitors (Amendment) Act, 1994* by failing to provide her (named) clients with the particulars in writing prescribed by the section in relation to the purchase of a property – (€500)
c) Breached section 68(1) of the *Solicitors (Amendment) Act, 1994* by failing to provide her (named) clients with the particulars in writing prescribed by the section in relation to the abortive purchase of another property – (€500)
d) Breached section 68(2) of the *Solicitors (Amendment) Act, 1994* by charging a solicitor and client fee over and above what was received on a party and party basis calculated as a percentage of the settlement amount plus VAT – (€10,000)
e) Breached section 68(3) of the *Solicitors (Amendment) Act, 1994* by appropriating the settlement cheque and refusing to release same until her fees were agreed by her client despite the opposition of her client to such payments
f) Breached section 68(6) of the *Solicitors (Amendment) Act, 1994* by failing to furnish to her (named) client a bill of costs in the format prescribed by that section as soon as practicable after the settlement of her client's case
g) Breached section 68(8) of the *Solicitors (Amendment) Act, 1994* by failing to take all appropriate steps to resolve a dispute between her and her clients about her legal costs, by failing to inform her clients in writing of their right of taxation and the clients' right to make a complaint to the society under section 9 of the *Solicitors (Amendment) Act, 1994* about alleged excessive charging by her
h) Threatened her client with proceedings for recovery of the said costs if she failed to either sign a requisition to tax or discharge the costs, notwithstanding the fact that an investigation of a complaint (by the society) about her charges was taking place.

The tribunal ordered that the respondent solicitor:

a) Do stand censured
b) Pay the total sum of €11,500 to the society's Compensation Fund
c) Pay the costs of the society.

In the matter of Michael J Murphy, solicitor, carrying on practice under the style and title of MJ Murphy & Company Solicitors, 25 Lower Salthill, Galway, and in the matter of the *Solicitors Acts, 1954 to 1994* [4803/DT220]
Law Society of Ireland (applicant)
Michael J Murphy (respondent solicitor)

On 6 March 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 reply to letters and to telephone calls of enquiry from his client about his client's case
b) Failed to reply to correspondence from the society
c) Failed to write to his client about his case and to furnish a copy of the letter to the society in breach of his undertaking to the society
d) Failed to comply with a notice pursuant to section 10 of the *Solicitors (Amendment) Act, 1994* requiring the delivery to the society of the complainant's file and papers to investigate the complaint of the complainant
e) Through his non-compliance with the section 10 notice caused the society to have to make an application to the High Court for delivery of the file and papers.

The tribunal ordered that the respondent solicitor:

a) Do stand censured
b) Pay the sum of €2,000 to the society's Compensation Fund
c) Pay the costs of the society.

In the matter of Michael J Murphy, solicitor, carrying on practice under the style and title of MJ Murphy & Company Solicitors, 25 Lower Salthill, Galway, and in the matter of the *Solicitors Acts, 1954 to 1994* [4803/DT230]
Law Society of Ireland (applicant)
Michael J Murphy (respondent solicitor)

On 6 March 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 communicate with his client
b) Failed to respond to a series of phone calls from or on behalf of his client enquiring about his case
c) Failed to reply to correspondence from the society
d) Failed to comply with his undertaking of 24 February 2000 to forward his client's file to the society
e) Failed to comply with a notice served on him by the society pursuant to section 10 of the *Solicitors (Amendment) Act, 1994*.

The tribunal ordered that the respondent solicitor:

a) Do stand censured
b) Pay the sum of €1,000 to the society's Compensation Fund
c) Pay the costs of the society.

In the matter of Michael J Murphy, solicitor, carrying on practice under the style and title of MJ Murphy & Company Solicitors, 25 Lower Salthill, Galway, and in the matter of the *Solicitors Acts, 1954 to 1994* [4803/DT249]
Law Society of Ireland (applicant)
Michael J Murphy (respondent solicitor)

On 6 March 2003, the Solicitors Disciplinary Tribunal found that the respondent solicitor was guilty of misconduct in his practice as a solicitor in that he had:

TRIBUNAL

a) Failed to respond to communications from his client about her case
b) Failed to comply with his client's instructions to hand over her file to her new firm of solicitors despite the fact that he had effectively stopped doing any further work to progress the case on behalf of his client
c) Seriously prejudiced his client through his gross neglect of her case
d) Failed to hand the client's file over to the complainant's new solicitor having undertaken verbally to do so in October 1999
e) Failed to comply with a Registrar's Committee direction made on 13 January 2000 pursuant to section 8 of the *Solicitors (Amendment) Act, 1994* that he hand over his client's file to her new firm of solicitors within ten days of notification of the direction.

The tribunal ordered that the respondent solicitor:
a) Do stand censured
b) Pay the sum of €1,000 to the society's Compensation Fund
c) Pay the costs of the society.

In the matter of Denise McNulty, solicitor, carrying on practice under the style and title of Denise McNulty and Company, Solicitors, at Zion Court, Zion Church Grounds, Rathgar, Dublin 6 and in the matter of the *Solicitors Acts, 1954 to 1994* [4457/DT340]
Law Society of Ireland (applicant)
Denise McNulty (respondent solicitor)

On 4 March 2003, the Solicitors Disciplinary Tribunal found that the respondent solicitor was guilty of misconduct in her practice as a solicitor in that she had:
a) 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 her 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 censured
b) Pay the sum of €500 to the society's Compensation Fund
c) Pay the costs of the society.

In the matter of Daniel Murphy, solicitor, carrying on practice under the style and title of Daniel Murphy & Company Solicitors, Macroom, Co Cork, and in the matter of the *Solicitors Acts, 1954 to 1994* [3917/DT342]
Law Society of Ireland (applicant)
Daniel Murphy (respondent solicitor)

On 26 June 2003, the Solicitors Disciplinary Tribunal found that the respondent solicitor was guilty of misconduct in his practice as a solicitor in that he had:
- 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 censured
b) Pay the sum of €1,500 to the society's Compensation Fund
c) Pay the costs of the society. G

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Personal injury judgment

Tort – personal injury – disclosure pursuant to *Rules of the Superior Courts 1998* – exchange of expert reports where it is intended to call the relevant expert as a witness – schedule to be prepared by parties listing all reports from expert witnesses intended to be called within specified period of service of notice of trial – copies of reports listed in relevant schedules to be exchanged – medical report referred to in the relevant schedule but then omitted from exchange on the basis that the party was not going to rely on that particular medical report – whether omission of actual medical report in accordance with rules of court

CASE

***Maria Kincaid v Aer Lingus Teoranta*, High Court, Kearns J; Supreme Court (McGuinness, Geoghegan and McCracken JJ), judgment of Geoghegan J for the court on 9 May 2003.**

THE FACTS

Maria Kincaid issued proceedings against Aer Lingus in respect of alleged liability for personal injury. The action proceeded through the usual phases of the pleadings. In the final stages of the pleadings, Aer Lingus included in its schedule of witnesses and reports a medical report by Niall Mulvihill, an orthopaedic surgeon, pursuant to the Rules of the Superior Courts *(No 6) (Disclosure of Reports And Statements) 1998* (SI no 391 of 1998).

Aer Lingus furnished copies of all its listed reports but omitted Mr Mulvihill's report. This was because, by letter dated 18 April 2002 and before furnishing copies of listed reports, Aer Lingus's solicitors informed Ms Kincaid's solicitors that Mr Mulvihill would not now be called as a witness and, that being so, there was no longer any obligation to furnish a copy of his report. Ms Kincaid claimed that Aer Lingus was not entitled to withdraw reliance on Mr Mulvihill for the purposes of the disclosure rules until after it had first furnished to Ms Kincaid copies of all the reports listed in the relevant schedule.

JUDGMENT OF THE HIGH COURT

The matter came before Kearns J of the High Court, who delivered an *ex tempore* judgment. It was noted that Ms Kincaid conceded that Aer Lingus was entitled to withdraw reliance on a report listed in Aer Lingus's schedule under order 39, rule 46(6) of the 1998 rules, but Ms Kincaid argued that this was only allowed after delivery of the report.

The essence of Ms Kincaid's argument in the High Court was that order 39, rule 46(6) of the 1998 rules should be construed as actually prohibiting a party from withdrawing reliance on a report included in a schedule until after the report had been delivered. Kearns J found that it was 'not an easy call to make' and that order 39, rule 46 seemed to contain conflicting provisions. Kearns J came down in favour of Ms Kincaid on the grounds that the rules were intended to provide for 'an element of mutuality which would guarantee transparency between the parties' and considered it to be contrary to the intentions of the rules-making committee that one side could see the report of another and then, perhaps on foot of what it saw, withdraw reliance on a witness included in its schedule of reports and on the report itself.

Aer Lingus appealed the decision to the Supreme Court

JUDGMENT OF THE SUPREME COURT

The appeal came before McGuinness, Geoghegan and McCracken JJ, with Geoghegan J delivering the judgment of the court on 9 May 2003.

Geoghegan J began his judgment by stating that, in recent years, a welcome innovation had been introduced into personal injury litigation. There was now a requirement that the parties exchange expert reports where it is intended to call the relevant expert as a witness. The judge said that it seemed to have been decided by the powers-that-be that neither amended rules of court nor still less a practice direction would be sufficient for the enforcement of such new arrangements. Because of its effect on the long-standing legal principles of privilege in relation to documents prepared for the purposes of litigation, a statutory backing was required. Hence, the enactment of section 45 of the *Courts and Court Officers Act, 1995*, which Geoghegan J cited later in this judgment. That section empowered the Superior Courts Rules Committee and the Circuit Court Rules Committee to make rules requiring disclosure between the parties of any report or statement from any expert intended to be called to give evidence of medical or paramedical opinion in relation to an issue in the case. The section also contained analogous provisions relating to other kinds of experts' reports and certain kinds of particulars and information appropriate to be exchanged.

Geoghegan J noted that it proved difficult to draft satisfactory rules pursuant to this section, but that the current rules and those that were relevant to this appeal were contained in the Rules of the Superior Courts *(No 6) (Disclosure of Reports And Statements) 1998* (SI no 391 of

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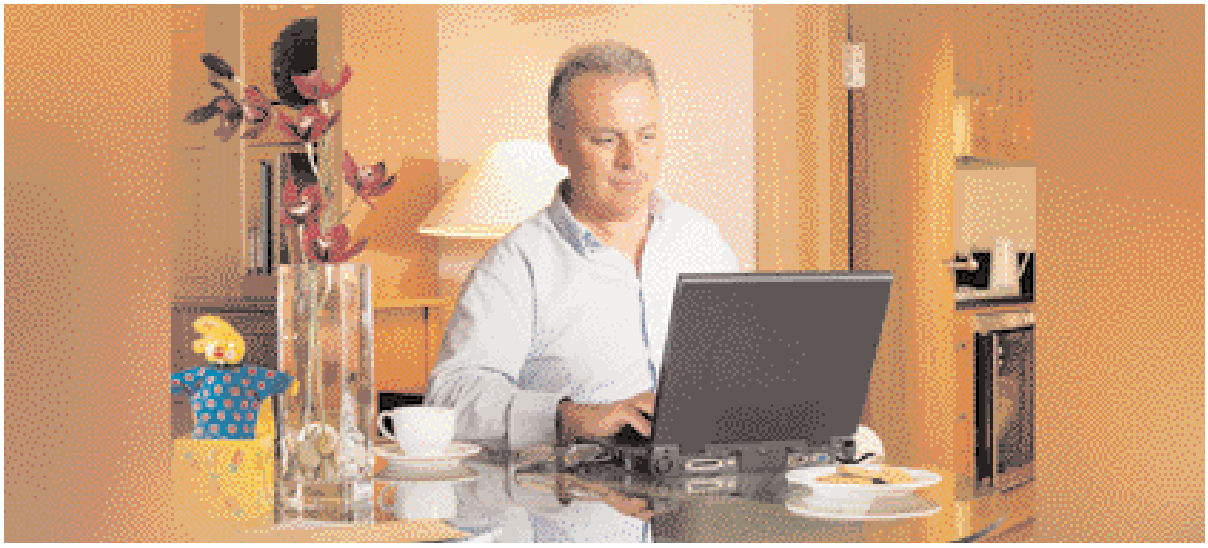

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1998). These new rules (45-51) were inserted into order 39 of the *Rules of the Superior Courts*. The new rule 45 contains a number of definitions, including a definition of 'report'. But the judge noted that it was rule 46 that was relevant to this appeal. In order to explain how the appeal arose and what the issues were, the judge considered it essential to cite all of rule 46:

'1) The plaintiff in an action shall furnish to the other party or parties or their respective solicitors (as the case may be) a schedule listing all reports from expert witnesses intended to be called within one month of the service of the notice of trial in respect of the action or within such further time as may be agreed by the parties or permitted by the court. Within seven days of receipt of the plaintiff's schedule, the defendant or any other party or parties shall furnish to the plaintiff or any other party or parties a schedule listing all reports from expert witnesses intended to be called. Within seven days of the receipt of the schedule of the defendant or other party or parties, the parties shall exchange copies of the reports listed in the relevant schedule

2) The parties in an action shall exchange with the other party or parties or their respective solicitors (as the case may be) the information and statements referred to in section 45(1)(a)(iii), (iv) and (v) within one month of the service of the notice of trial or within such further time as may be agreed by the parties or permitted by the court

3) In any case where a party or his solicitor certifies in writing that no report exists which requires to be exchanged pursuant to sub-rule (1), any other party shall, on the expiry of the time fixed, agreed or permitted as the case may be deliver any report within the meaning of the section to all other parties to the proceedings

4) Any party who, subsequent to the delivery required by sub-rule (1) above, obtains any report within the meaning of the section or the name and address of any further witness shall forthwith deliver a copy of any such report or statement or details of the name and address of such witness (as the case may be) to the other party or parties or their respective solicitors (as the case may be)

5) Service of any report, statement or information required to be exchanged or delivered may be effected by letter in writing enclosing the report, statement or information required to be delivered by virtue of the section and may be sent by ordinary prepaid post or in any other manner in which service is authorised by these rules. Such letter shall specifically state that the service is for the purpose of complying with the requirements of section 45 of the act and these rules. The court may on application to it by any party to an action or of its own motion require that an affidavit or affidavits be filed by any party in relation to proof of disclosure and service required by these rules in any case in which it appears to the court necessary so to do

6) Any party who has previously delivered any report or statement or details of a witness may withdraw reliance upon such by confirming by letter in writing that he does not now intend to call the author of such report or statement or such witness to give evidence in the action. In such event, the same privilege (if any) which existed in relation to such report or statement shall be deemed to have always applied to it notwithstanding any exchange or delivery which may have taken place'.

The Supreme Court considered that the purpose of the rules was not to disclose the strengths and weaknesses of each other's case, but rather to prevent surprise evidence being thrown up at a trial which the other party at that stage is unable to deal with.

The Supreme Court then considered the interpretation of rule 46(6) of the 1998 rules. Geoghegan J could not agree that the rule meant that a party was prohibited from withdrawing reliance unless he had previously delivered the report. The sub-rule, according to the judge, had not prescribed any such thing. Rather, it was trying to cope with the situation that would arise if, after delivery of such a report, the party who delivered it decides he is no longer going to rely on that witness. The report, even though by that time it had got into the hands of the opposing party, is nevertheless to be deemed to have been privileged from the beginning. The situation that had arisen in this case was simply not expressly covered by the rule.

Geoghegan J stated that, with all respect, he did not necessarily agree with the view of Kearns J that there was a conflict in the rules. It seemed to Geoghegan J that it was more a question of there not being an express provision to cover every eventuality. The fact that there may be no express provision dealing with the point that had arisen in this case did not mean that the rules cannot be interpreted as implicitly covering the problem. This would seem to be particularly so in light of the fact that the rules were made pursuant to a special statutory provision. Clearly, if the rules did not exist, Mr Mulvihill's report would be a privileged document in the hands of Aer Lingus, and Ms Kincaid would have no right to see it. What rule 46(6) of the 1998 rules was dealing with was the problem that arises when a privileged document is in fact in the hands of another party. That was not the case here.

So as to apply a proper interpretation to the rules to cover the actual situation that had arisen, the Supreme Court considered it necessary to look to the underlying statutory provision and, therefore, the court cited in full the relevant part of section 45 of the 1995 act, that is to say, section 45(1)(a):

'Notwithstanding any enactment or rule of law by virtue of which documents prepared for the purpose of pending or contemplated civil proceedings (or in connection with the obtaining or giving of legal advice) are in certain circumstances privileged from disclosure, the Superior Courts Rules Committee, or the Circuit Court Rules Committee as the case may be, may, with the concurrence of the minister, make rules (a) requiring any party to a High Court or Circuit Court personal injuries action to disclose to the other party or parties, without the necessity of any application to court by either party to allow such disclosure, by such time or date as may be specified in the rules, the following information, namely:

i) Any report or statement from any expert intended to be called to give evidence of medical or paramedical opinion in relation to an issue in the case

ii) Any report or statement from any other expert of the evidence intended to be given by that expert in relation to an issue in the case

iii) The names and addresses of all witnesses intended to be called to give evidence as to facts in the case

iv) A full statement of all items of special damage together with appropriate vouchers or statements from witnesses by whose evidence such loss would be proved in the action

v) A written statement from the Department of Social Welfare showing all payments made to a plaintiff subsequent to an accident or an authorisation from the plaintiff to the defendant to apply for such information, and

vi) Such other relevant information or documentation (as may be provided for by rules of court) so as to facilitate the trial of such personal injuries actions'.

The Supreme Court noted that in the case of each of the categories of information, whether documentary or otherwise, required under section 45(i) to (vi) of the 1995 act, they were each by their express wording directed towards the hearing of the action. The only kind of report or statement from any expert that is required is a report or statement from an expert 'intended to be called to give evidence' in the case of a medical

witness or, in the case of a non-medical expert, a report or statement of evidence 'intended to be given by that expert'. Only the names and addresses of witnesses 'intended to be called to give evidence' need be furnished. The statement of all items of special damages has to be furnished together with appropriate vouchers or statements 'from witnesses by whose evidence such loss would be proved in the action'.

Geoghegan J observed it was obvious that the statement from the Department of Social Welfare was also required pursuant to section 45 of the 1995 act for the purposes of the action and, finally, the generic provision relating to 'other relevant information or documentation' was such 'as to facilitate the trial of such personal injury action'. The court concluded, therefore, that the Oireachtas was not intending to give any power to the rules-making committees to alter the rules of privilege, except in relation to evidence intended to be used at the hearing. Nor would it ever have been intended by the Oireachtas to prohibit a party from changing his mind as to whether he wanted to call a particular witness during some particular period within the pendency of an action. Geoghegan J determined, therefore, that once Aer Lingus changed its mind about calling Mr Mulvihill, it could not have been obliged thereafter to furnish his report, because the report was then a privileged document. If the rules were to be interpreted as providing otherwise, Geoghegan J was of the opinion that the rules-making committee was acting *ultra vires*, but he saw no reason to interpret the rules in the way contended by Ms Kincaid and, therefore, allowed the appeal and set aside the order that had been made by Kearns J.

Geoghegan J then made a final observation. The obligation under order 39, rule 46(1) was to 'exchange' scheduled reports. If a party's solicitor ensures that the exchange is contemporaneous, there is no danger of the so-called 'abuse' arising. If each party's solicitor ensures that an actual contemporaneous exchange of reports takes place, there was no danger that the procedure could be abused in the manner suggested by Ms Kincaid. G

This judgment was summarised by solicitor Dr Eamonn Hall.

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COMPANY

Credit and security, receivership

Sale of assets – section 316 application – duties of receivers – duty of care – power of sale – credit and security – conflict of interest – confidentiality – valuation of assets – fair market value – current market value – whether court should approve sale of assets of company – whether assets of company undervalued – whether receiver exercised reasonable care – Companies Act, 1963

The proceedings concerned the sale of the main assets, an ore body, of a company (Bula) which was in receivership. The receiver of the company had brought an application pursuant to section 316a of the *Companies Act, 1963* seeking court approval for the sale of the ore body for the sum of £27.5 million to a neighbouring company (Tara Mines). The application had been opposed by the directors of Bula on a number of grounds. The directors had contended that the receiver had a conflict of interest in acting as receiver. In addition, it was claimed that the assets of the company were grossly undervalued and that the value of the ore body was over £60 million. It was submitted that the receiver should sell the shares of Bula and not the assets. Furthermore, it was claimed that the receiver should await the final resolution of related litigation. It was argued that the receiver's bargaining position was all the greater, given that the prospective purchaser, Tara Mines, was a neighbour. In the High Court, Mr Justice Murphy issued an order approving the sale of the assets. The directors appealed, raising the same issues in the Supreme Court.

The Supreme Court (Denham J delivering judgment; Murray J and McGuinness J agreeing) dismissed the appeal (and a number of related appeals). The role of the court was to examine whether the receiver had exercised all reasonable care to get the best price reasonably obtainable. A receiver was not obliged to wait for a rising market before selling. The primary duty of the receiver was to the secured creditors, and this meant realising the assets. The receiver had sought and obtained specialist advice from mining consultants in relation to the sale. The sale of the mine was brought to the open market and the attention of 60 major mining companies. Section 316 dealt with price and not valuation. The receiver was not obliged to somehow force the interested and ultimate purchaser (Tara Mines) to pay more for the ore body. The High Court judge acted within his judicial discretion in refusing to allow cross-examination of deponents on their evidence at the hearing of the section 316 application. At such an application, parties are put on notice and could present evidence but it was not an adversarial trial by affidavit. Most of the other matters raised in the related appeals were moot and those appeals were also dismissed. Concern was also expressed as to the length of court time allocated to the hearing of these matters and it was hoped that in the future the courts would be assisted in case management.

***In the matter of Bula Limited (in receivership)*, Supreme Court, 11/4/2003** [FL7793]

Directors' duties, interpretation

Company law – directors – liquidation – restriction of directors – application by liquidator – delay – whether liquidator precluded from bringing application to restrict directors by reason of delay – statute – interpretation – extension of time within which to bring application – factors to be considered – Companies Act, 1990, *section 150* – Company Law Enforcement Act, 2001, *section 56*

The applicant, the liquidator of the company, was under an obligation pursuant to section 56(2) of the *Company Law Enforcement Act, 2001* to bring an application on or before 28 April 2003 (that is, within five months of the date upon which he furnished his report on the company to the director of corporate enforcement) before the High Court seeking a declaration of restriction of the respondent directors of the company in liquidation pursuant to section 150 of the *Companies Act, 1990*. This application was commenced on 1 May 2003 by originating notice of motion, which also sought orders extending the time within which the applicant could file and serve an

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affidavit supporting the section 150 application. The respondents objected to the extension of time sought. At the hearing of the preliminary application, three issues were identified: whether the time limit specified in section 56(2) of the 2001 act was a limitation period in the sense of precluding an application by the liquidator pursuant to section 150 of the 1990 act; the matters to be considered by the court in the exercise of its discretion on an application to extend time under section 56(2) of the 2001 act; and the application of the court's discretion on the facts of this case.

Finlay Geoghegan J extended the time for the making of an application pursuant to section 150 of the 1990 act by the liquidator, holding that section 56(2) of the 2001 act was a regulatory limitation which, in its express terms, did not bar the entitlement of the liquidator to bring an application for a declaration of restriction of the directors at a later date than that set out therein. As section 41 of the act of 2001 amended section 150 of the act of 1990 by adding sub-section 4A, which gave a liquidator the power, without any time limitation, to bring an application for a declaration of restriction of company directors, it had to be assumed that the Oireachtas intended each of the two provisions of the 2001 act to take effect in accordance with their express words and to be consistent with each other, and if the Oireachtas intended the power given in section 150(4A) of the 1990 act to be limited in time, as specified in section 56(2) of the 2001 act, there would have been express words to that effect. Accordingly, the court should not consider the position of the directors in an application for an extension of time under section 56(2) of the 2001 act because the only effect of an extension of time, if granted by a court under section 56(2), was to relieve the liquidator from being considered guilty of an offence under sub-section 3. Any entitlement of directors to preclude the application being pursued against them by reason of delay would have to be considered in accordance with the principles in *Duignan v Carway* ([2001] 4 IR 550), which were not applicable on the facts of the present case. Given that the application was among the first batch of applications under the 2001 act and the very short extension of time sought, it was fair to exercise the court's discretion to extend the time for making the application.

***Coyle v O'Brien, Hill and Hughes*, High Court, Miss Justice Finlay Geoghegan, 14/7/2003** [FL7813]

CRIMINAL

Certiorari, courts

Judicial review – certiorari – *natural and constitutional justice – fair procedures* – audi alteram partem – *summons – service – whether obligation to serve accused personally with summons – whether district judge should have heard case and imposed sentence without taking reasonable steps to ensure that accused aware of hearing – alternative remedies – adequacy of alternative remedies – whether court should exercise discretion to refuse relief where alternative remedies exist – committal warrant – whether warrant should have been reissued where no evidence that accused could not be found by gardaí – appeal* – Courts Act, 1991, *section 22* – District Court Rules 1997, *order 26, rule 11*

The applicant complained that he had been unfairly convicted and sentenced to imprisonment by the first respondent on a road traffic summons without ever knowing about the case, as he had not been personally served with the summons nor had it ever been brought to his attention. He contended that the first respondent erred in law and acted in excess of jurisdiction in proceeding to hear the summons when it should have been apparent that the applicant had not been served personally; breached his rights to natural and constitutional justice by not affording him due process; and acted in excess of his discretion in not deeming it appropriate to issue a bench warrant for his arrest, which would have enforced his attendance before the District Court, before imposing a custodial sentence. He also complained about his arrest pursuant to a committal warrant which had been reissued by the second respondent following the expiration of a prior committal warrant relating to the offences he had been convicted of by the first respondent. He submitted that the second respondent erred in law in reissuing the warrants without any or sufficient evidence that they should be reissued and by not having regard to order 26, rule 11 of the *District Court Rules 1997*, in that there was no evidence that the applicant could not be found by the gardaí before the expiration of the original warrant. The respondents submitted that a court order, regular on its face, creates the presumption that the proceedings which led to it were in order and that, in any event, the court should exercise its discretion to refuse relief as the applicant could have applied to have the proceedings set

aside under section 22(6) of the *Courts Act, 1991* rather than by way of judicial review.

The Supreme Court (Hardiman and Geoghegan JJ; Murray J concurring) allowed the appeal and quashed the orders of the first and second respondents, holding that section 22 of the 1991 act did not require personal service on an accused of a summons. A court order, regular on its face, did not create the presumption that the question of proof of service of a summons, which was the subject of a specific statutory provision, was in order. In circumstances where no evidence had been tendered by the respondents to rebut the allegation, the High Court ought to have drawn the inference that no enquiries relating to service of the summons had been made by the district judge. The applicant therefore made out a *prima facie* case that the hearing should either have been adjourned or the district judge should have satisfied himself that the accused did in fact know about the case. Once the first respondent had determined to impose a prison sentence, he failed to afford the applicant due process by proceeding to hear the case without taking reasonable steps to ensure that the applicant was aware of its occurrence. Given that the applicant was in prison and had to avail of an urgent remedy, it was not unreasonable for him to proceed by way of judicial review rather than by way of an appeal under section 22(6) of the 1991 act. Accordingly, it would not have been appropriate to refuse *certiorari* on a discretionary basis. There was a clear requirement under order 26 of the *District Court Rules 1997* that there be a certificate before the judge to whom the application for reissue of a committal warrant is made, certifying the reasons why the original warrant had not been executed. Where there was no evidence of that certificate ever having existed, the High Court ought to have drawn inferences in favour of the applicant and quashed the reissued warrant on the basis that the applicant had put forward a *prima facie* unrebutted case that there were no adequate reasons why the original warrant could not have been executed within the proper six-month period.

***Brennan v Windle J, Murphy J, the DPP, Ireland and the Attorney General*, Supreme Court, 31/7/2003** [FL7856]

Certiorari, evidence

Judicial review – certiorari – *fair procedures – evidence – whether district judge permitted to recall prosecution witness of his own motion – whether evidence of garda warning of a formal nature or whether it relates to merits*

The applicant was convicted by the respondent in the District Court of various offences under the *Criminal Justice (Public Order) Act, 1994*. At the close of the prosecution case, the applicant submitted that he was entitled to have the charge contrary to section 8 of the 1994 act dismissed, as the prosecution failed to prove in evidence that he had been given a mandatory warning that if he failed to comply with the direction of a garda he would be committing a criminal offence. The respondent adjourned his ruling on the submission until the following day, when he indicated he wished to hear the evidence of the prosecuting garda again. Having heard the evidence afresh, including evidence that the requisite warning had been given, he ruled against the applicant. The applicant was granted leave to seek an order of *certiorari* on the grounds that the respondent erred in law and breached principles of fair procedures in that he, of his own motion, recalled the prosecuting garda to provide vital evidence and thereby acted partially. The respondent submitted that a district judge had discretion to reopen proceedings after the prosecution has closed in certain circumstances and to allow further evidence to be given if it related to procedure only and not to the merits.

In granting an order of *certiorari* quashing the decision of the respondent, Ó Caoimh J held that a district judge may, of his own volition, recall a witness to give evidence of a formal or technical nature, but that power should be used sparingly. The evidence in question, however, related to the merits, went further than mere formal or technical evidence and, accordingly, could not be permitted to be given after the prosecution had closed its case.

***Bates v Judge Patrick Brady and DPP*, High Court, Mr Justice Ó Caoimh, 12/5/2003** [FL7817]

Delay, prejudice, prohibition

Judicial review – criminal law – constitutional law – right to fair trial – delay – prohibition – fair procedures – prejudice – whether delay in prosecuting offences prejudiced defence of accused – whether order of prohibition restraining trial should issue – whether real risk of unfair trial

The applicant sought an order of prohibition to restrain his trial on the grounds of the delay in instituting criminal proceedings against him. The applicant claimed that the delay had prejudiced his defence in that witnesses and relevant evidence were no longer available. It was submitted that the delay violated the applicant's right to trial with reasonable expedition and that in all the circumstances it would be unjust for the trial to proceed. In relation to some of the alleged offences, a period of 36 years had elapsed. The application was opposed by the director of public prosecutions, who contended that the delay that had arisen was due to the nature of the offences and it was denied that the lapse of time which had occurred had prejudiced the applicant's defence or had given rise to an incurable presumption of prejudice.

Ó Caoimh J refused the relief sought. It was clear that a significant passage of time had elapsed between the date of the alleged offences and the time when the applicant was first confronted with the accusations, which had given rise to some prejudice. However, even if the complaints had been made many years earlier, the difficulties identified by the applicant would still have been present. The applicant had failed to establish that there was a real and substantial risk that he could not obtain a fair trial in relation to the events alleged against him.

***M(J) v DPP*, High Court, Mr Justice Ó Caoimh, 21/3/2003** [FL7845]

Drink-driving, case stated

Drink-driving – lawfulness of detention prior to provision of breath specimen – Road Traffic Act, 1994

This was a consultative case arising from the prosecution of the accused for the offence of failing to provide two specimens of his breath, having been arrested on suspicion of drink-driving. The questions of law that were posed related to the lawfulness of the detention of the accused for 20 minutes prior to requiring him to provide breath specimens.

The Supreme Court (Keane CJ, Denham, Murray, McGuinness and Hardiman JJ) answered the questions in the affirmative, holding that in criminal proceedings the onus was on the prosecution to establish beyond reasonable doubt that the accused, while in custody, was held in accordance with law. It was rational and logical that the state have procedures for administering the test. There was objective justification for the 20-minute observation period. Unless there was some kind of controlled observation, there

would always be the risk that the accused could claim to have surreptitiously taken something while the garda was distracted.

***DPP v McNiece*, Supreme Court, 14/7/2003** [FL7712]

Health and safety

Delay – statute – interpretation – literal meaning of words used – whether canons of construction could be used in interpreting statute when ordinary meaning of words used clear and unambiguous – Petty Sessions (Ireland) Act 1851, *section 10(4)* – Courts (No 3) Act, 1986, *section 1(7)* – Safety, Health and Welfare at Work Act, 1989, *section 51(3)*

Section 51(3) of the *Safety, Health and Welfare at Work Act, 1989* provides that 'notwithstanding section 10(4) of the *Petty Sessions (Ireland) Act 1851*, but without prejudice to sub-section 4, proceedings for an offence under any of the relevant statutory provisions may be instituted at any time within one year after the date of the offence'. The 1989 act provides for different penalties according to whether the offences created therein are prosecuted summarily or on indictment, but does not specify which offences shall be prosecuted summarily and which on indictment. Section 10(4) of the *Petty Sessions Act 1851* provides that 'in all cases of summary jurisdiction the complaint shall be made … within six months from the time when the cause or complaint shall have arisen, but not otherwise'. Section 11 of the 1851 act makes provision for the issue of summons in respect of indictable offences but contains no provision as to any time limit from the date of the offence within which any such summons shall be issued. An inquest into the death of an employee of the accused on 24 July 2000 occurred on 26 January 2001. On 22 June 2001, several summons were issued, charging the accused with offences contrary to section 13 of the *Non-Fatal Offences Against the Person Act, 1997* and under the *Safety, Health and Welfare at Work (Construction Regulations) 1995*, made pursuant to section 48 of the 1989 act, with the National Authority for Occupational Health and Safety named as prosecutor. Those summonses were struck out, following a decision to proceed by way of indictment rather than on a summary basis in November 2001.

When the matter came before the District Court, the new summonses, issued in October 2001, were struck out on the basis that they had not been issued within time, that is, within one year from the date of the incident or within six months of the inquest, as provided for in section 51 of the 1989 act. The District Court judge then stated a case to the High Court for a determination as to whether she was correct in doing so. The prosecutor submitted that the time limits set out in the 1989 act were applicable only to summonses charging summary offences and not to charges brought on indictment.

Peart J answered the case stated in the negative, holding that statutes had to be interpreted by reference to the ordinary meaning of the particular words used and the meaning of section 51(3) of the 1989 act was clear and unambiguous. The context of the section was offences being prosecuted summarily and a literal interpretation of section 51 permitted that the time limits set out therein were applicable only to offences being prosecuted summarily. If the legislature had intended to restrict the commencement of offences by indictment to a 12-month time limit, it would have stated in section 51(3) 'notwithstanding section 10(4) and section 11 of the *Petty Sessions (Ireland) Act 1851* …' and would have deleted the word 'summary' from the final paragraph of the sub-section.

***DPP v BJN Construction Ltd and Mooney*, High Court, Mr Justice Peart, 25/6/2003** [FL7818]

ENVIRONMENTAL

Waste management, *certiorari*

Judicial review – certiorari – *planning and environmental law – waste management – whether grounds adduced by applicant substantial – whether failure by local authority to adopt relevant waste management plan* – Waste Management Act, 1996 – European Communities (Waste) Regulations 1979 – Environmental Protection (Agency) Act, 1992

The applicant sought leave to bring judicial proceedings in respect of a decision by the respondent (the EPA) to grant Meath County Council a waste licence in respect of a landfill development. The applicant was obliged to show that the grounds adduced were substantially in accordance with section 43(5) of the *Waste Management Act, 1996*. The applicant contended that the respondent was in breach of its statutory obligations in determining the waste licence in the absence of a waste management plan. In addition, the applicant contended that the respondent should not have granted a waste licence where the local authority had failed to carry out an environmental impact assessment. It was also submitted that there was an intention to allow waste from other counties to be deposited in the landfill, which had not been indicated

in the original proposal. The applicant also submitted that there were issues of European law at issue and that these required to be submitted for a preliminary ruling under article 234 of the *EC treaty*.

Ó Caoimh J refused leave to seek judicial review. Although there was a waste plan in existence, this was not made under the *Waste Management Act, 1996*. However, it was clear that the provisions of the 1996 act indicated that, until a waste management plan was adopted, the pre-existing plan was to continue. The applicant had failed to demonstrate that it was the function of the EPA to investigate whether a waste management plan fulfilled all the requirements of Irish or European law before having jurisdiction to enter into considering an application for a waste licence. The applicant had failed to advance substantial grounds in order for the court to grant leave to institute proceedings.

***Boyne Valley v EPA*, High Court, Mr Justice Ó Caoimh, 17/4/2002** [FL7843]

FAMILY

Nullity petition

Nullity – grounds – capacity – evidence – whether parties capable of entering into and sustaining normal marital relationship – whether respondent suffering from personality disorder – appeal from order of Circuit Court

The applicant applied for a decree of divorce in the Circuit Court, having previously applied for and obtained a decree of nullity from the Catholic Church. The respondent resisted that application and counterclaimed for a declaration that the marriage was null and void, and this counterclaim was dismissed by the Circuit Court. The respondent appealed that order to the High Court. Evidence was provided by two psychologists as to the capacity of the parties to enter into and sustain a normal marital relationship.

In allowing the appeal and varying the order of the Circuit Court so as to grant the respondent a decree of nullity, Finlay Geoghegan J held that a marriage was voidable by reason of the incapacity of one party. A decree of nullity may only be granted to a person on the grounds of his own incapacity if there had been conduct on the part of the other spouse which amounted to repudiation of the marriage contract. Seeking a decree of annulment in the ecclesiastical courts would amount to such repudiation. Grounds for nullity include the fact that a person, at the time of the marriage, lacked the capacity to enter into and sustain a proper or normal marital relationship, which may be caused by a personality disorder. As the applicant had repudiated the marriage by the claim made by her to the Catholic Marriage Tribunal for a decree of nullity, the respondent was, accordingly, entitled to seek a decree of nullity from the civil courts based on his own incapacity, which had been established as a matter of probability from the expert evidence.

***MOC v MOC*, High Court, Miss Justice Finlay Geoghegan, 10/7/2003** [FL7809]

Nullity petition

Nullity – whether parties lacked capacity to enter into normal lifelong marital relationship

This was an application by the petitioner for a declaration that the marriage entered into between the parties was null and void by reason of the fact that the petitioner and the respondent lacked the capacity to enter into a normal life-long marital relationship. The respondent did not contest the claim.

Quirke J granted the petitioner the relief sought and declared the marriage null and void, holding that both parties entered into the marriage innocently and, by reason of factors connected with the personality and psychology of each partner, it was impossible for them to sustain a normal marriage relationship.

***McG(P) v F(A)*, High Court, Mr Justice Quirke, 7/5/2003** [FL7726]

LAND LAW

Litigation, *locus standi*

Practice and procedure – motion – motion to strike out – sale of lands – locus standi – res judicata – *whether proceedings should be struck out*

The plaintiff had entered into a judicial separation with his wife. At the time, a court order was issued to the effect that the plaintiff transfer certain lands to his wife. Subsequently, the wife of the plaintiff entered into a contract for the sale of lands to the second-named defendant in trust for the third-named defendant. The plaintiff initiated proceedings, seeking to set aside the transaction on the basis that it was a sale at gross undervalue. The defendants sought to have the proceedings set aside on the basis that the plaintiff lacked the necessary *locus standi* to maintain the proceedings. In addition, it was argued that the matters raised had been determined in previous court proceedings.

Kelly J made the following order. The lands had been in the ownership of the plaintiff for many years and the transfer had caused the plaintiff some upset. However, it was quite clear that at the time the contract in question was entered into, the title to the lands was vested in the plaintiff's wife. Accordingly, the plaintiff had no *locus standi* to maintain the present proceedings and they would be struck out.

***Lynch v English*, High Court, Mr Justice Kelly, 18/6/2003** [FL7771] 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

Immigration and asylum law and policy

This has been a tumultuous year for the development of immigration and asylum law and policy in Ireland and the EU. In Ireland, the year started badly for many non-national parents of Irish-born citizens. The Supreme Court (by a majority of five to two) gave a narrow reading to the judgment in *Fajujonu v The Minister for Justice* ([1990] 2 IR 151) and, for the sake of the effectiveness and integrity of the state's immigration and asylum systems, effectively put many such non-nationals (and, indirectly, their citizen children) at risk of deportation (*O & L v The Minister of Justice*, judgments of 23 January 2003).

The *Immigration Bill, 2002* addressed the liability of carriers and proposed modest changes to the *Refugee Act, 1996*. As enacted in July 2003, the *Immigration Act* contains important provisions on the liability of carriers, on entry, search and seizure and on the removal of persons 'refused leave to land'. It also contains sweeping amendments of the *Refugee Act, 1996*. In June, the Oireachtas enacted the *European Convention on Human Rights Act, 2003*, to be brought into operation by the end of the year, which incorporates the convention (ECHR) into the Irish legal order in a somewhat indirect and arguably incomplete way. Judges hearing immigration and asylum cases have, up to now, declined to entertain arguments based on the ECHR. This is now set to change.

In the European Union, several important measures have been taken in the development of the common European asylum system, including the *Reception directive* in January 2003 and the *Dublin II* regulation in February 2003. Despite the demands of the June 2002 Seville European Council, there have been continued delays in reaching agreement on the proposals for the qualification and procedures directives, though these are intended for the end of the year. In the field of immigration, the year has so far seen the adoption of a directive on the status of long-term resident third-country nationals and agreement in principle on the *Family reunification directive*. Discussions on the proposed *Immigration for employment directive* have continued with no end in sight. Work has continued in relation to external borders and illegal immigration.

May 2004 will see the end of the five-year 'transitional' period leading to the creation of an 'area of freedom, security and justice' (FSJ area). By that date, we may well see the signing of the treaty establishing a constitution for Europe, which will contain important new provisions in the FSJ area.

Current *EC treaty* framework

The *Amsterdam treaty* introduced a new title IV into part three of the *EC treaty*, enabling 12 of the member states, and Ireland and the UK if they so choose, to take measures in relation to visas, asylum, immigration and other policies related to the free movement of persons.

The overall objective of these provisions is the progressive establishment of an 'area of freedom, security and justice'. Just how these three elements inter-relate is a fertile area for debate: although the commission has argued that all three should be given equal weight, a 'security' bias has arguably emerged in the aftermath of 11 September 2001. Centres of responsibility for these activities are the justice and home affairs (JHA) and civil protection council, the JHA directorate-general of the European Commission and individual member state ministers responsible for justice or the interior.

In relation to asylum policy, article 63(1) provides for the adoption of measures on asylum, in accordance with the *Geneva convention*, the *New York protocol* and other relevant treaties, within several areas:

- Criteria and mechanisms for determining which member state is responsible for considering an application for asylum
- Minimum standards on the reception of asylum seekers
- Minimum standards with respect to the qualification of a person as refugee, and
- Minimum standards on procedures for granting or withdrawing refugee status.

Article 63(2) provides for measures on refugees and displaced people, to cover:

- Minimum standards for giving temporary protection to displaced people who cannot return to their country of origin and for those who otherwise need international protection
- Promoting a balance of effort between member states in receiving and bearing consequences of receiving refugees and displaced people.

In relation to immigration policy, article 63(3) provides for measures covering:

- Conditions of entry and residence
- Standards of procedures for the issue of long-term visas (more than three months) and residence permits, including for family reunion, and
- Illegal immigration and illegal residence, including repatriation.

Article 63(4) provides for measures 'defining the rights and conditions under which nationals of third countries legally resident in a member state may reside in other member states'.

Although no reference is made to 'minimum standards' in articles 63(3) and (4), it is made clear that council measures are not to prevent any member state from maintaining or adopting national provisions compatible with the treaty and international agreements.

The FSJ provisions are complex, reflecting the sensitivities of the areas covered. A few issues can be briefly identified:

- Action in most areas is to be taken within five years of the *Amsterdam treaty*'s entry into force. There is no time limit in certain areas, such as 'balance of effort', conditions of entry, and residence and free movement
- During the five-year transitional period, member states have the right to initiate legislation

- Law-making has been by unanimity in the council, which risks logjams. The European Parliament is merely to be consulted, which raises issues of democratic legitimacy
- Where it concerns minimum standards, the right of member states to retain or introduce national provisions, or the exercise of member state responsibilities in maintaining law and order and safeguarding internal security, it is clear that we are in a sensitive area where critical national interests are at stake
- The usual jurisdiction of the Court of Justice is limited. Mandatory references under article 234 of the *EC treaty* are to be made by courts or tribunals of last resort. There is no possibility of references from other courts
- Finally, the UK and Ireland have opted out of the provisions, though the relevant protocol allows a piecemeal 'opt-in' and Ireland may elect to discontinue its opt-out. Denmark has also opted out of the provisions, preferring these matters to be dealt with by inter-governmental co-operation which is less threatening of its 'sovereignty'.

Developments since the *Amsterdam treaty*

Activity in the FSJ area has grown apace. The challenges of immigration and asylum have grown and, with this growth, the ability of individual member states to address these challenges has dwindled. Events as shocking as the Dover and Rosslare tragedies and the 11 September attacks on the World Trade Centre have precipitated common action in a way that would have been unthinkable even five years ago.

Building on the seminal December 1998 council and commission action plan (OJ 1999 C19/1), the October 1999 Tampere European Council (the first devoted to FSJ issues) approved a detailed plan of action for the first five years and sought, among other things, the progressive development of a common European asylum system and a coherent immigration policy (council press release 200/99). It endorsed the setting of more severe time limits for action than those set out in the *EC treaty*. In the field of asylum, for example, it called for the adoption of minimum standards in relation to reception and procedures by 1 May 2001, and in the field of immigration, the same time limit for an instrument on the lawful status of legal immigrants.

The commission's attempts to develop coherent and workable asylum and immigration policies have been reflected in a series of communications. In relation to asylum, a November 2000 communication on a common asylum procedure and a uniform status for people granted asylum (COM [2000] 755 final) has been followed by reports on its implementation in November 2001 and March 2003 (COM [2001] 710 final and COM [2003] 152 final). In June 2003, the commission issued a communication on more accessible, equitable and managed asylum systems (COM [2003] 315 final). In relation to immigration, the commission issued a communication in November 2000 on a community immigration policy (COM [2000] 757 final). This was followed by a July 2001 communication on the open method of co-ordination for immigration policy (COM [2001] 387 final) and, in June 2003, by a communication on immigration, integration and employment (COM [2003] 336 final). A November 2001 communication on illegal immigration (COM [2001] 672 final) was followed by a June 2003 communication on the development of a policy in illegal immigration and trafficking, external borders and the return of illegal residents (COM [2003] 323 final). Mention should also be made of a December 2001 communication on the relationship between safeguarding internal security and complying with international protection obligations and instruments (COM [2001] 743 final) and a December 2002 communication on integrating EU migration issues in relations with third countries (COM [2002] 703 final).

It is hard to keep abreast of everything that is going on. A biennial scoreboard maintained by the commission (which can be accessed from the web page of the commission's JHA directorate-general) tracks developments in some detail (most recently, COM [2003] 291 final). The JHA directorate-general has also recently published the JHA *Acquis*. Work in the council is documented in its website, though much material is only partly available or not available at all to the public.

The legislative record is mixed. Although there have been some successes in relation to asylum (such as the European refugee fund, the Eurodac (fingerprinting) system, the adoption of directives on temporary protection and reception, and the adoption of the *Dublin II* regulation), there have been serious delays in the law-making process and there are continued delays in relation to the proposed qualification and status and procedures directives. In relation to immigration, there has been some progress in relation to illegal immigration and trafficking, but it has taken longer than expected to finalise the proposed directives on family reunification and the status of long-term resident third-country nationals, and the proposed directive on immigration for employment is in deadlock.

European councils – at Laeken in December 2001 and again at Seville in June 2002 – have sought to give a stronger direction to immigration and asylum policies and to speed up work in the council. Since Seville, the council presidencies (Denmark, Greece and now Italy) have maintained and updated a 'road map' (for the most recent version, see council document 6023/6/03 rev 6). The June 2003 Thessaloniki European Council urged even greater efforts to complete the asylum package before the end of the year. It has not always been easy for the individual member states meeting in the JHA council to follow the directions at the same speed. It has to be recognised that there are wide variations in member state practice and several seriously entrenched positions. At the same time, there are complex issues of community competence, the manner in which fundamental rights are to be respected and the need to achieve systemic coherence, which all take time to resolve.

The Irish position

A protocol annexed to the *EC treaty* and the *TEU* excludes the UK and Ireland from making, and being bound by, decisions in relation to the lifting of border controls and FSJ measures. Either or both of these states may participate in the adoption or application of a measure, and Ireland may notify the president of the council that it no longer wishes to be covered by the protocol. At least as far as Ireland is concerned, the reason for this 'flexibility' or 'variable geometry' is the need to protect the integrity of the common travel area (CTA). Ireland has thus 'reluctantly' gone this route and, in a declaration to the final act, has declared its readiness to participate to the maximum extent compatible with the maintenance of the CTA.

Ireland has signed up to four adopted asylum measures: the European refugee fund, Eurodac, temporary protection and the *Dublin II* regulation (replacing, save with respect to Denmark, the *Dublin convention*). It is also participating in the proposed qualification and status and procedures directives. It has, up to now, not opted in to the proposed reception condi-

tions directive (although the UK has opted in). In relation to immigration, together with the UK, it has not opted in to the forthcoming directive on the status of legally-resident third-country nationals, apparently because the free movement provisions in part II of that directive could affect the integrity of the CTA. It has, however, opted in to proposed directives on the conditions of entry and residence for employment and on the facilitation of unauthorised entry, transit and residence.

Looking to the future

The final draft of the treaty establishing a constitution for Europe, hammered out in the *European convention*, was submitted to the president of the European Council in Rome on 18 July 2003 (CONV 850/03). The inter-governmental conference is scheduled to begin on 4 October in Rome and may continue in Ireland in the first half of 2004. It is as yet unclear whether any serious attempts will be made to unravel the hard-won text agreed by the convention, though certain institutional questions remain controversial.

As far as the areas of immigration and asylum policy are concerned, it is proposed that the 'transitional' provisions in the *EC treaty* are replaced by new provisions addressing 'policies on border checks, asylum and immigration' in the 'area of freedom, security and justice' (see articles III-158 to III-169 of the draft treaty). Some key features of the proposed regime are as follows:

- The area of freedom, security and justice is, generally, to take into account the different legal traditions and systems of the member states
- The common policy on asylum, immigration and external border control is to be 'based on solidarity between member states' and is to be 'fair towards third-country nationals'
- Reflecting developed practice, the European Council is to define the strategic guidelines for legislative and operational planning within the area
- The Council of Ministers is to adopt European regulations to ensure administrative co-operation between the relevant departments of the member states and between these departments and the commission
- European laws (the new name for current regulations) and framework laws (formerly directives) in the specified areas of asylum and immigration policy are to be taken by qualified majority. Such legislation will be enacted by the European Parliament jointly with the Council of Ministers
- In relation to asylum, the union is to develop a common policy on asylum and temporary protection with a view to offering 'appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*'. The focus has shifted from establishing minimum standards in the first stage of the common European asylum system to measures for a more unified system. Explicit reference is made to the concept of subsidiary protection, complementing the asylum system under the *Geneva convention*
- In relation to immigration, the stated aim is to ensure the efficient management of migration flows, fair treatment of third-country nationals legally residing in member states and the prevention – and enhanced combating – of illegal immigration and trafficking. In addition to existing actions, specific provision is made for measures defining the rights of legally-resident third-country nationals, for the removal of unauthorised residents, for combating trafficking and for concluding re-admission agreements with third countries. Provision is made for union measures to support and provide incentives for national action in promoting the integration of legally-resident third-country nationals, but any harmonisation of national measures is excluded. Member states are to be entitled to determine the volumes of admission of third-country nationals seeking work
- Finally, it is provided that these policies and their implementation are to be governed by the principle of solidarity and fair sharing of responsibility – including financial implications – between the member states.

The area of immigration and asylum is a sensitive one and, as has been seen, it has proved difficult to keep to the Tampere agenda. Agreement on community measures has often proved possible only after bouts of secretive horse trading, and the resultant measures often leave much to be desired. The proposed measures are even more ambitious than the old and their prospects for delivery remain problematic.

The position of Ireland (and the UK) remains unclear. The draft treaty does not address the question of incorporating the current protocols. It appears that existing protocols and declarations will be carried over to the new treaty and that the current Irish opt-out, and possibility of opting in, will continue. G

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Public procurement: a recent Irish decision

In the area of public procurement, council directive 89/665/EEC of 21 December 1989 (the *Remedies directive*) requires that decisions taken by contracting authorities be reviewed effectively, and, in particular, as rapidly as possible. In Ireland, this requirement has been given effect under order 84A, rule 4 of the *Rules of the Superior Courts*.

Rule 4 provides: '*An application for the review of a decision to award or the award of a public contract should be made at the earliest opportunity and in any event within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending such a period*'.

The manner in which the time limits established under rule 4 are to operate in practice has recently been considered by the Supreme Court in the case of *Dekra Éireann Teoranta v The Minister for the Environment and Local Government and SGS Ireland Limited* (judgment of the Supreme Court, dated 4 April 2003).

The purpose of this article is to briefly review and comment on the judgments of Denham and Fennelly JJ (with whom the other members of the court concurred), with particular reference to the leading judgment of Denham J.

The case arose from a decision by the minister for the environment and local government to award a contract to SGS Ireland Limited to supply and operate a system for testing private cars in Ireland pursuant to the introduction of a system for roadworthiness testing in Ireland provided for by council directive 96/96/EC. Dekra Éireann Teoranta (Dekra) was an unsuccessful tenderer for the contract and on 25 March 1999 issued judicial review proceedings against the minister in respect of his decision to award the contract to SGS.

On 15 June 1999, SGS sought to strike out these proceedings on the grounds that Dekra did not comply with the time limits prescribed under rule 4 and, furthermore, that there were no grounds that would warrant extension of time. The High Court refused the relief sought and extended the time limit provided for in rule 4. SGS and the minister appealed against that order and judgment of the High Court.

Judgments

As a preliminary matter, Denham J upheld the finding of the High Court that SGS had *locus standi* to bring this application. Denham J then proceeded to consider the constituent parts of rule 4 as follows:

a) Earliest opportunity. In her view, these words are 'clear and unambiguous'. She made a comparison with similar words in order 84, rule 21, which had been considered in the case of *State (Cussen) v Brennan* ([1981] IR 181). According to Henchy J in that case, there is the discretion afforded to the court to extend the time limit specified in the *Rules of the Superior Courts*, but there is also a discretion to refuse an application, even within the specified time limit.

Denham J took the view that somewhat similar principles apply to the review of the awarding of public contracts under rule 4, subject to some additional factors. In her view, the reference under rule 4 to the requirement that application be made 'at the earliest opportunity' indicated a degree of urgency in applications of this type. (It is interesting to note that Fennelly J did not seem to attribute any particular significance to this form of wording, which he seemed to view as equivalent to the usual reference to 'promptly').

In the present case, Denham J noted that Dekra was informed of the awarding of the contract (albeit 'subject to contract'), while the contract itself was awarded on 15 December 1998. On the previous day, 14 December 1998, Dekra's solicitors had written to the minister putting him on notice of proceedings. Accordingly, in the view of the judge, the time for bringing the application ran from 14 December 1998 and yet proceedings were not issued until 25 March 1999. In her view, the earliest opportunity may have been 24 November 1998 and certainly was by 14 December 1998. On that basis, Dekra could not be regarded as applying 'at the earliest opportunity'.

Denham J noted in passing that in some cases 'the date of the decision to award is not appropriate and thus the relevant date may be the date of the awarding of the contract'. She did not elaborate on the circumstances in which that could occur. One could imagine that concealment of the decision to award the contract might be one such reason. In any event, that situation did not arise in the present case.

b) In any event within three months. Denham J observed that the three-month period is 'enabling'; in other words, in all the circumstances of a case, the court could determine in its discretion that the prejudice to the public or to a party could be such that (as in *Cussen*) the application should be refused. Thus, the institution of proceedings within the three-month period may not necessarily satisfy the requirements of rule 4.

In the present case, taking the time as running from either 24 November or 14 December 1998, Dekra did not come within the three-month time limit.

c) Discretion of the court to extend the time limit. Denham J (and for that matter Fennelly J) upheld the finding of the High Court that rule 4 permits an extension of time, whether or not 'the earliest opportunity' occurs within or outside the three-month time limit. The judge furthermore affirmed the finding of the High Court that the primary onus rested with the applicant who seeks an extension of the time limit 'to demonstrate on an objective basis that there is an explanation for the delay and a justifiable reason for it'. In other words, there is a two-fold requirement of applicants in such cases. First, they must provide an explanation for the delay (and not just part thereof), and, second, they must provide a justifiable reason to extend the time limit.

Denham J commented that, in exercising its discretion, the court must weigh its duty to protect the rights of access to the courts with the 'special weightings' that apply in the area of public procurement. These include: 1) the requirement under European and Irish law that such applications be brought rapidly; 2) the nature of the contract under review (in terms of the significance of the liabilities, obligations and expenditure); 3) prejudice to the parties in the event of delay; and 4) prejudice to the public or common good by delays.

In the present case, the judge found that Dekra had to show that there were reasons that both explained the delay and offered a justifiable excuse. (Reference was made by both Denham and Fennelly JJ in this respect to *O'Donnell v Dun Laoghaire Corporation*, [1991] ILRM 301.) In her view, Dekra had failed to explain the whole delay and had not provided the court with a 'good reason' – a justifiable excuse for the delay.

Accordingly, both Fennelly and Denham JJ found that the High Court had erred in refusing to strike out the judicial review proceedings and had

erred in the exercise of discretion conferred under rule 4. Consequently, the order of the High Court was set aside and the application for judicial review of the public contract in issue was refused.

Comments

The judgments of Denham and Fennelly JJ are to be welcomed, as they provide clarification of the manner in which rule 4 is to operate in practice. For both disgruntled tenderers and their legal advisers, they underline the importance of applying for judicial review of a decision to award a contract or the award of the contract as a matter of urgency; ideally, within a few days of the decision to award the public contract in issue becoming known to them.

While it is likely that the institution of proceedings within three months from the date on which they became aware of the decision to award or the date of awarding of the public contract (being the most likely grounds for the application) is likely to suffice for the purpose of rule 4, it seems clear that the court may exercise its discretion in rejecting such an application as being out of time. This, again, underlines the need for the applicant to issue proceedings with all due haste.

Failure to institute proceedings at the earliest opportunity or, at the latest, within the specified three-month period, presents a grave risk that such proceedings will be struck out unless the applicant is in a position to both explain the delay and provide a justifiable excuse so as to satisfy the court that an extension of time is warranted. It seems likely that an application for an extension of time will probably only be allowed in the most exceptional circumstances.

It remains to be seen how the court's discretion to extend time is applied in future cases where, unlike the present case, the applicant has both explained and provided a *prima facie* good reason for its delay in issuing proceedings, but the respondent (or a notice party) pleads prejudice – to itself and/or the common good – as a result of the delay. G

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Recent developments in European law

EMPLOYMENT

The council has adopted a directive on activities and supervision of institutions for occupational retirement provision. The directive is designed to facilitate cross-border occupational pensions. It provides for the mutual recognition of supervisory regulation of pensions, allowing such institutions to operate in other member states while being subject to home-country control. Detailed rules are set out for the institutions. Institutions are required to provide information to pension holders on the terms of the scheme, the situation of the institution and their rights. Member states will have 24 months to implement the directive into national law from the date of its publication in the *Official journal*.

FREE MOVEMENT OF GOODS

Case-383/01 *De Danske Bilimportrrer v Skatteministeriet, Told-og Skattestyrelsen*, 17 June 2003. No motor vehicles are produced in Denmark. DBI is a Danish association of car importers. It purchased a new Audi car but had to pay in excess of €40,000 in registration duty. DBI instituted legal proceedings, arguing that this duty had been levied improperly and was incompatible with the principle of free movement of goods. The ECJ held that the duty is part of a general system of internal dues on goods. As such, it must be examined in the context of article 90. That provision prohibits the imposition on products from other member states of taxation in excess of that imposed on similar domestic products or internal taxation of such a nature as to afford indirect protection to other products.

Article 90 guarantees neutrality of internal taxation as regards competition between domestic products and imports. However, the court held that article 90 could not be invoked against internal taxation imposed on imports where there are no similar or competing domestic products. As there is no domestic Danish production of cars, the Danish registration duty imposed on new motor vehicles is not covered in the prohibitions laid down in article 90. The court reviewed the number of new vehicles registered in Germany – 80,000 to 170,000 a year. It concluded that these levels of imports did not in any way show that the free movement of cars between other member states and Denmark had been impeded by the level of the duty.

Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge*, 12 June 2003. An Austrian environmental association organised a protest on the Brenner motorway to publicise the increase in traffic on that road and to call on the Austrian government to take corrective measures. It informed the administrative authority in advance and the demonstration passed off peacefully without breaching Austrian law. The motorway was completely closed to road traffic for 30 hours. Schmidberger is a company that specialises in transport between Italy and Germany. It brought proceedings against Austria, seeking financial compensation for restriction of its right to free movement of goods within the EU.

The ECJ held that the free movement of goods is one of the fundamental principles of the EU and that any restriction on that freedom must be eliminated. Where a member state does not adopt measures required to deal with obstacles to intra-community trade, it may be held liable even if they are not caused by the state and result from actions taken by private individuals. This obligation is all the more essential when one of the principal communication links between northern Europe and the north of Italy is in question. The fact that Austria did not ban the demonstration is, in principle, incompatible with EC law unless there is an objective justification. In this case, the Austrian government was seeking to respect the demonstrators' fundamental rights of freedom of expression and freedom of assembly. The Austrian constitution and the *European convention on human rights* guarantee these rights.

The court weighed up the interests involved: protection of these rights and compliance with the free movement of goods. It found that a fair balance had been struck. The demonstration was peaceful and in accordance with local law. Road users had been warned well in advance, a single route was blocked and the Austrian authorities had taken measures to minimise the disturbance as much as possible. The legitimate objective pursued by the demonstration could not be achieved by measures less restrictive of community trade.

Cases C-469/00 and 108/01 *Ravil SARL v Bellon Import SARL and Biraghi SpA* and *Consorzio del Prosciutto di Parma and Salumificio S Rita SpA v Asda Stores Ltd and Hygrade Foods*

Ltd, 20 May 2003. A 1992 regulation establishes EU protection for designations of origin and geographical indications. To be able to use a protected designation of origin, an agricultural product or foodstuff must comply with a specification that describes it in detail. In 1996, a further regulation was adopted. It registered the Italian cheese, Grada Padano, and the Italian ham, Prosciutto di Parma. The specification for the cheese refers to Italian law under which it has to be grated and packaged in the region of production. There is a similar requirement for Parma ham – that it should be sliced and packaged in the region of production.

Ravil is a French company that imports, grates, packages and distributes in France Grada Padano cheese, which it marketed under the name *Grana Padano*, freshly grated. Other distributors brought proceedings in France, seeking to have Ravil cease distribution. Hygrade is an English company that buys unsliced Parma ham from Italy. It slices the ham in the UK, packs it, and the product is sold through the Asda supermarket chain. Proceedings were commenced in England by the Italian Parma ham producers' association seeking to have Asda and Hygrade cease the distribution and sale of this product.

The ECJ held that the restrictions in question did restrict patterns of exports of cheese and ham. The conditions set out in Italian law were measures equivalent to a quantitative restriction. The treaty provides for exceptions to free movement of goods on grounds such as the protection of industrial and commercial property. Protected designations of origins are industrial and commercial property. They confer rights on those entitled to use them against improper use by third parties seeking to benefit from the reputation these products have gained.

The court held that the grating of cheese and the slicing of ham and their packaging are important operations that could damage the quality and authenticity and thus reputation of designation if the requirements are not complied with. The specifications for *Grana Padano* cheese and Parma ham define checks and detail strict operations in order to preserve the reputation of those products. The protected designations of those products would not be protected in the same way by an obligation imposed on operators outside the region of production to inform consumers by appropriate labelling that grating, slicing and packaging have taken place outside that region. Therefore, no alternative, less restrictive measures are available to attain the objective pursued. However, the court held that such operations as grating, slicing or packaging are only protected if they are laid down in the specification for the designation of origin. The protection given by a designation does not normally extend to these operations. G

Speculating to accumulate

Pictured with graduates at a recent conferring for the *Diploma in applied finance* are *(front row, right from centre)*: Law Society Director General Ken Murphy; vice-chairman of the Education Committee Stuart Gilhooly; Dr Liam O'Reilly, chairman of the Irish Financial Services Regulatory Authority; *(far right)*: Sylvia McNeece, legal education co-ordinator at the Law School; and Paul Egan, chairman of the society's Business Law Committee

DSBA annual conference

The Dublin Solicitors' Bar Association held its annual conference in Cape Town, South Africa last month. The business session involved an address from education minister and former Trinity College lecturer Professor Kader Asmal. Asmal spent time in exile in Ireland, during which he was also a leading anti-apartheid campaigner.

According to DSBA president James McCourt: 'The delegates were warmly welcomed at receptions hosted by the Law Society of The Western Cape, the High Court and by the Irish ambassador to South Africa, Gerry Corr. And they found time to explore the wine lands, the notorious Robben Island, Table Mountain and the spectacular beauty of the Cape of Good Hope'.

A full report on the conference will be available on the DSBA website (*www.dsba.ie*) and in the forthcoming issue of the association's publication, *The parchment*.

European year for disability

The Law Society hosted a conference in September to mark the European year for people with disabilities. The conference, entitled *Global trends in disability law: the context for Irish law reform*, was co-sponsored by the Human Rights Commission (HRC) and the National Disability Authority (NDA). Pictured are *(from left)*: Dr Maurice Manning, president of the HRC; Law Reform commissioner Patricia Rickard-Clarke; Alma Clissmann of the Law Society's Law Reform Committee; Angela Kerins, NDA chairperson; Dr Rory O'Donnell of the National Economic and Social Council; Stefano Sensi of the Office of the United Nations High Commissioner for Human Rights; Professor Gerard Quinn of the HRC; Donal Toolan of the Disability Legislation Consultation Group; the European Commission's Barbara Nolan; and John Costello, chairman of the Law Reform Committee. The conference papers are available on the Law Society website (*www.lawsociety.ie*)

Colley to chair Legal Aid Board

Law Society Council member Anne Colley has been appointed to chair the Legal Aid Board. Her appointment follows the death of former chairman Eamonn Leahy SC in July. Colley is the principal of the Dublin law firm Anne Colley and Co. 'I am honoured and very happy to have been appointed', she says. The board currently employs 89 solicitors in 30 law centres around the country.

'Like other state bodies, we face challenging times in the near future due to restricted funding. We will be working to maintain these services, which are so vital to the less privileged in our society', she added.

Sign language?
Director general Ken Murphy talking with Inez Bailey, director of the National Adult Literary Agency, at the launch of *A plain English guide to legal terms*

Are we winning?
Douglas Sadlier and Gareth Murphy, winners of the International Negotiation Competition finals in Canada, are pictured here with *(from left)*: Law Society President Geraldine Clarke, director of education TP Kennedy, and Mr Justice Michael Peart

Wexford, ho!
William Aylmer, Jamie Ensor, Doug Smith and Barry Kenny all took part in an 85-mile charity cycle from Dublin to Wexford to raise money for Fr Peter McVerry's Arrupe Society for homeless children

Armed and ready
Members of the Law Reform Committee outside Leinster House on their way to the oral hearings on Seanad reform on 17 September. Copies of the written submission are available on the Law Reform Committee section of the Law Society website. Pictured are *(from left)*: Alma Clissmann, committee chair John Costello, and Law Society past-president Patrick O'Connor

SIGNIFICANT OTHERS

The Law Society's Guidance and Ethics Committee recently published a booklet entitled *Partnership?*, designed to provide basic information to help solicitors make good decisions about partnership. Copies are available from the committee or by e-mail to a.collins@lawsociety.ie. Pictured at the launch are committee members *(from left)* Stephen Maher, Andrew Cody, Brian Lynch, committee secretary Therese Clarke, Tom Martyn, Anton Richardson, and John P O'Malley

Mergers Review Day

On Friday, 10th October 2003, The Competition Authority will host its Mergers Review Day in the Hogan Mezzanine, Croke Park, Dublin 1.

The conference will examine the new mergers regime in Ireland following the entry into force of Part III of the Competition Act 2002 and will also look at the operation of the E.U. Merger Regulation in 2003.

Speakers include:

- John Fingleton, Chairman, The Competition Authority
- Philip Lowe, EU Commission's Director General of Competition
- Prof Richard Whish, Kings College London
- Peter Freeman, UK Competition Commission

The price for the day long conference is €100 including lunch.

Any queries should be directed to Sandra Rafferty: tel: 01 804 5417, e-mail: conference@entemp.ie

SADSI
Solicitors Apprentices Debating Society of Ireland

Autumn roars in

As the summer draws to a close, the SADSI committee has been quietly gathering pace for a busy autumn schedule. This was kicked off on Saturday 20 September with a barbecue organised by southern representative Cormac O'Regan. It was well attended by trainees from the southern region. As with past events, the legendary hospitality and congeniality of the Cork trainees drew a small but enthusiastic group of colleagues from Dublin and Limerick.

Tales were told of great hardship on the long road down and huge festivities in the city environs. It is unfortunate that these epic sagas and great romances cannot be retold here. Suffice it to say that several of our trainees, exuberant at their release from the office for the weekend, truly lived it up.

On a more serious note, vying for 'most important event' status are the annual SADSI ball, which is getting something of a facelift, and the SADSI careers day, which has been moved from July to October. Weighing excellent weather against the possibility of increased attendance, the committee is confident that the revised careers day will be useful to the entire trainee body, particularly the incoming PPC1 class and the 2001 October PPC1 class, now nearing qualification. More information on both the ball and careers day will be available in the next mail shot in early October. In the meantime, please drop us a line at sadsi-committee@campus.ie.

Des Barry, auditor

Off their trolley in Cork

SADSI held a barbecue on the evening of Saturday 20 September. The event was at the Angler's Rest bar in Carrigrohane, Co Cork. There was a good attendance, including apprentices from Dublin and Limerick. Even though the weather stayed dry, the crowd remained indoors. SADSI paid for transport into Cork and drinks in Costigan's bar, Washington Street. At this stage, most of the contingent bade their farewells, but a few stalwarts rounded off the night by dancing it away in Cubin's nightclub. Our Dublin contingent then returned to the delights of Sheila's hostel, chancing upon the assistance of a shopping trolley to speed them on their journey. There were no casualties.

Cormac O'Regan, southern rep

SADSI annual ball

Final preparations are currently underway for the SADSI annual ball. Our eastern representative Lorraine Rowland has performed tremendous feats over the past few weeks and has surpassed our wildest expectations. Therefore, we can reveal that this year's ball will be held on Saturday 15 November at the Berkeley Court Hotel on Lansdowne Road, Dublin 4. The festivities will begin with a wine reception at 7pm and continue after dinner with a live band and DJ.

The SADSI ball is traditionally very well attended, and while the new venue allows a slightly higher capacity, we urge all trainees to buy their tickets as early as possible to avoid disappointment. Tickets will be sent to your regional representatives in the second week of October and will go on sale immediately thereafter. If you have problems getting tickets, or have any queries about the ball, please e-mail the committee at sadsi-committee@campus.ie, and mark it for the attention of Lorraine Rowland.

DRINKING TO SUCCESS

Not content with merely helping out on the ball, our ever-industrious public relations officer Nessa Barry is busy laying the groundwork for a social evening in Dublin in the coming weeks. As she has been spending much of her time lately locked away with sponsors in an effort to bring in as much free booze as possible, she has not yet revealed to the committee the exact venue.

Reassured by the fact that Nessa was the primary architect of the hugely successful PPC2 party in April, the committee eagerly awaits developments.

Website update

The SADSI website is currently undergoing essential redesign and updating. In the first six months following its re-launch, the website attracted much positive comment from the trainee body and we want this success to continue. At the moment, we have two priorities with the site. First, we want to have the site fully up-to-date for the autumn months and the new PPC1 intake and preparations for qualification of the October 2001 PPC1 class. Second, the site in its present form is somewhat complex and time-consuming to maintain. We are busy streamlining the procedures whereby by this, and successive committees, can revise it.

Perfect partnerships

Make your move with confidence

IN-HOUSE

Senior Legal Advisor 90k+Benefits+Bonus

International bank require a candidate with a minimum of 5-7 years PQE gained in trade finance, loan/bond market, capital markets and derivatives. Outstanding opportunity for a commercially focussed candidate.

Legal Affairs Manager 70k+Benefits+Bonus

International pharmaceutical organisation requires a Legal Affairs Manager. Candidates will need a minimum of 5 year's PQE with pharmaceutical contracts experience.

Senior Funds Lawyer 70k+Benefits+Bonus

International financial institution seeks a Lawyer with a minimum of 5 year's PQE. Detailed knowledge of funds together with corporate finance & banking.

Company Lawyer 55k- 70k+Benefits+Bonus

Multinational financial services organisation requires a Company Lawyer. Excellent drafting skills required and exposure to funds, domestic & foreign regulators, review of third party agreements.

Company Lawyer 45k- 65k+Benefits+Bonus

International financial services provider seeks a Company Lawyer with 2-4 year's PQE gained in funds. Strong drafting skills and specific experience to include; custody, material contracts, regulation.

Company Lawyer 45k- 55k+Benefits+Bonus

Newly qualified to 2 years' PQE, required for large bank in IFSC. Experience of corporate & commercial, internal & external control regulation. Experience of company secretarial would be an advantage.

PRACTICE

Equity Partner - Conveyancing 120k+Bonus

Growing firm in Dublin requires an experienced Solicitor to take responsibility to develop the Commercial Conveyancing department of the firm. Outstanding opportunity for the successful candidate.

Senior Lawyer - Commercial 75k+Bonus

Dynamic Dublin firm seek a Commercial/Corporate Lawyer to work with international and Irish client base. Exposure to M&A, MBO's, takeovers, reconstructions.

Senior Solicitor - Conveyancing 75k+Bonus

Reputable Dublin firm require an experienced Residential Solicitor to manage their Building Estates department.

Senior Commercial Solicitor 75k+Bonus

Established Munster firm are looking for a partnership calibre solicitor. Experience of general commercial matters including; company and asset acquisitions.

Financial Services Lawyer 70k- 85k+Bonus

Progressive medium sized firm in Dublin seek a lawyer at Senior Associate/Associate Level. Experience across full spectrum of financial services, including investment management, banking, treasury & custody.

General Practice 65k- 75k+Bonus

Solicitor required for small expanding firm in Dublin. Candidates with a minimum of 7 years' experience in; domestic conveyancing, employment law, civil plaintiff litigation. Fast track to partnership on offer to right candidate.

For these and further opportunities please contact, in confidence:
Eamonn O'Reilly, Business Unit Manager, HRM Legal Recruitment,
47 Fitzwilliam Square, Dublin 2. Tel: (01) 632 1870 Fax: (01) 632 1888
Email: securemail@hrm.ie **www.hrm.ie**

HRM RECRUITMENT GROUP LEGAL

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 3 October 2003)

Regd owner: Noel Lynch, Stramatt, Lisduff, Virginia, Co Cavan; folio: 12348; lands: Clonasillagh, Ballyhist; area: 4.3225 hectares, 2.3623 hectares, 5.6655 hectares; **Co Cavan**

Regd owner: Bernard McGrath (deceased), Drumbarkey, Cootehill, Co Cavan; folio: 6736; lands: Dungormtaining; area: 8 acres or thereabouts like measure; (application made by Agnes McGrath, the personal representative of Bernard McGrath [deceased], the registered owner mentioned in the schedule); **Co Cavan**

Regd owner: Christopher Daly (deceased); folio: 25624; lands: townland of Clonroad More and barony of Islands; area: 1 rood; **Co Clare**

Regd owner: Michael and Rita O'Loughlin; folio: 10536F; lands: townland of Drumcaran More and barony of Islands; area: 0.910 acres; **Co Clare**

Regd owner: Arthur Comyn; folio: 4474F; lands: a plot of ground being part of the townland of Killetra and barony of Fermoy in the county of Cork; **Co Cork**

Regd owner: Muriel O'Brien; folio: 29791F; lands: a plot of ground situate to the north of Main Street on the road leading from Passage West to Douglas in the town of Passage West being part of the townland of Pembroke and barony of Kerrycurrihy in the county of Cork; **Co Cork**

Regd owner: Douglas Home Improvements Centre Limited; folio: 7119L; lands: a plot of ground being part of the townland of Douglas and barony of Cork in the county of Cork; **Co Cork**

Regd owner: Patrick McLoughlin, Tievebane, Burnfoot, Co Donegal; folio: 6042; lands: Tievebane; area: 3.667 hectares; **Co Donegal**

Regd owner: Antoinette Byrne; folio: DN90507F; lands: property situate to the east of Oldbawn Road in the town and parish of Tallaght; **Co Dublin**

Regd owner: James Murphy (junior); folio: DN10967F; lands: property situate in the townland of Templeogue and barony of Uppercross; **Co Dublin**

Regd owner: Frederick O' Farrell and Mary O'Farrell; folio: DN 45684L; lands: property known as 115 Foxwood, situate in the townland of Swords, demesne and barony of Nethercross; **Co Dublin**

Regd owner: Mary Tyrell; folio: DN111911F; lands: property situate at 6 Fortunestown Crescent in the town and parish of Tallaght; **Co Dublin**

Regd owner: Angela Fox; folio: DN47281L; lands: property known as no 70 Broombridge Road, situate in the parish of Finglas, district of Finglas North; **Co Dublin**

Regd owner: Ronnie Hutton; folio: DN141739F; lands: property known as 19 Bramblefield Walk, Blanchardstown, situate in the townland of Huntstown and barony of Castleknock, shown as plan H5A3; **Co Dublin**

Regd owner: Mary Duggan; folio: 21613; lands: Ballinprior, barony of Clanmaurice; **Co Kerry**

Regd owner: Thomas Cullen; folio: 17195; lands: Edenderry and barony of Coolestown; **Co Kings**

Regd owner: Rathkeale and District Credit Union; folio: 23350; lands: townland of Skagh and barony of Coshma; **Co Limerick**

Regd owner: Rita Gill, Ardboghill, Edgeworthstown, Co Longford; folio: 5995; lands: Ardboghil; area: 14.8873 hectares; **Co Longford**

Regd owner: Patrick James Boyle and Eileen Boyle, 80 Muirhevna, Dublin Road, Dundalk, Co Louth; folio: 760L; lands: Marshes Upper; area: 0.2782 hectares; **Co Louth**

Regd owner: John F Gaughan (orse John Gaughan, orse Sean Gaughan) (deceased); folio: 12097; lands: townland of Foxford and barony of Gallen; area; 2 perches; **Co Mayo**

Regd owner: Agnes Daly (deceased); folio: 41660; lands: townland of Ballinvilla and barony of Clanmorris; area: 0.0961; **Co Mayo**

Regd owner: Ronan Griffin, 47 Silverlawns, Navan, Co Meath; folio: 22368F; lands: Abbeyland; **Co Meath**

Regd owner: John Francis Kelly, Clonlonan, Castleshane, Co Monaghan; folio: 11174; lands: Fedoo; area: 5.70625 hectares; **Co Monaghan**

Regd owner; Laurence Buckley (deceased); folio: 9486 and 9487; lands: Kyleboher and barony of Ballyboy; **Co Offaly**

Regd owner: John Corcoran; folio: 10516; lands: Trumra and barony of Maryborough West, **Co Queens**

Regd owner: James Duffy, Main Street, Ballaghaderreen, Co Roscommon; folio: 6144; lands: Ballaghaderreen, **Co Roscommon**

Regd owner: Michael McDonnell (deceased); folio: 30032; lands townland of (1) Cam, (2) Castlesampson and barony of (1) and (2) Athlone South; area: (1) 17.2902 hectares; (2) 0.5514 hectares; **Co Roscommon**

Regd owner: Jeremiah Dooney; folio: 22274; lands: townland of (1) Ross, (2) Drumnagoal and barony of (1) and (2) Tireragh; area: (1) 12.4660 hectares and (2) 6.3880 hectares; **Co Sligo**

Regd owner: Michael Lynch (deceased) and Angela Lynch (deceased); folio: 6392; lands: townland of Carrowdough and barony of Carbury; area: 0.1163 hectares; **Co Sligo**

Regd owner: the lord mayor, aldermen and burgesses of Waterford; folio: 758L; lands: a plot of ground situate on the south side of Oriel Square in the parish of Trinity without and county borough of Waterford; **Co Waterford**

Regd owner: Liam Fitzpatrick and Gillian Fitzpatrick; folio: 16655F; lands: a plot of ground situate to the west of Belmont House in the parish of Ballynakill and city of Waterford; **Co Waterford**

Regd owner: Dungarvan Urban District Council; folio: 1064F; lands: a plot of ground situate to the south of O'Connell Street in the parish of Dungarvan and in the urban district of Dungarvan and county of Waterford; **Co Waterford**

Regd owner: James O'Riordan and Gladys O'Riordan; folio: 358L; lands: a plot of ground being part of the townland of Farranshoneen and barony of Gaultiere and county of Waterford; **Co Waterford**

Regd owner: John Clarke, Redmondstown, Castletown-Geoghegan, Co Westmeath; folio: 10066; lands: Redmondstown; area: 78.843 acres; **Co Westmeath**

Regd owner: Thomas Kavanagh; folio: 809; lands: townland of Ballybeg and barony of Newcastle; **Co Wicklow**

WILLS

Crosby, Patrick Joseph (deceased), (victualler), late of Millbrook, Ballinasloe, Co Galway and formerly of Main Street, Ballinasloe, Co Galway. Would any person having knowledge of a will made by the above named deceased who died on 3 October 2002, please contact Hilary McNamara, 41 Blackmill Street, Kilkenny, e-mail: hilarymcnamara@eircom.net

Dunne, Connell (deceased), late of Greenview, Fairgreen, Rathdrum, Co Wicklow. Would any person having knowledge of a will made by the above named deceased who died on 1 March 2003 at his home in Rathdrum, please contact WR Joyce & Co, Solicitors, 18 Main Street, Arklow, Co Wicklow; tel: 0402 32062, fax: 0402 31702

O'Callaghan, Nora (otherwise Kitty) (deceased), late of New Line South, Charleville, Co Cork. Would any person having knowledge of a will made by the above named deceased who died on 26 January 2003, please contact O'Flynn Exhams & Partners, Solicitors, 58 South Mall, Cork, tel: 021 427 7788, fax: 021 427 2117, ref: NJT/OCA165/1

O'Leary, Daniel (otherwise known as O'Leary, Daniel Nicholas), late of 187 Old Youghal Road, Cork. Would any person having knowledge of a will made by the above named deceased who died on 18 July 2003, please con-

tact Anne L Horgan & Co, Solicitors, 3 Convent Road, Blackrock, Cork; tel: 021 435 7729, fax: 021 435 7070, e-mail: dcronin@alh.ie

O'Sullivan, Mary Agnes (deceased), late of Rosenheim, Blackrock Road, Cork. Would any person having any knowledge of a will executed by the above named deceased who died on 11 June 2003, please contact Philip Wm Bass & Co, Solicitors, 9 South Mall, Cork; tel: 021 427 0952, fax: 021 427 7882, ref: MJO'K/ROL/O.3079

O'Toole, Andrew (deceased), late of 96 Mangerton Road, Drimnagh, Dublin 12. Would any person having knowledge of a will made by the said deceased who died on 3 July 2003 at St James' Hospital, Dublin, please contact Cannon Solicitors, 1-3 Sandford Road, Ranelagh, Dublin 5, tel: 01 497 6555, fax: 01 497 1409

Quirke, Patrick (deceased), late of 41 Fr Sheehy's Tce, Clougheen, Cahir, Co Tipperary. Would any person having any knowledge of a will executed by the above named deceased who died in April 1994, please contact MJ O'Connor, Solicitors, 2 George Street, Wexford; tel: 053 22555, fax: 053 24365

Tyrrell, Brendan (deceased), late of 19 Slemish Road, Navan Road, Dublin 7. Would any person having knowledge of a will made by the above named deceased who died on 23 April 1999 at 19 Slemish Road, Navan Road, Dublin 7, please contact Nicola Dunphy, Solicitor, O'Donnell Sweeney, Solicitors, the Earlsfort Centre, Earlsfort Terrace, Dublin 2

EMPLOYMENT

Assistant solicitor position in Westport – general practice. CV to Karen O'Malley, Solicitors, Westport, Co Mayo

Locum solicitor required from November 2003 to March/April 2004 for general practice in Kildare area. Apply with CV to Hanahoe & Hanahoe, Solicitors, 16 North Main Street, Naas, Co Kildare, tel: 045 897 784

Solicitor required, Dublin 4 – min 10 years' experience in practice. Would help if interested in employment law and conveyancing. Phone Patricia McNamara, Patricia McNamara & Co, at 01 668 0005

Co Cavan, full or part-time solicitor required for busy south-east Cavan general practice. One year post-qualification experience in conveyancing and probate preferred. Salary negotiable. Sample commuting times: Dublin – 1 hour, 20 minutes; Drogheda – 40 minutes. Applications to Eamonn Carolan, managing partner, Patrick J Carolan & Co, Market Square, Kingscourt, Co Cavan, or e-mail: ecarolan@pjcarolan.com

Two apprenticeships available in busy Co Cavan practice. Sample commuting times: Dublin – 1 hour, 20 minutes; Drogheda – 40 minutes. Applications to Eamonn Carolan, managing partner, Patrick J Carolan & Co, Market Square, Kingscourt, Co Cavan, or e-mail: ecarolan@pjcarolan.com

Experienced solicitor with own practising certificate seeks locum or part-time position in general practice, tel: 086 320 7180

Locum solicitor required from December 2003 to September 2004. Reply with CV to Brian Lynch & Associates, Solicitors, 4 The Courthouse Square, Galway

Locum solicitor required with experience in general practice; December 2003 to January 2004. Dublin-city office. Fax: 01 662 5770 or e-mail: peterd@indigo.ie

Experienced solicitor seeks merger (with a possible view to purchase) with existing sole practitioner interested in reducing workload and/or retirement. Dublin area. Reply to **box no 80** or dublinsolicitor@eircom.net

Experienced solicitor (four years) seeks locum or part-time vacancy in general practice. Preferably Dublin area. Please reply to dublinsolicitor@eircom.net or tel: 086 908 5709

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, Co 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 KJ Neary

England and 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

TO LET

1st and 2nd floor offices between Four Courts and Ormond Hotel on Upper Ormond Quay in newly built/refurbished premises. Self-contained offices in one or more units to a maximum gross floor area of 420sqm. Available February 2004. Contact 01 677 9408

Legal practice for sale in Co Donegal. Ideal for solicitor wishing to develop own practice or Northern Irish firm wishing to expand cross border. Freehold premises. Reply in confidence to **box no 81**

Solicitor's practice for sale in top-class location in expanding Dublin suburb. Small, well-established general practice. Quality client base, strong growth year-on-year. Well-organised, experienced staff. Excellent modern offices with all facilities in a top location. Principal available to remain for a transition period. Early sale envisaged. Reply to **box no 82**

Bursec Ltd. Workplace safety consultants and food safety and hygiene; marine specialists (general fisheries, aquaculture, leisure); tel: 094 903 1985, fax: 094 903 1469, e-mail: pmb@esatlink.com

TITLE DEEDS

In the estate of James Cafferkey, late of 185 Killester Avenue, Dublin 5. Anybody with any information regarding the whereabouts of the title deeds of the above property purchased in the 1970s for the sum of £23,000, please contact Jeremy Doyle, Doyle Hanlon, Solicitors, 6 Richmond Road, Drumcondra, Dublin 3

In the matter of the *Landlord and Tenant Acts, 1967-1994*: an application by Texaco (Ireland) Limited (the applicant)
Take notice that any person having any interest in the freehold estate of the following property: the plot of land part of the lands of Rathfarnham in the parish of Rathfarnham, barony of Rathdown and city of Dublin, now in the county of Dun Laoghaire-Rathdown and now known as Texaco Service Station, Rathfarnham Road, Rathfarnham, Dublin 14.

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

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

Date: 3 October 2003
Signed: Matheson Ormsby Prentice, Solicitors, 30 Herbert Street, Dublin 2

In the matter of the *Landlord and Tenant Act, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978*: an application by Daniel Finnegan
Take notice that any person having any interest in the freehold estate of the following property: no 1 Sorrento Road, Dalkey, Co Dublin, being part of Finnegan's public house, Sorrento Road, Dalkey in the county of Dublin and more particularly described along with other property in an indenture of lease dated 3 April 1885 and made between Edward Harrison of the one part and Michael O'Meara of the other part for a term of 100 years from 1 May 1885 subject to the yearly rent of £24.

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

In default of any such notice being received, Daniel Finnegan intends to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the county/city

of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the property, aforesaid premises, are unknown or unascertained.
Date: 3 October 2003
Signed: Partners at Law, Solicitors, 8 Adelaide Street, Dun Laoghaire, Co Dublin

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 Una Fleming (legal personal representative of John Naughton [deceased])
Take notice that any person having any interest in the following property: house and land at Killough, Spiddal, Co Galway.

Take notice that Una Fleming, as legal personal representative of John Naughton (deceased), intends to submit an application to the county registrar of the county of Galway for acquisition of the freehold interest in the aforesaid property and any party asserting that they hold a superior interest in the aforesaid premises or any of them are called upon to furnish evidence of the title to the aforementioned premises to the below named within 21 days from the date of the notice.

In default of any such notice being received, Una Fleming, as legal personal representative of John Naughton (deceased), 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 Galway for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in each of the aforesaid premises are unknown or unascertained.
Date: 18 September 2003
Signed: William F Semple & Company, Solicitors, Lough Corrib House, Waterside, Galway

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 David Donohoe and Simon Kelly
Take notice that any person having any interest in the freehold estate of the following property: 'The Tenters' public house, no 1 Mill Street, Dublin 8.

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

In default of any such notice being received, David Donohoe and Simon Kelly intend to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the county/city of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in each of the aforesaid premises are unknown or unascertained.
Date: 19 September 2003
Signed: BCM Hanby Wallace, Solicitors, 1 High Street, Dublin 8