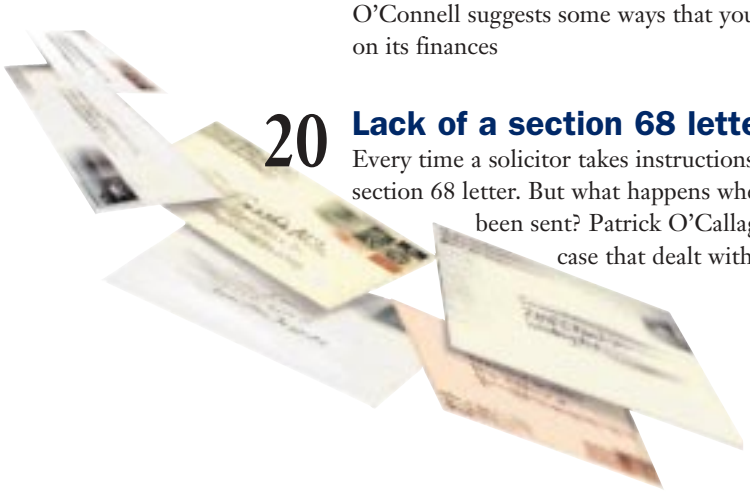
Law Society Gazette

Regulars

COVER PIC: REX FEATURES

Cover Story



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NATIONWIDE
News from around the country

DUBLIN

Seminar fever

Active as ever, the Dublin Solicitors' Bar Association is holding two important seminars this month. The first, on Monday 27 September, will be on money laundering: what it is, how to tackle it, what our obligations are to combat it, and the penalties involved. The speakers will include Mary O'Toole SC and Helene Coffey. It will be held in the Conrad Hotel in Earlsfort Terrace – opposite the old UCD, for the more senior colleagues among us.

The second seminar, the next day in the same place, will be on the Personal Injuries Assessment Board. As the reality of PIAB begins to affect the lives of our clients and solicitors' practices, the seminar will consider the way forward. The speakers will include Law Society president Gerard Griffin, DSBA president John O'Connor, chairman of the DSBA's litigation committee Jonathan White, and DSBA council member Stuart Gilhooly.

Building bridges

And now for something completely different. At a time when co-operation and understanding between the government and the solicitors' profession is more important than ever, DSBA president John O'Connor recently hosted a well-attended dinner in honour of the attorney general Rory Brady. Those present, including Siobhán Brady, heard the attorney general speak of his high esteem for the competence and abilities of members of the solicitors' profession.

GALWAY

Honour bound

The current issue of NUI Galway's alumni newsletter carries a photo of solicitor Dr Eamonn Hall, winner of the NUI Galway *Alumni award for law, public service and government*.

Eamonn, a 1974 LLB graduate of the university in the City of the Tribes, has held various legal positions and has worked in the government departments responsible for legal work in telecommunications and broadcasting. The citation added that he is author of *The electronic age* and is vice-president of the Irish Society for European Law and a former president of the Medico-Legal Society of Ireland.

A game of two halves

Cork solicitors beat Cork barristers 3-2 in a soccer match in July. Pictured are the winning team: *(back row, from left)* Edward Carey, Peter Kiely, Finian Dullea, John Henchion, Kevin McCarthy, Neil Dineen, Brian O'Halloran; *(front row, from left)* Stephen McDevitt, Aidan Lynch, Harry McCullagh, Tom Fox and Dermot Kelly

MEATH

Court in the act

Solicitors in the Dunshaughlin area are reportedly angry at recent proposals, announced just before the end of the law term, to close the courthouse. The court is due to move to Navan from 1 October.

'Justice should be administered locally. The courts should be decentralised, rather than centralised', according to local solicitor Liam Keane. This move is very inconvenient for people, particularly since there is no direct bus route from Dunboyne, Ratoath or Ashbourne to Navan.

The facilities at Dunshaughlin could be improved, rather than just closing the courthouse. The court sittings in Dunshaughlin were on the first and third Tuesday of each month. A spokesman for the Courts Service said that Navan Courthouse offered better facilities and that there would be consultations with solicitors on how best to re-organise the district services.

WICKLOW

Conveying the meaning

Tánaiste Mary Harney doesn't understand conveyancing, Karl Carney, secretary of the Wicklow Bar Association told the *Gazette* recently. 'People are taking her simple advice to "shop around" too seriously', he said. 'The result is a drop in prices, but also a drop in standards'.

Price under-cutting by solicitors looking for conveyancing work has become a serious problem in Wicklow. 'Of course it is affecting the quality of conveyancing and accordingly hurting us all and also the clients in the long run', he warned.

Engaging a solicitor to do the conveyancing for the purchase and mortgage of your house is not like buying a pair of socks, where the customer can examine and make comparisons. The client does not really know what he is getting, professionally, from the solicitor for his or her money or how much time and attention to detail the solicitor has really put into the file.

Something would have to be done to explain to people that conveyancing is a professional service that deserves a reasonable fee. The problem will be addressed by the Wicklow Bar Association over the coming months.

WATERFORD

PIAB

Meetings are being organised for members of the Waterford Law Society to ensure that solicitors are fully briefed on how to handle the new environment, John Purcell, president of the society, told the *Gazette*. A package was being put together to help members.

'What most people do not realise, of course, is that PIAB will cost Joe Public more in the long run. It will add another layer of bureaucracy to the process', he said.

He estimated that 'it will take about a year for the dust to settle' and we would then see where things were.

Claims had been falling before PIAB, he suggested. And this was because the courts had been forcing employers and others to take greater care of their employees and others. The old cliché that we have a compensation culture was only part of it. We have also had a negligence culture. The system was already working before PIAB hit the streets. G

Nationwide is compiled by Pat Igoe, principal of the Dublin law firm Patrick Igoe & Co.

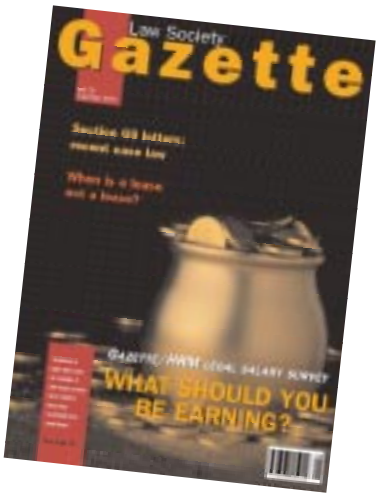
50% of solicitors 'underpaid', *Gazette* salary survey finds

Solicitors in small firms are paid up to 23% less than their counterparts in bigger firms, according to the *Gazette/HRM Legal salary survey 2004*. It also found that 50% of solicitors feel that they are underpaid, while less than 5% feel that they are paid above the market rate.

A recently-qualified solicitor in Dublin is likely to earn €38,574, rising to €42,595 after a year, while in Connacht the comparable salaries are €34,133 rising to €36,467, in Munster €36,896 rising to €39,251, and in Leinster €35,815 rising to €38,496 after one year. After seven years in practice, a solicitor in Connacht is likely to be paid just €59,395 compared with €76,858 in Dublin.

Among other key findings, the survey reports that:

- Demand for in-house solicitors is increasing, while the historic salary gap between practice and in-house solicitors is narrowing. In-house solicitors enjoy greater levels of benefits
- Salaries in London are up to 80% higher than comparable positions in Dublin
- Bonuses vary substantially from practice to practice but, broadly, solicitors are receiving between 10% and 30% of fees generated after a fee-generation threshold of between two and three times basic salary is reached
- Role content is the most important aspect for solicitors when they are changing jobs
- Solicitors in large firms earn an average of 20% more in their basic salaries than their counterparts in small firms
- Long hours and the 'unrealistic expectations of clients' are among the most frustrating aspects of working as a solicitor.



The *Gazette/HRM Legal salary survey 2004* was the largest of its kind to be undertaken for solicitors in Ireland. It was carried out by means of postal questionnaire included in the *Gazette* and/or telephone interviews, and was supplemented by other market information. In total, 832 respondents and candidate details contributed to the final results.

• *A full report on the salary survey including comprehensive salary tables appears on pages 14 to 17.*

Competition Authority to restrict legal representation

The Competition Authority is to restrict legal representation of people appearing before it, according to new guidelines published last month. The authority says that the guidelines are necessary to resolve any potential conflicts of interest in relation to the legal representation of those attending before it.

Explaining the rationale behind its proposal, the authority says that where 'the integrity of its investigative processes may be compromised by the fact that the same lawyer represents more than one person in any particular matter, the authority will permit that lawyer to appear before it on behalf of only one of those persons'.

According to Terry Calvani, director of the cartels division in the Competition Authority: 'The purpose of these guidelines is to ensure the integrity and effectiveness of the authority's investigative processes. As we investigate potential price-fixing cartels or other possible breaches of competition law, we rely heavily on the testimony and statements of persons attending before the authority. We don't want the enforcement of competition law compromised by conflicts which potentially arise where the same lawyer represents more than one person in the same investigation'.

Responding to the proposals, Law Society director general Ken Murphy said: 'We are very concerned at this attempt to restrict freedom of choice of representation. Conflict of interest is already governed by established legal and ethical principles. The society's Council is considering a formal response'.

The full text of the *Notice in respect of legal representation of persons attending before the Competition Authority* is published on the authority's website at *www.tca.ie/notices*.

HIBERNIAN LAW JOURNAL

The winter 2003 edition of the *Hibernian law journal* is now available for subscription. This year's edition addresses such areas as international sanctions, human rights, data protection, the law of charities and the Council of Europe cybercrime convention. For further information, contact the editor at editor@hibernianlawjournal.com. Subscriptions can also be obtained from this site.

RETIREMENT TRUST SCHEME

Unit prices: 1 August 2004
Managed fund: 436.956c
All-equity fund: 102.679c
Cash fund: 256.197c
Long-bond fund: 115.079c

TRAINING ON FARM PARTNERSHIP SCHEME

A half-day seminar on farm partnerships will be held at the Teagasc Research Centre, Moorepark, Fermoy, Co Cork, on Monday 27 September, starting at 1.30pm and finishing at around 5.30pm. The seminar will deal with the statutory regulations on milk production partnerships, the legal aspects of such partnerships, and accounting and taxation. Certificates of attendance will be issued for accreditation purposes. The seminar costs €100+VAT and further details can be obtained from gmryan@moorepark.teagasc.ie, tel: 025 42244.

CORPORATE GOVERNANCE CONFERENCE IN BELFAST

A major international conference on corporate governance will be held at Queen's University, Belfast on 20-21 September. The organisers say that *Governing the corporation: mapping the* loci *of power in corporate governance design* 'will bring together many of the key players at a critical stage in the debate to develop common standards in international accounting and effective corporate governance structures'. Details of the conference can be found at *www.governance.qub.ac.uk/govcorp*.

DNA database still under consideration

The creation of a DNA database of criminal suspects may have moved a step closer with news that the Law Reform Commission (LRC) is to run a seminar on the issue on 27 September. This follows an LRC consultation paper on a possible DNA database published in March of this year. The commission says it will make its final recommendations 'following further consideration of the issues and consultation with interested parties'.

A DNA database is a repository of DNA profiles generated from samples taken from suspects, which are electronically stored for comparison with profiles generated from material found at the scene of a crime. The primary aim of any DNA database is to link individuals to unsolved offences and unsolved offences to each other via DNA profiling.

DNA databases operate successfully in a number of countries, including England, the United States and New Zealand, and have proved to be a significant investigative tool in the fight against crime. On the downside, the LRC says that such databases also bring with them the possible infringement of human rights, such as the right to privacy and bodily integrity. The commission says that its recommendations will try to strike a balance between these conflicting interests.

The commission's provisional recommendations are contained in the consultation paper, which is available on the LRC website at *www.lawreform.ie*. The LRC says it would welcome feedback and submissions in writing or by e-mail to info@lawreform.ie.

UN jurisprudence booklet

The Office of the UN High Commissioner for Human Rights has produced a booklet containing a digest of jurisprudence of the UN, the ECtHR and other international organisations dealing the protection of human rights in the context of terrorism. Copies are available for free from *www.unhchr.ch* and the text is also available on the internet at *http://www.unhchr.ch/html/menu6/2/digest.doc*.

A swipe at the Four Courts

The Courts Service is considering issuing photo ID swipe cards to all solicitors who request them. These cards would enable much quicker access to the Four Courts following the introduction of the new security system that is being planned to protect all users of the Four Courts building.

Airport-style security screening of all people and materials entering the Four Courts is planned for the end of 2004. The Courts Service has been liaising with the Law Society on this. Director general Ken Murphy said: 'We welcome the possibility that solicitors may be able to use the same streamlined access system as court staff, with a view to keeping delay and inconvenience on entering the building to a minimum'.

ONE TO WATCH: NEW LEGISLATION

Residential Tenancies Act, 2004

The act is intended to ensure that the private rented sector's potential is realised 'by providing the legal framework for an efficient, attractive, vibrant and responsive private rented sector. It will reform aspects of landlord and tenant law that have been problematic. It introduces a measure of security of tenure, specifies minimum obligations applying to landlords and tenants, contains provisions relating to rent setting and review and provides for the establishment of a private residential tenancies board to undertake a number of key functions within a reformed private rented sector' (Noel Ahern, minister of state at the Department of the Environment, Heritage and Local Government). It is a major piece of legislation that is set to reform many aspects of residential landlord and tenant law. The first parts of the act came into force on 1 September 2004 (SI 505/04), as set out below. The rest of the act is expected to be brought into effect before year end.

Part 1

Part 1 sets out the tenancies to which the act does *not* apply:

- Dwellings used for business, partly or wholly, which qualify as business tenancies
- Formerly rent-controlled tenancies
- Long occupation lease tenancies
- Social or owner-occupied housing, and
- Holiday lettings.

Lettings to family members are included if a lease or tenancy agreement exists. It confirms that the act applies 'to every dwelling, the subject of a tenancy (including a tenancy created before the passing of this act)'. A tenancy is defined to include periodic and a fixed-term tenancy, whether oral, in writing or implied.

Procedures for the service of notices and penalties (including daily fines) for offences are set out.

Part 4

Part 4 deals with security of tenure. The general scheme involves a probationary period of six months within which the landlord can terminate without giving a reason. For the next three-and-a-half years, the tenant enjoys security of tenure and then a fresh tenancy must be entered into, giving entitlement to a further four years' security of tenure. The tenant is free to terminate at any time, subject to a fixed-term agreement, such as one year. (If the landlord refuses consent to sub-letting or assignment, the tenant may terminate the tenancy on a standard notice period [s186].) The security of tenure provisions cannot be contracted out of. Minimum notice periods for both landlords and tenants increase to correspond to the length of occupancy.

This part does not apply to a dwelling in which the landlord also resides, if he notifies this exemption from the start. Any greater security of tenure that the tenant is able to negotiate is not affected. It is not possible to create a sub-tenancy of part of a dwelling out of a part 4 tenancy. A table in s34 sets out the grounds on which a landlord may terminate a part 4 tenancy. They contain some safeguards against abuse, including first refusal to the tenant if the property becomes available again, and financial compensation:

- Expiry of the four-year period of security of tenure
- Non-compliance by the tenant with his or her obligations under the tenancy, subject to notice, except for serious anti-social behaviour that does not require this prior notice
- The dwelling has ceased to be suitable for the tenant's needs,

Law school appeals for volunteers

The 'new style' professional practice course is entering its fifth year in October 2004, *writes director of education TP Kennedy*. To date we have been extremely fortunate in the calibre of the members of the profession lecturing and tutoring on the various modules comprised in the course. We are always looking for new talent to complement our existing pool. If you have ever considered tutoring and/or lecturing in the Law School, now is as good a time as any to put yourself forward.

We invite solicitors who have been qualified for three years or more to consider doing some teaching for the Law School. We also welcome applications from those with less than three years' practice experience but with specialist qualifications or experience. Applications are welcome from solicitors with experience in all areas, but the Law School is specifically looking for solicitors with experience in the areas of criminal litigation, employment law, European law and human rights law. Educational training (including the use of IT) and payment for teaching will be provided, and hours spent teaching or training qualify for CPD hours.

Law School: fame and riches await you

If you are interested in giving a few hours a year to tutor or lecture, please write to TP Kennedy, director of education, at the Education Centre, Law Society of Ireland, Dublin 7. In your letter, please indicate what subject areas you are interested in, indicate your date of qualification, and briefly set out your post-qualification experience.

If you require further information, please contact either TP Kennedy or Geoffrey Shannon, deputy director of education. Either of the above can be contacted at the Education Centre, Law Society of Ireland, tel: 01 672 4802

Judges measuring costs

The society's Litigation Committee would like practitioners to note that where a party has been in default in delivering pleadings or a summary of witness evidence, the commercial court has made and measured costs orders which are payable forthwith. The court has measured such costs at €3,000. Practitioners should therefore take particular note of time limits set by the court and if additional time is needed they should seek that time before the expiry of deadlines.

Practitioners will be aware also that SI 63/2004 amends order 27 of the *Rules of the Superior Courts* regarding delay in delivery of statements of claim and delivery of defences. The rules provide for fixed costs of €750 for such motions. A copy of statutory instrument 63/2004 is available at *www.lawsociety.ie*.

based on the number of bed spaces
- The landlord intends to sell the dwelling within three months of termination
- The landlord requires the dwelling for his/her occupation or for a member of his/her family
- The landlord intends to substantially refurbish or renovate, and the dwelling must be vacant for this
- The landlord intends to change the use of the dwelling.

A part 4 tenancy terminates on the death of the tenant, unless a family member in occupation elects to become a tenant. It runs into another part 4 tenancy unless a valid termination notice is served, which can be done within the first six months of the new tenancy. If there are multiple tenants, their tenancy survives a tenant's death.

If a licensee of a part 4 tenant applies to become a part 4 tenant, the landlord cannot reasonably refuse his consent (s50), and the new tenant begins his probationary period of six months. However, the tenancy is regarded as beginning on the date when the first part 4 tenancy comes into being (s53).

If one or more multiple tenants are in breach of obligations of the tenancy, it may be terminated against that tenant and any other tenants who are to taken to have consented because they have not assisted the landlord in identifying the tenant responsible. Disputes can be referred to the dispute resolution procedures in part 6, not yet in force.

Part 5

Part 5 deals with tenancy terminations and institutes the use of a 'termination notice', regardless of the reason for termination, making notices of forfeiture and re-entry obsolete. Gradated notice periods are introduced to reflect the duration of the tenancy, but do not affect any greater notice periods agreed. Notice periods (if there is no breach of the tenancy) range from a minimum of 28 days for periods less than six months, to 112 days for four or more years, if given by the landlord. For a tenant, the periods range from a minimum of 28 days for less than six months to 56 days for two or more years. Lesser periods apply in cases of anti-social behaviour, threat to the fabric of the dwelling or non-payment of rent (notice by the landlord), or imminent danger of death, serious injury or danger to the fabric of the building, or breach of the tenancy terms (notice by the tenant). There are special provisions for sub-tenancies. Section 74 makes it an offence to serve an invalid notice of termination and then act in reliance on it and thereby adversely affect the interests of the person served.

Part 7

Part 7 deals with registration of tenancies and replaces the 1996 registration regulations. Landlords are required to register tenancies with the Residential Tenancies Board, established in part 8 (which was already functioning on a non-statutory basis). Some information from the register will be public, but not the identity of landlords, tenants or rent. Aggregated information may be published by the board, and may be analysed and used in the resolution of certain types of disputes. The cost of registration is €70 per dwelling, capped at €300 for a number in the same premises registered at the same time. Late registration will cost double. The fee may be revised periodically by the board to reflect change in the value of money. A change in rent must be notified within one month by the landlord. The provision of false or misleading information is an offence. The board has

Bar leaders' concern at Guantánamo

Twenty-eight leaders of bar associations and law societies, representing over a million lawyers around the world, have signed a statement expressing concern at the continuing detention of non-US 'enemy combatants' in Guantánamo Bay.

While welcoming the US Supreme Court's ruling on 28 June allowing the detainees to challenge the validity of their detention in US courts, the statement calls on the US authorities to abandon the 'review panels' in Guantánamo Bay. The US authorities are seeking to satisfy the Supreme Court judgment with these 'review panels', rather than give the detainees access to civilian courts in the United States.

Among the 28 signatories of the statement was Law Society director general Ken Murphy. Other signatories included the presidents of the law societies of Northern Ireland, of Scotland and of England and Wales, and further afield.

Men behind the wire: detainees at Guantánamo Bay

The bar leaders were the international guests of the American Bar Association (ABA) at its annual meeting in Atlanta in August. The statement was signed by every guest in the room at the end of a detailed presentation on the US constitutional and human rights law issues by legal experts in the Guantánamo situation.

The ABA had presented an *amicus* opinion to the Supreme Court in support of what the court broadly found, by six votes to three, in the case of *Rasul v Bush* in its judgment of 28 June. That case involved two Australians and 12 Kuwaitis who were seized in 2001 in Afghanistan during the military campaign there and held in military custody at the United States naval base in Guantánamo Bay, Cuba.

They sought *habeas corpus* relief, alleging that their detention was illegal. According to their petition, they had never been combatants against the United States, were not charged with any crimes, and had no access to courts or lawyers. The District Court and US Court of Appeals dismissed their action, but the Supreme Court reversed and allowed the action to proceed.

However, it remains to be seen whether the US government's response of establishing 'review panels', rather than granting access to civilian courts in the US, will be found to be an adequate response to the Supreme Court's decision.

enforcement powers, including the right to inspect premises and require information. There is provision for supply of data under limited circumstances. Local authorities may supply data to the board, and information may be exchanged between the board and the Department of Social Welfare for the purposes of supplementary welfare allowances, and information may be supplied on registered tenancies to the Revenue Commissioners at their request or the request of a landlord.

Local authorities will continue to be responsible for the enforcement of the *Rent books and standards regulations*.

Part 8

The Private Residential Tenancies Board is established by part 8, having already been operating on a non-statutory basis. Its functions include the resolution of disputes under part 6 (not yet in force), registration of tenancies under part 7, advice to the minister on policy in relation to the private rented sector, publication of guidelines for good practice, collection and provision of information – including prevailing rent levels – and research and monitoring. The board is to consist of nine to 15 members appointed by the minister for terms of up to five years, at remuneration levels to be set by the minister and the Department of Finance. The board is responsible for setting up the Dispute Resolution Committee, which alone will have functions under part 6 (dispute resolution). The board is also required to establish panels of mediators and adjudicators, appointed for at least three years. Adjudicators may be removed for misconduct by order of the District Court.

Part 9

Most of part 9 is now in force, the excluded parts mainly relating to dispute resolution under part 6. Arbitrary and unjustifiable terms included in leases are void if designed to enable a landlord to curtail a tenancy at will. It is an offence not to inform a sub-tenant of the nature of the tenancy. A tenant may terminate a tenancy even for a fixed term if the landlord does not consent to assignment or sub-letting. If a complaint against the management company of an apartment complex is received, the management company is obliged to send to the landlord, for forwarding to the tenant, a written response (s187). Management companies owe the same duty to tenants as to landlords to explain how charges are calculated.

Part 9 also contains amendments to existing legislation including:

- Enabling a tenant to renounce his or her right to a long occupation equity lease (s191; which would make sense if done in return for being allowed to continue in the tenancy), and
- The future abolition (five years from now, on 1 September 2009) of the entitlement to apply, for the first time, for a long occupation equity lease under the 1980 *Landlord and Tenant Act* (s192).

Provision is made for excluding orders, interim excluding orders and *ex parte* applications (s197).

The schedule adapts provisions of the act for sub-tenancies to extend part 4 security of tenure protections to sub-tenants. G

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

HUMAN RIGHTS WATCH

Implications of the *ECHR Act, 2003*

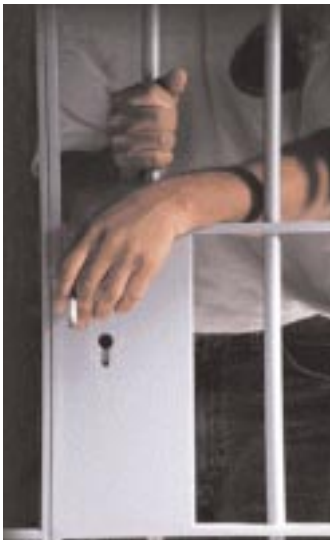
Alpha Connelly, chief executive of the Human Rights Commission, outlines some of the implications of the *ECHR Act, 2003*

The *European Convention on Human Rights Act, 2003* gives effect in Irish law to the rights provisions of the convention and protocols to which Ireland is party (the 'convention provisions'). This effect is subject to the constitution, affording primacy at the national level to the fundamental law of the state.

One of the significant ways in which effect is given to the convention provisions is that, subject to any other statutory provision or rule of law, every organ of the state shall perform its functions in a manner compatible with the state's obligations under the convention provisions, and a person who has suffered injury, loss or damage by reason of the failure of an organ to do so, may be awarded damages in respect thereof.

Another significant effect is that the courts shall, insofar as possible, interpret and apply a statutory provision or rule of law in a manner compatible with the state's obligations under the convention provisions. Judicial notice is to be taken of the convention provisions and – most importantly – in interpreting and applying these provisions, the courts shall take due account, among other things, of judgments of the European Court of Human Rights (ECtHR).

Moreover, should a situation arise in either the High Court or, on appeal, the Supreme Court, where it is not possible for the court to interpret and apply a statutory provision or rule of law in a manner compatible with the state's obligations under the convention provisions, the court may make what is termed 'a declaration of incompatibility'. A declaration does not affect the validity of the statutory provision or rule of law, and any



amendment or repeal thereof is a matter for the Oireachtas, not the courts.

On the face of it, the act is a major step forward in the adoption of a rights-based perspective on Irish law. But will it actually make any difference? After all, the constitution provides extensive human rights guarantees, and a major plank in the government's arguments for not affording effect to the convention in the past has been that there was no need for this, given the fundamental rights provisions of the constitution. While it is true that many human rights and freedoms are underpinned by the constitution, few would now say that there is no need for such supplementary protection as that afforded by the act.

Potential areas of difference

In what areas of the law is the act likely to make a difference?

The mental health sector is undergoing substantial reform with the passage of the *Mental Health Act, 2001* and the establishment of the Mental Health Commission, Mental Health Tribunals and the office of the Inspector of Mental Health Services. There is a long line of cases in which the ECtHR has identified some important safeguards in respect of the detention of persons who are mentally ill. The reforms should ensure that these safeguards are in place in Ireland. However, part 2 of the *Mental Health Act*, which will regulate the involuntary admission of a person who is mentally ill to a hospital or other treatment centre, has yet to be commenced. Until it is, there must at least be a question mark over the compatibility with the convention provisions of the current law relating to involuntary admission.

And what about some prison conditions? The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment visited a number of places of detention in Ireland in May 2002. It found that at Cork and Mountjoy prisons, and to a lesser extent at Cloverhill, prisoners in need of psychiatric care were frequently placed in unfurnished padded cells for days, and that the conditions in these cells, including sanitary arrangements, were very poor. In its opinion, such treatment could well be characterised as inhuman and degrading. Also, slopping out is still practised in some Irish prisons; and in a recent Scottish case, the Outer House of the Court of Session reviewed the relevant jurisprudence of the ECtHR on the right to freedom from inhuman or degrading treatment or punishment and found that the conditions of detention of a prisoner, which included slopping out, constituted degrading treatment contrary to the convention (*Napier v the Scottish Ministers*, 26 April 2004).

Another area in which there is evolving ECtHR case law concerns the rights of persons in a homosexual relationship. The court has held that homosexual people may not be discharged from the armed forces solely because of their sexuality (*Lustig-Prean and Beckett v The United Kingdom*, 27 September 1999, and *Smith and Grady v The United Kingdom*, 27 September 1999), that a man's former wife should not have been awarded custody of their daughter because he was living with another man in a homosexual relationship (*Salgueiro Da Silva Mouta v Portugal*, 21 December 1999), and that a man was entitled to succeed to a tenancy after the death of his male partner as he would have been so entitled if his partner had been female (*Karner v Austria*, 24 October 2003).

Consideration of such issues

Such issues will be considered at a conference, that the Human Rights Commission is holding jointly with the Law Society on 16 October 2003 at Blackhall Place. The conference will review the effect of the *European Convention on Human Rights Act*, looking in particular at its implications for the courts and for local authorities. It will also address the contributions and limitations of the convention in relation to co-habitation, sexual orientation and same-sex unions. It affords an opportunity for solicitors and other interested people to refresh and improve their knowledge of this increasingly important area of the law. G

Conference enquiries should be addressed to Nicola Crampton, Law Society, Blackhall Place, Dublin 7; tel: 01 672 4961; e-mail: n.crampton@lawsociety.ie.

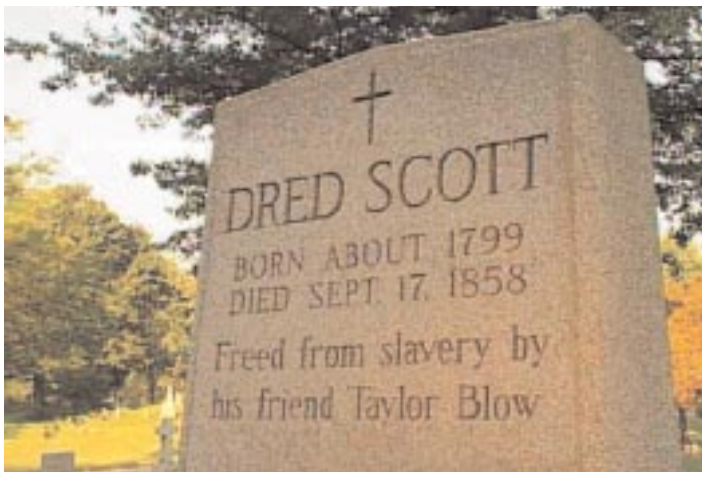
Guantánamo Bay and the spe

The constitutional limbo of the detainees held at Guantánamo Bay has parallels to the legal status of African-Americans before the US Civil War, writes TP O'Mahony

What court case could be said to have contributed to a civil war? Only one comes to mind – *Dred Scott v Sandford*, which was the subject of a seven-to-two decision by the US Supreme Court on 6 March 1857.

A milestone in American constitutional history, the *Dred Scott* case is more than a historical artefact. The denial of fundamental rights that it embodied was a foreshadowing of the internment without trial of Japanese-Americans during the Second World War (upheld in another racially-motivated Supreme Court judgment in 1944 in *Korematsu v United States*) and finds an eerie echo in the treatment of prisoners held today at Guantánamo Bay.

In his analysis of *Dred Scott* in *Great cases in constitutional law*, Cass Sustein, professor of jurisprudence at the University of Chicago, said that it was 'probably the most important case in the history of the Supreme Court of the United States. Indeed, it was probably the most important constitutional case in the history of any nation and any court'.



Judging Dred: freedom's just another word for nothing left to lose

At a time when the United States was polarised between pro- and anti-slavery factions, the case drove a further wedge between the two sides. It also provoked a response from the man soon to be elected president, Abraham Lincoln, that continues to be cited today by those who (from President Jefferson to President Reagan) believe that the Supreme Court has no monopoly on constitutional interpretation.

Roots of the problem

Born in Virginia in 1799, the slave Dred Scott moved with his master to St Louis, where in 1833 he was sold to Dr John Emerson, an army surgeon, who in 1838 married Irene Sandford. Emerson's military career subsequently took them both to the free territory of Illinois. Since Scott lived for an extended period in what was a non-slave state, the question arose whether he was thereby a free man.

It was a question that went all the way to the Supreme Court. Emerson had died in the meantime and Irene Emerson's

How will the new chief justice

How will the Supreme Court under the newly-appointed chief justice, John Murray, address the role of the judiciary in today's Ireland? asks Pat Igoe

The appointment as chief justice of Mr Justice John Murray this summer was overshadowed by the appointment a few days earlier of Charlie McCreevy as Ireland's nominee to the EU Commission. But it is a moot point as to which appointment is more important to the lives of individual citizens and other residents of this country.

The status and credibility of politicians in Ireland has probably never been lower. The pantheon of fallen political 'household names' merely serves to feed public disquiet and cynicism. Confidence in the political system and process has clearly suffered.

It is for this reason in particular that the role of the judiciary has moved closer to centre stage in recent years. Never before have there been more applications in the Four Courts for judicial review of disputes across a wide diversity of human activity. Never before have we had so many judge-led tribunals of inquiry with quasi-political roles. Judges are being asked to assist in issues well beyond their usual turf.

But judicial activism of the variety of the Ó Dálaigh Supreme Court of the 1960s is not to be expected. The youngest member of the Supreme Court, Mr Justice Hardiman, warned two years ago that people should not be encouraged to look to the courts to resolve political issues.

The new chief justice is unlikely to treat his office with reckless abandon. The oft-quoted phrase about him has been that he is a 'safe pair of hands'. So, is it likely to be boring and predictable, with 'heads down' at the Four Courts for the next seven years?

Mr Justice John Murray is unlikely to cut a radical, maverick or unpredictable figure. That is not what is sought at this time. His appointment is at a time of moving land masses in the relationship between the government and the Oireachtas, on the one hand, and the judiciary on the other. There is a certain wariness. His experience of two stints as attorney general at the interface of these relationships can only be helpful and re-assuring to the government

ctre of *Dred Scott*

brother, John Sandford, who was the executor of Emerson's will, acted in her stead in the case. Thus, *Dred Scott v Sandford*.

For the court, Chief Justice Roger Taney wrote the majority decision, and it was ruled that no person descended from an American slave could ever be a citizen for constitutional purposes. Little wonder that the ruling came to be regarded as an abomination, and 6 March 1857 as the blackest day ever in the history of the US Supreme Court.

Dred Scott, by the way, was granted his freedom by Irene Emerson and her new husband shortly after the case was decided, following the intervention of Scott's benefactor, Taylor Blow. Dred Scott worked as a hotel porter until his death from tuberculosis in 1858. He lay in an unmarked grave for many decades. However, on the centenary of his case, a committee provided a granite headstone for his grave in Calvary Cemetery in St Louis, Missouri.

In *A history of the Supreme Court*, Bernard Schwartz, professor of law at the University of Tulsa, described the effect of the case: 'What burst with such dramatic impact upon the nation was the fact that the highest court in the land had denied both the right of blacks to be citizens and the power of Congress to interfere with slaveholding in the territories'.

Schwartz also reminds us that, in the opinion of Justice Felix Frankfurter, '*Dred Scott* probably helped to promote the Civil War, as it certainly required the Civil War to bury its *dicta*'.

Making amends

It was as a direct consequence of the war (1861-65) that Congress, on 16 June 1866, passed the *14th amendment*, the opening section of which reads: 'All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside'.

The people ratified the amendment in 1868, thereby overruling *Dred Scott v Sandford* by democratic means. But the case continued to cast a very long shadow. In another highly controversial case involving African-Americans, *Plessy v Ferguson* (1896), Justice John Marshall Harlan said 'the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case'. And how right he was.

The constitutional limbo into which African-Americans were consigned by the ruling in the *Dred Scott* case finds a disconcerting parallel in contemporary America, in the treatment of over 600 detainees at Guantánamo Bay.

Categorised at the outset as 'unlawful combatants' by the Bush administration, and therefore denied due process under the American constitution as well as the protections guaranteed to prisoners of war by the *Geneva convention* (a denial defended by Ruth Wedgwood, professor of international law at Yale University in an article in *Time* in February 2002), they occupied a legal black hole.

That situation continued until 28 June 2004, when the US Supreme Court, by a six-to-three majority in *Rasul v Bush*, ruled that prisoners held at Guantánamo were entitled to challenge the legality of their detention in the American courts. G

TP O'Mahony is a columnist with the Irish Examiner.

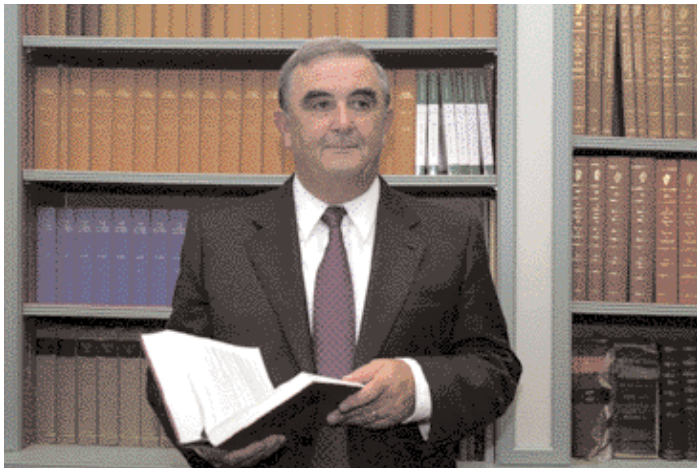
affect the Supreme Court?

with regard to judicial awareness of political realities and sensitivities.

Thrusting forth

The new chief justice is, of course, a son-in-law of the late Mr Justice Brian Walsh, who was appointed an ordinary judge of the Supreme Court on the same day that Cearbhall Ó Dálaigh was appointed chief justice in December 1961. Through the 1960s, both judges introduced an era of judicial 'thrusting-forth' not experienced in the Four Courts before or since.

They examined the constitution and used it as a living document. It became relevant, not simply a small dusty tome. It was examined and interpreted and individual rights identified and expanded. The government and civil service were appalled, traumatised even. We still benefit today from their work.



John Murray: his Supreme Court will establish its own identity

But today's agenda and needs are different. Ours is now a heterogeneous society. Where Ó Dálaigh and Walsh encouraged counsel to refer to US precedents, the new era may encourage more European precedents. The incorporation into Irish law of the *European convention on human rights* may foster a further spurt in human and individual rights.

But, in a spirit of *realpolitik*, the new Murray-led Supreme Court is unlikely to lead to a reversal of the recent trend for more consideration of community and societal rights. The individual's right is at the expense of others. Raised eyebrows greeted one of the last decisions of the Keane-led Supreme Court, which held that Rosemary Cunningham, whose action against

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obstetrician Dr Michael Neary was statute-barred, had to pay the costs of the defence.

One columnist in *The Irish Times* even called it 'deeply disturbing' that the plaintiff had to pay the costs of a lost action. So, the worm is turning then. Despite suggestions to the contrary (including from some of our colleagues?), litigation is not risk-free. Somebody has to pay.

Commentators have already called on the new chief justice to outline his vision for his tenure in office. But he is not an unknown quantity. His political pedigree is Fianna Fáil. He served as attorney general for four months in 1982 and also from 1987 to 1991. From 1991 to 1999, he was a judge of the Court of Justice of the European Communities. During the 1990s, he was a visiting lecturer to Fordham University, New York. From 1997 to 2000, he was visiting professor of law at Louvain University in Belgium. In 1998, he was guest lecturer at the Human Rights Summer School at the University of Aix-en-Provence in France.

Living document

In *Sinnott v The Minister for Education* (2001), he quoted approvingly Mr Justice Walsh's *dictum* that the constitution speaks in the present tense. He added that the constitution is a living document that falls to be interpreted in accordance with contemporary circumstances, including prevailing ideas and mores. But this did not mean that it could be divorced from its historical context.

Earlier this year, his judgment in *CK v JK*, a case stated from Judge Pat McCartan of the Circuit Court, suggested a willingness, an anxiety even, to address the realities of the issues and difficulties of the parties and to bring the law to bear in an equitable way.

The respondent in the case was resisting the applicant's claim for various normal reliefs in a marriage breakdown, on the grounds that he was never lawfully married to her. This, he argued, was because his earlier marriage had not ended in a lawful divorce. But he and the applicant had lived for almost 17 years as husband and wife. Now he was claiming that it was all a sham. The Circuit Court found that he actively concealed from the applicant the fact that he had not been properly divorced.

Denial of marriage

Judge McCartan asked the Supreme Court whether he was entitled to hold that the respondent was now estopped from denying his marriage to the applicant, which denial would deprive her of her various rights as a married woman. She could not apply for judicial separation, custody of the two children of the union and maintenance.

But the judges of the Supreme Court held that the principles in *Gaffney v Gaffney* (1975) applied and, accordingly, the Circuit Court judge was not entitled to hold that the respondent was estopped from denying his marriage to the applicant. This they clearly regretted.

In his judgment, Mr Justice Murray said that the potential injustice was patent. The applicant sought a judicial separation, custody of the children, maintenance and an order in respect of the family home. But, absent the status of a lawfully married wife, she was denied these remedies or any remedy at all.

'In a society based on the rule of law, it would certainly be a major gap in its fabric if persons who have been wronged in the manner in which the applicant has been in this case were to be left without remedy', he said. In such a society, the framework of law was intended to be complete.

A plaintiff who established

similar facts to those found by the Circuit Court judge had, in his view, a cause of action for deceit based on fraudulent misrepresentation. The damages to be awarded in such an action should be informed by the constitutional right of the injured party to recover damages necessary to vindicate that right, having regard to the loss suffered by reason of being wrongfully deprived of the status of a spouse after a long period of ostensible marriage.

'When a person in good faith enters into a marriage contract, solemnised in accordance with law, he or she is entitled to expect to enjoy their constitutional status and the protections which the law affords, even in the event of its breakdown or ultimate dissolution', he suggested. The applicant was entitled to the protection of the courts for the infringement of her constitutional rights.

Notwithstanding the strict provisions of *Gaffney v Gaffney*, the applicant left the Supreme Court well equipped to fight for justice. Judge McCartan was even reminded that he had discretion to consider whether there were grounds for sending papers to the DPP in relation to the behaviour of the respondent.

Benchmarks

The Supreme Court cannot determine the issues that will fall to be decided before it. But, where a clear approach or ethos emerges and develops, it may come through even in ordinary cases. The court may adopt the approach of the Cearbhall Ó Dálaigh/Brian Lynch Supreme Court of the 1960s by making landmark decisions in apparently small cases and by not waiting for major constitutional issues to come to court.

For now, most controversial and interesting, of course, is the likelihood that the Oireachtas investigation into Judge Brian Curtin's conduct will come before the court for determination on the rights and limitations of an Oireachtas committee under the separation of powers and whether such committee is infringing in the judicial domain.

Multi-cultural Ireland

Issues in the increasing complexity of multi-cultural Ireland can also be expected to come before the court. Similarly, matters arising from the new Personal Injuries Assessment Board, which will have huge implications for the conduct of civil litigation in the state, can be expected to be argued before the court.

Also, procedures of the new commercial division of the High Court, under Justices Peter Kelly and Mary Finlay-Geoghegan, including the new 'case management', can be expected to be brought before the court. The list goes on. All of these issues affect ordinary people in their everyday lives.

It is perhaps a mark of the success of the judicial arm of government since the foundation of the state that citizens look to the courts in such numbers. The courts have kept faith.

The Murray-led Supreme Court can be expected to establish its own identity and forge its own leadership role over the coming seven years. And, no, it will not be boring. G

Pat Igoe is principal of the Dublin law firm Patrick Igoe & Co.

Letters

Wild, wild west: conditions of planning permission

From: Gerard Dollard, director of service, economic development and planning, Clare County Council

As you are probably aware, Clare County Council, as part of planning permissions granted for single house developments, frequently includes conditions relating to restricting the use of the proposed dwelling. Such conditions, commonly referred to as occupancy clauses, form part of the planning permission granted and must be complied with in a similar manner to other planning conditions. You may be aware that the draft ministerial guidelines on sustainable rural housing, published in April 2004, also include a suggested wording for such conditions.

It has come to the council's attention that many properties on which planning permission has been granted, subject to an occupancy condition, are being offered for sale and, indeed, in some cases a sale transaction would appear to have been completed. The sale of a property in such circumstances is a breach of the planning permission granted and consequently constitutes an unauthorised development. The council has recently initiated proceedings in cases where such conditions have been breached. The council will continue to focus on securing compliance with these conditions, which are a key basis on which permission would have been granted in the first instance.

I would ask that you might bring this to the attention of your members.

Practice sometimes makes perfect

From: John G Lanigan, John Lanigan & Nolan, Dean Street, Kilkenny

In the July issue of the *Gazette* (page 39) there is a practice note concerning the dating of a certificate of title given to a lending institution in relation to a client's mortgage transaction.

Dating the certificate of title as of the date of parting with the loan funds causes me a concern in one respect. The Law Society-approved form of certificate of title states in its third paragraph that all the

documents evidencing the borrower's title to the property are properly listed in the third schedule thereto and are furnished therewith.

It is extremely unlikely, in very many Land Registry cases, that at the date of parting with the loan funds the solicitor signing the certificate of title will be in possession of all the documents evidencing the borrower's title. In such cases, these documents would be the land certificate and/or a filed plan that will only be issued by the Land Registry on completion of a dealing.

It appears to me that if a solicitor acting for a borrower is to comply with this practice direction, that solicitor would have to retain the loan funds until such time as he was in receipt of the land certificate and/or a filed plan from the Land Registry. This, of course, would cause considerable distress, loss and inconvenience to the borrower.

In my opinion, therefore, the practice direction of the Conveyancing Committee in relation to the dating of a certificate of title is impracticable.

I take the view that the certificate of title should be dated on the date that the borrower's solicitor receives the land certificate and/or filed plan from the Land Registry.

I await the opinion of the Conveyancing Committee in this regard.

Call the undertakers

From: David Alexander, Solicitors, Fitzwilliam Square, Dublin 2

A footnote, so to speak, to the letter from Collins, Brooks & Associates in the July issue.

It seems to me that the 'new' form of undertaking (and arguably also the 'old' form of undertaking) sought by VHI Healthcare of solicitors is arguably *ultra vires* VHI Healthcare's own rules and/or terms and conditions of membership and, in particular, section 9 of such rules (the section headed 'claims').

Identity crisis

From: Esmond Reilly, Stamullen, County Meath

I Esmond Reilly, solicitor, of 4 Orchard Rise, Stamullen, County Meath, and previously of Malahide, County Dublin, wish to make it clear to all concerned that I have no connection whatsoever, directly or indirectly, with one Thomas Flood, solicitor, who carries on business under the style of Esmond Reilly, Solicitors, at Dargan House, Fenian Street, Dublin 2.

Since I sold my practice at 8 Ontario Terrace, Dublin 6, to Mr Flood in 1990, there has been constant and considerable confusion caused to both colleagues, lending institutions and clients alike, by virtue of the fact that Mr Flood continues to carry on business under my name, rather than his own, contrary to my wishes. Correspondence, telephone calls and even title deeds are misdirected, on an almost daily basis, causing delay and inconvenience to all concerned.

I have retired from private practice, but I continue to provide a first-class consultancy/locum service to colleagues in a wide range of different situations.

I publish this clarification to draw the distinction to the attention of my colleagues in the hope that it will minimise further confusion.

Letters

Who wants to be a tribunal millionaire?

From: Kevin O'Higgins, Blackrock, Co Dublin

I refer to the on-going debate in relation to the curtailment of the exorbitant fees earned by lawyers involved in the litany of tribunals, and I declare a professional involvement in a couple of the longer-running sagas.

I endorse the Law Society position, as presented by Ken Murphy so ably, to the effect that the never-ending nature and proliferation of tribunals has shovelled odium upon the legal profession and, not least, the solicitors' side of the profession. However, one point I don't think has emerged on any side (with the honourable exception of the back page piece of the recent issue of *The Parchment*) is that solicitors, with very few exceptions, have been utterly unremunerated to date in respect of the tribunals.

I am not unique in this regard, but a sizeable amount of my professional time over the last seven to eight years has been enmeshed in tribunals. However, I have yet to receive my first euro. But there are others, even more heavily involved than myself, on behalf of clients (and not necessarily monied clients) such as Dunlop, Lowry, Burke, McGlinchy, Brearty and so on, whose instructing solicitors remain similarly in hopeful expectation. I would not want to be seen to be banging my own drum but, on behalf of our other colleagues, I think that message too might also be mentioned.

Yet the fortnightly largesse still wings its way to the tribunal counsel as they clock up more and more 'non-sitting' days and for a lot of the time, arguably, doing work which could, just as effectively, be done by a solicitor. But then we weren't asked, were we?

Are rates really just a three con trick?

From: Richard R O'Hanrahan, Limerick Law Chambers, Limerick

The rates on premises are governed by acts from 1838, 1852 and the act of 2001.

The 1838 act stated that rates were to be assessed on the estimated annual rent or value of a property.

The 1852 act was repealed by the 2001 act entirely, except section 68 of the 1852 act, which states, in summary: 'If there was an act passed before 1852 which allowed for an appeal of a valuation to the court that this right of appeal would no longer [since 1852] apply where the rates were for the relief of destitute poor in a rate area' (this section is still valid, but meaningless because there are no rates levied for destitute poor any more in Ireland).

With the passing of time, even though rates were supposed to be based on the net annual rental value, the net annual rental value was fixed initially in 1838 and left static in most cases in corporations and county councils, resulting in ridiculous rate computations, such as £73 in the pound, meaning that the rental valuation of a property fixed in 1838 was multiplied by 73 and that crazy calculation was your rates.

In spite of this meaningless situation being in existence, the 1952 and 1938 act, the notional rent allowed both ratepayer and/or rating authority to apply without restriction to have a property re-rated upwards or downwards.

In 1987, to encourage re-development of city derelict sites, named developments were given special tax advantages. In the main, 100% of the capital expenditure could be written off by the owner from his tax and 200% of the rent could be written off by his tenant from his tax. Needless to say, these tax advantages blew the notional rental (or rateable) value out of all proportion. (Since the higher the rent, the higher the tax relief to the tenant.)

No rates were payable for ten years, so both owner and tenant were not alerted to the consequences of this huge 'notional' rental value.

When the ten years had expired, this inflated rate kicked in. In the year 2001, the government then passed an act saying that, after that, only the government authorities could apply to have the rates valuations re-assessed. The owner or the tenant could not, unless there was a 'material change of circumstance'. A 'material change of circumstance' was described as a premises reconstructed or burnt down or if it became no longer rateable (for example, church or army barracks or state occupation) or if it was merged together with another building, or divided into two buildings. The government knew full well that the likelihood of any of these happening to these ten-year-old, brand new properties was one in a million. The effect of this section was to basically say: 'You cannot have rates re-valued'. I believe this combination (or is it a three con trick) is an attempt to allow the government to claw back more than they had given away in so-called concessions.

I believe this trickery should be constitutionally challenged. If you feel the same, I would like your assistance, co-operation, finance and if you would join me as a co-plaintiff against the state.

The goi

There are very few people outside the legal profession who think solicitors are underpaid. But do you really know your market value, what your salary should be and what your peer group is being paid? Eamonn O'Reilly has the answers

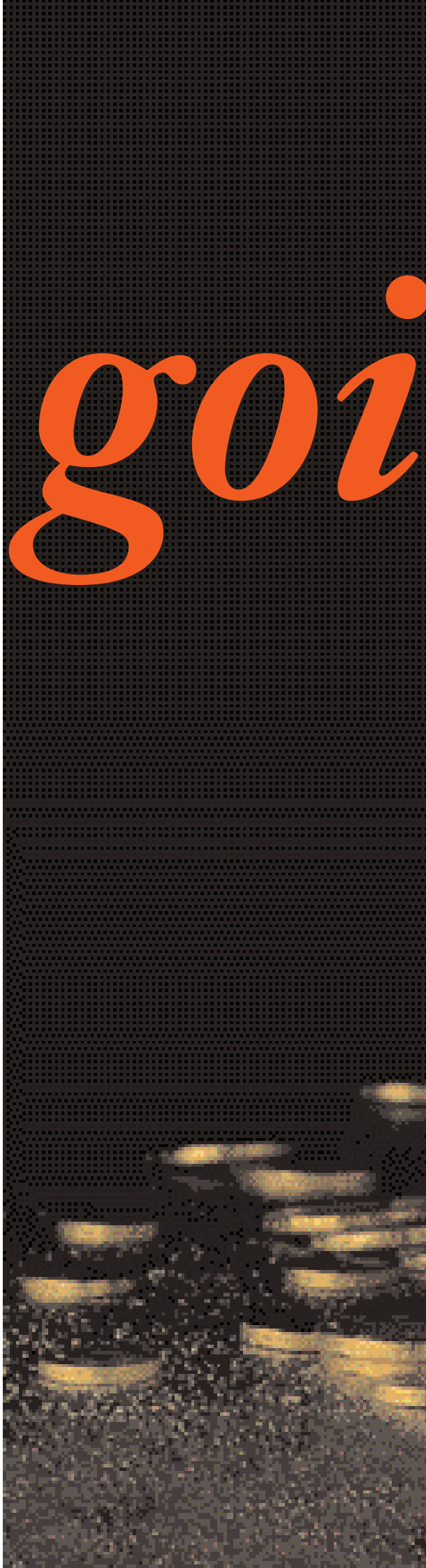
MAIN POINTS

- ***Gazette/HRM Legal salary survey***
- **Salary differentials between industries**
- **Frustrations of the job**

Like it or not, the subject of how much solicitors earn for the legal services they provide is always topical conversation. Unlike other professions, salary information is rarely published and, as a result, the layman's view of solicitors' earnings is often derived from newspaper headlines about the costs associated with legal action and the highly-publicised super-earnings of some solicitors and barristers. Maybe you feel that the public's perception simply doesn't matter, but the 2004 *Gazette/HRM Legal salary survey* reports that the second most frustrating aspect of working as a solicitor in practice is 'the negative public perception of solicitors'.

The survey, the largest of its kind to be undertaken for solicitors in Ireland, is intended not only as a guide for solicitors as to how their salaries are positioned against market averages, but is also an essential tool for employers in their efforts to win the battle for good legal talent. The survey highlights that, after 'role content', 'salary' is the second most important consideration when changing jobs.

You already know how long it takes to qualify as a solicitor and the very real hardship often experienced when going through the training process. Even after qualification, it doesn't necessarily improve that quickly. For those qualifying in 2004, there is stiff competition in the Dublin practice market, partly due to the volume of solicitors coming through



Gazette/HRM Legal salary survey 2004

ng rate

HOW THE SURVEY WAS CARRIED OUT

HRM Legal is the legal recruitment business within the HRM Recruitment Group.

The *Gazette/HRM Legal salary survey* was carried out by means of postal questionnaire included in the *Law Society Gazette* and/or telephone interview and was supplemented by other market information, including the substantial legal candidate database that HRM Legal maintains. In addition to information on compensation and benefits, the survey also took the opportunity to look at some broader issues that affect the careers of solicitors in Ireland. In total, 832 respondents and candidate details contributed to the final results.

Respondents were divided into 'practice' or 'in-house/industry'. In reviewing salaries for solicitors working in practice, only solicitors with a maximum of seven years' experience were included. Beyond this point, many practitioners have risen to partner level. The survey does not report on salaries for solicitors working at partner level, as the structure and level of compensation packages for partners vary considerably.

Salary figures contained in all tables within the survey refer to basic salaries only and do not include a value for any other form of compensation received by respondents. Additional benefits and bonuses are dealt with elsewhere in the survey report.

Tables containing salary information from respondents working in-house are not analysed by location, although almost 80% of these solicitors are working in organisations based in Dublin city and county.

Blackhall Place. The average salary paid to a recently-qualified solicitor this year is €38,574, rising to €42,595 after a full year's experience. The difference between working in a small practice as opposed to a large practice can be up to 23% of salary.

Compare this with chartered accountants, who, according to the Leinster Society of Chartered Accountants' salary survey 2004, receive on average 10% more than solicitors on qualification – a gap in favour of chartered accountants that seems to remain about that level for the first seven years of post-qualification career.

Perhaps this is why the 2004 *Legal salary survey* reports that 50% of solicitors working in practice (and industry) feel that the salaries they are being paid are less than the market rate. Only 40% of solicitors working in practice, according to the survey, believe their salaries to be equal to market rate.

SALARIES FOR SOLICITORS EMPLOYED IN PRACTICE IN DUBLIN CITY AND COUNTY

Levels of experience	Small firm	Medium firm	Large firm	Average salary
<1 PQE	€34,845	€38,541	€42,336	€38,574
1 PQE	€39,214	€41,673	€46,899	€42,595
2 PQE	€42,116	€45,147	€52,356	€46,540
3 PQE	€47,245	€50,248	€57,963	€51,819
4 PQE	€51,978	€57,956	€63,658	€57,864
5 PQE	€58,054	€63,985	€73,209	€65,083
6 PQE	€62,988	€67,499	€77,427	€69,305
7 PQE	€68,221	€74,185	€88,168	€76,858

Salaries categorised by levels of post-qualification experience and size of practice

SALARIES FOR SOLICITORS EMPLOYED IN PRACTICE OUTSIDE DUBLIN

Levels of experience	Leinster, not Dublin	Connacht	Munster	Dublin average salaries
<1 PQE	€35,815	€34,133	€36,896	€38,574
1 PQE	€38,496	€36,467	€39,251	€42,595
2 PQE	€41,258	€39,057	€41,996	€46,540
3 PQE	€42,899	€41,158	€45,468	€51,819
4 PQE	€47,901	€44,633	€48,567	€57,864
5 PQE	€52,776	€50,048	€54,973	€65,083
6 PQE	€58,663	€56,674	€60,256	€69,305
7 PQE	€63,259	€59,395	€71,586	€76,858

SALARIES FOR SOLICITORS IN INDUSTRY, REGARDLESS OF LOCATION

Levels of experience	Banking/ financial services	Technology	Pharmaceutical	Public sector
Newly qualified	€39,167	€42,246	€43,512	€32,143
1-3 years' PQE	€51,826	€58,333	€53,645	€42,899
3-5 years' PQE	€55,654	€69,237	€65,218	€46,891
5-7 years' PQE	€76,268	€79,660	€81,483	€58,166
Head of legal/director of legal	€108,750	€111,702	€119,318	€85,634

Salaries categorised by levels of post-qualification experience and industry sector

Faring better in the Fair City

Dublin appears to be the place to work for solicitors in practice, with on average an 11% higher salary level over next-placed Munster. Roles in Leinster outside Dublin come next, followed by Connacht-based positions.

While competition for recently-qualified solicitors will be significant over the next 12 months, most of the country's leading law firms are actively recruiting experienced solicitors at this time. Demand is strong in areas of law such as corporate and commercial, financial services, property and commercial litigation (particularly in the area of alternative dispute resolution) and newer speciality areas such as competition and EU law, pensions, regulation/compliance and environmental law.

Current recruitment demand is not restricted to Dublin. Small-to-medium firms outside Leinster have a constant requirement for solicitors with strong general practice PQE. Emphasis is on experience in residential and commercial conveyancing, family law, private client commercial work and employment law.

The establishment of the Personal Injuries Assessment Board appears to have had a generally negative effect on the recruitment of candidates with personal injury experience. Whether this will continue in the long term remains to be seen.

The last six months have seen a reasonably strong increase in the number of solicitors coming to Ireland from overseas. This is despite a serious gulf in salaries between Dublin and London of up to 80% (*Michael Page salary survey*, 2003/2004). Ireland now appears to be seen as a genuine career option to ex-pat and non-national UK and European-qualified lawyers for both practice and in-house positions, including lawyers from Poland and the Czech Republic.

The increased regulatory and litigation environment in which most Irish and multinational companies operate has substantially boosted the demand for in-house legal expertise. Traditional in-house employers such as banks and insurance companies are being joined by increasing numbers of companies from the IT, telecom and pharmaceutical sectors recruiting their own in-house support. In fact, the survey highlights that, at more senior levels, the pharmaceutical sector – which includes bulk and finished pharmaceuticals, medical devices and biotechnology – is the most competitive in remuneration, followed by technology employers. Technology companies appear to pay slightly higher salaries than other sectors at lower-level roles. Finance and banking comes third, reflecting perhaps the general downturn experienced in the last few years in financial services. Having said that, the survey research demonstrates that speciality areas within financial services, such as aviation capital and capital markets, still remain very competitive.

The 2004 *Legal salary survey* reports that public sector salaries rank below banking/finance, IT and pharmaceuticals at all levels, although some regulatory elements of the public service are, of necessity, paying higher salaries.

The important issue of bonus payments for solicitors working in practice is not factored into these conclusions. Although the system for calculating bonuses varies substantially from practice to practice, solicitors are receiving between 10% and 30% of fees generated after a fee threshold of two to three times basic salary is reached. The criteria influencing bonus achievement for solicitors in practice include fee generation, personal performance, practice performance and business development.

Solicitors working in-house are generally not receiving anything like the same level of bonus payments as solicitors in practice, but they do receive a much wider range of benefits. The survey highlights that 58% of in-house solicitors received contributions to a pension, compared with only 18% of those working in practice. More than 40% of solicitors working in industry receive an expensed telephone, whereas only 20% of their counterparts in private practice receive the same benefit. More than 30% of in-house respondents reported receiving private medical insurance, compared with only 12% of respondents from practice. Perhaps most surprising is the fact that, while nearly all in-house solicitors receive some form of additional benefit, less than 30% of respondents in practice indicated that they receive any form of non-cash emolument.

The survey also looked at other career elements affecting respondents. Among these was the issue of the factors that solicitors felt were important to consider when changing jobs. The 'work content' of the role was the most important factor for 31% of practice solicitors and 42% of in-house solicitors. Salary came next, followed by 'rapport with manager'. Job security factored low for both categories, perhaps underpinning the personal security that those who qualify from and work within a profession often experience.

Being a solicitor clearly has its frustrations. In our experience, it is not uncommon for solicitors to find the enormous amount of highly detailed work and often solitary existence completely out of sync with what they feel to be their natural personalities.

On a more general level, we asked solicitors about the most frustrating aspects of their role. The top five most frustrating aspects of working as a solicitor in practice were:

- Unrealistic client expectations
- The negative public perception of solicitors
- Long working hours
- Delays in the court system, and
- Dealing with other agencies/institutions.

The most frustrating aspects of working as a solicitor in industry were:

- Long hours
- Unrealistic client expectations
- Delays in the court system
- Other solicitors, and
- Dealing with other agencies/institutions.

Many of these will come as no surprise, but the high ranking of 'unrealistic client expectations' and 'negative public perception of solicitors' perhaps suggests that there is a need for greater education of the customer regarding the nature of the legal services provided, and perhaps for the solicitor in how to relate to the customer.

SUMMARY OF KEY FINDINGS

- Demand for in-house solicitors is increasing, while the historic salary gap between practice and in-house solicitors is narrowing. In-house solicitors enjoy greater levels of benefits
- Salaries in London are up to 80% higher than comparable positions in Dublin
- Bonuses vary substantially from practice to practice, but broadly solicitors are receiving between 10% and 30% of fees generated after a fee-generation threshold of between two and three times basic salary is reached
- Less than 5% of solicitors feel that they are paid above the market rate, while 50% feel that they are underpaid
- Pharmaceutical and technology sectors pay higher salaries than banking to their in-house solicitors
- Role content is the most important aspect for consideration when solicitors are changing jobs
- Solicitors in large firms earn an average of 20% more in their basic salaries than their counterparts in small firms
- Long hours and the 'unrealistic expectations of clients' are among the most frustrating aspects of working as a solicitor.

Alternative lifestyles

So what do you do if you can't put up with the frustrations or you don't like the pay or the direction in which your career is going? Well, here are the top ten alternative career choices of solicitors responding to the 2004 *Legal salary survey*:

1) Teacher/lecturer
2) Medicine
3) Writer/journalist
4) Psychologist
5) Property developer
6) Accountant
7) Stockbroker
8) Marketing/public relations
9) IT
10) Horticulture.

And just in case you thought that the profession lacked imagination, the survey also uncovered four solicitors who want to turn golf pro, four who would like to be professional footballers, three who would choose to be dentists, two budding theatre directors and a driving instructor! G

Eamonn O'Reilly is head of legal recruitment at HRM Legal.

HOW TO GET YOUR COPY

The *Legal salary survey 2004* is an essential supporting guide to any person working as or seeking to employ a solicitor. If you would like to receive a soft copy of the full report by e-mail, or hard copy by post, e-mail your details to legalsurvey@hrm.ie, indicating your preference.

KEEPING A tight rein ON FINANCES

MAIN POINTS

- Financial management of practices
- Use of technology
- Establishing targets

Better financial management is now more important than ever for busy law firms. Paul O'Connell suggests some ways that your firm can keep a tighter grip on its finances

Over the last 12 months, the majority of legal practices have seen a significant downturn in litigation work, and this trend is likely to continue as a result of the introduction of the Personal Injuries Assessment Board. Now more than ever, medium-sized practices need to have good financial management. This can be achieved by the setting of defined targets for fee-earners and following up on this through the use of a computerised accounts system.

Most medium-sized practices have embraced technological change by introducing computerised accounts and case management systems. However, some of them do not address, or fully use, the financial information produced by their computer systems as effective tools for financial and practice management. Reports that can easily be generated by their computer systems are either not prepared or issued only to top management and may not be properly acted upon.

Establishing defined targets

Outlined below is a procedure that, if implemented, could add greatly to the financial management of a practice.

Each partner and fee-earner should be issued with a budgeted fee-target for the year. The budget should be set and based on historic fees generated, with an allowance for an increase of, say, 10%. Budgets set should be agreed and form the basis of targets for the year. The 12-month budget should be broken down into a monthly budget so that each fee-earner has a monthly target.

At the end of the month, the bookkeeper/accountant should issue a report to all fee-earners that sets out the fees billed for the month compared with the budgeted figure, together with details of receipts collected for the month. A monthly meeting should be held with each individual fee-earner, attended by the bookkeeper/accountant and the managing partner. The purpose of the meeting would be to review the previous month's billing and cash collection figures, and the year-to-date budgets and cash collections targets. From this meeting, the partner and fee-earner should be able to identify how the fee-earner is progressing.

At the end of each quarter, the bookkeeper/accountant should issue a report to all fee-earners setting out the fees billed for the quarter, the budgeted figure and the cash collected for the quarter. A meeting should be held every quarter with each individual fee-earner, attended again by the bookkeeper/accountant and the managing partner.

The following items should be the agenda of the quarterly meeting:

1) Budgeted compared with billed fees
2) Cash collection
3) Work in progress
4) Fees – significant new clients/clients lost
5) Debtors
6) Staffing.

Minutes of the meeting would be kept by the accountant and circulated to each fee-earner so that they can act on any decisions made. It is important that each client matter is correctly identified on the computer system under the person who is the lead fee-earner on the case. That way, any reports produced on a fee-earner basis will be accurate.

Greater financial management is now more important than ever, given the downturn in litigation work. The establishment of defined targets for fee-earners and the monitoring of these by way of reports from computerised accounts systems can help a firm to achieve improved financial management and, ultimately, improved profitability. G

Paul O'Connell is education officer with the Institute of Legal Accountants of Ireland.

LACK OF A *section*

Every time a solicitor takes instructions to provide legal services, he must send the client a letter listing his charges, in accordance with section 68 of the *Solicitors (Amendment) Act, 1994*. But what happens when no section 68 letter has been sent? Patrick O'Callaghan reports on a recent case that dealt with this issue

MAIN POINTS

- Lack of a section 68 letter
- *Goodbody v Colthurst*
- Disciplinary implications

The opening of every file demands the issuing of a section 68 letter. The important point that arose in *Goodbody v Colthurst and Tenips Limited* (High Court, unreported, 5 November 2003) is what happens when such a section 68 letter cannot be found, does not exist or was never sent to the client. Several points were litigated in that case, but the purpose of this article is merely to explore the section 68 aspect of the case.

In the absence of a section 68 letter, can a solicitor recover any or all of his monies due under a solicitor-and-client bill of costs? Or is the solicitor prejudiced by the lack of a section 68 letter when suing to recover all of his costs lawfully due? What right of recourse has a client where a solicitor fails to issue a section 68 letter? What role does the Law Society have to play in what is, in essence, a contract between two free-standing third parties, one of whom is a solicitor and subject to its disciplinary jurisdiction.

Facts of the case

The action came before Mr Justice Michael Peart by way of an appeal from a decision of the master of the High Court granting liberty for the entry of judgment by the plaintiff solicitors against the defendants in respect of a bill of costs. The plaintiff solicitors had been instructed by Charles Colthurst in relation to six separate contentious matters arising out of a dispute that he had with his parents. All matters had been settled between the various parties prior to hearing, but on the basis that each side should bear their own costs.

It was accepted by the solicitor who dealt with the files concerned that a section 68 letter could not be located. There was no such letter on file. However, it was averred that the defendant client was regularly apprised of the costs situation, both at the outset and during the course of proceedings. The case was put forward that the client was merely seeking another method to avoid paying for the legal services provided.

Decision in *Goodbody v Colthurst*

The decision of Mr Justice Peart is interesting in the manner in which it dealt with the various aspects of the differing requirements flowing from and impinging upon a consideration of the non-existence of a section 68 letter. These can be best approached by distinguishing between:

a) The effect of the non-existence of a section 68 letter on the right to recover fees by action at law
b) The quantification of the fees actually owing, upon taxation by the taxing master in a solicitor-and-client taxation, in the light of the non-existence of a section 68 letter
c) The effect of the lack of a section 68 letter on a solicitor's professional obligations to the Law Society.

Mr Justice Peart held that the lack of a section 68 letter does not remove a solicitor's right to recover fees by action at law. Full recovery of all fees properly allowable upon taxation and owing can be obtained by legal action. He rejected the notion, put forward by counsel on behalf of the defendant client, Mr Colthurst, that section 68 operated to bar any right of

68 LETTER

recovery of costs by the solicitor where an appropriate letter had not been written to the client upon the inception of the retainer. Rather, section 68 is a 'stand alone' section, designed to put in place a number of requirements intended to provide greater protection to clients of solicitors in the matter of costs. He held that, despite section 68 being worded in mandatory terms, it was not designed to deprive the solicitor who has failed to send a section 68 letter of his right to recover his costs when taxed.

Effect on taxation

However, the *quantum* of those fees may be materially (and adversely) affected by the lack of a section 68 letter. Mr Justice Peart held that, in the absence of prior notification of the basis for certain charges contained in the bill of costs, the taxing master may, in his discretion, attach such significance to the absence of a section 68 letter as he deems appropriate in any particular case. This clearly raises the spectre of certain charges being reduced or not allowed, where a section 68 letter has not been written. It is in this area that the provision most keenly bites – on the pockets of defaulting solicitors!

It is the taxing master who is charged with the task of ensuring that a client is only charged appropriately for services rendered. The provisions of section 68 are not intended as a substitute for this. When a bill of costs is presented for taxation, only those charges that can be properly shown to have been rendered will be allowed – at the appropriate rate. If the fees being charged are in excess of what the taxing master considers appropriate in the absence of prior notification of the basis of charges, it will be something he can have regard to, even if he might be prepared to allow the same fees where a section 68 letter had been written. As a taxing master exercises a discretion that is of a judicial nature in relation to all fees properly allowable (*Kelly v Breen*, [1978] ILRM 63), this is of significant import.

Disciplinary impact

Ultimately, the underlying theme in the judgment of Mr Justice Peart is that section 68 is primarily a matter impacting upon solicitors' professional obligations. It is a breach of a solicitor's obligations to fail to send a section 68 letter. It affects his relationship with his statutory professional disciplinary body, the Law Society, and can lead to censure and a fine.

Accordingly, the lack of a section 68 letter does not affect the right to recovery by a solicitor under a bill of costs. It may affect the *quantum* of that bill when it is submitted for taxation, given the lack of prior notification of the basis for the charges made. Certainly, it does adversely affect a solicitor's professional obligations as a member of the Law Society.

It is in this regard that the adverse affects of failure to write a section 68 letter will most directly be felt by a solicitor in practice. G

Patrick O'Callaghan BL is a Dublin-based barrister.

Occupational HAZAR

Lawyers advising clients on contracts that involve the occupation of premises and on-going payment need to take care in their drafting, as recent litigation has shown, writes Albert Power

The recent decision of Cork District Court, ordering possession against a man who had lived in a cottage in Blarney for 44 years, brings again into uneasy relief the question of when occupation confers an interest and when it doesn't. In *Colethurst v O'Leary* (May 2004), Judge O'Leary accepted the argument of the plaintiff landlord of Blarney Castle that the occupation by the defendant had been under a caretaker's agreement of December 2000. The defendant, who had lived in the cottage all his life, regarded it as home. Even so, once the caretaker's agreement was revoked, the court compelled him to leave.

Perhaps the most distinctive feature of the case was the length of time that the occupation endured. Also, unlike many other cases in which the character of occupancy has been contested, payment of rent seems not to have been involved. Usually, controversy over the character of occupancy and the consequential rights of the occupant arises when occupation has been permitted or enjoyed for a term, accompanied by the payment of periodic consideration. In such cases, where the occupancy is commercial, its continuance for five years often induces the occupier to urge that his periodically paid consideration is a 'rent' and that he has a statutory entitlement to renewal of his 'lease'.

There have been many cases where occupation agreed on the basis of licence was later argued as pursuant to a lease.

MAIN POINTS

- Licence or lease?
- Landlord and tenant law
- Character of occupancy

Lease of life

A lease brings with it, potentially, statutory rights of renewal, compensation for disturbance, compensation for improvements, enforceability of covenants between successors to the original parties, covenants implied by statute and – in principle – the freedom by the occupier to assign his interest.

A licence enjoys none of these things. It neither creates nor transfers an interest in land. In its essence, it is a mere permission, given sometimes gratuitously and sometimes on foot of an agreement for value. In its typical guise, a licence cannot be assigned.

A more enduring type of licence arose in what 19th century law reports called a 'licence coupled with an interest'. This was a licence granted to enjoy some more substantial legal interest, which itself had to be granted by deed – like a *profit à prendre*. At common law, such a licence could be readily revoked unless granted by deed, because the thing it attached to was not effectively granted unless by deed. If the licence was revoked, the licensee then became a trespasser and, accordingly, disabled from seeking damages for his removal (*Wood v Leadbitter*, [1845] 13 M&W 838). However, if the clear intention was that the licence was to continue until the subject matter of its enjoyment was consumed, then, even if not granted by deed, equity looked on the licence as irrevocable and would permit an injunction to restrain its revocation (*Atkinson v King*, [1878] 2 LR Ir 320).

In the 20th century, this distinction between proprietorial and ephemeral licences was replaced by judicial inclination to regard a licence as, in effect, an offshoot of the agreement that begot it. Lord Greene MR, in *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* ([1946] 1 All ER 678), expressed the principle succinctly:

'A licence created by a contract is not an interest. It creates a contractual right to do certain things which otherwise would be a trespass … In considering the nature of such a licence and the mutual rights and obligations which arise under it, the first thing to do is to construe the contract according to ordinary principles'.

Accordingly, a right that in traditional language might be deemed a licence coupled with an interest

falls to be interpreted, in relation to its possible revocation, by the terms, express or implied, of the agreement creating it (*Woods v Donnelly*, [1982] NI 257).

All very interesting. But, as every legal practitioner knows, under section 3 of the *Landlord and Tenant Law Amendment, Ireland, Act 1860* ('Deasy's act'), the relationship of landlord and tenant is deemed to be founded on the express or implied contract between the parties and to arise where one party agrees to hold land from another party 'in consideration of any rent'.

So, if both a lease and a licence derive from contract, both involve occupation and both feature payment of monies – in one case termed 'rent', in the other perhaps not – how, then, is it possible to tell them apart? Let us try.

Exactly what it says on the tin

At first appearance, there seems to be no good reason why the nature of the agreement should not be precisely what the parties decide it will be. The Supreme Court has said so. In *Irish Shell and BP Limited v John Costello Limited (No 2)* ([1984] IR 511), Henchy J stated: *'In all cases it is a question of what the parties intended, and it is not permissible to apply an objective test which would impute to the parties an intention which they never had'.*

But this cannot be taken to mean that the parties are entitled to dress up their real intention in a misleading document. On reflection, the wiser course is to regard the *dictum* of Henchy J as applying to those cases where, objectively looked at, the relationship between the parties might be as much one thing as another, but the parties have clearly chosen which it will be.

The following observation by Lord Templeman in *Street v Mountford* ([1985] AC 809) is, arguably, more apt and incisive: *'The consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence'.*

AN OBJECTIVE TEST

The decision of Peart J in *Smith v Córas Iompair Éireann and Iarnród Éireann* (9 October 2002, High Court, unreported) represents the assertion of a robustly objective basis for determining whether an agreement giving a right of occupancy does so by way of lease or licence. The grantee ran a newsagency and general confection shop beneath one of the arches of Tara Street railway station for a ten-year period on the basis of what appeared to be a licence. There was much merit in thinking it a licence. The parties had treated on the basis that it was a licence. At the time, a lease was not in prospect. Halfway through the term, it was put to the grantee that if he surrendered his licence, he might be considered for a lease. He did nothing until the term was up, when he sought a renewal of what he called his lease. The agreement had contained a long lawyerly provision to the effect that it was a licence, not a lease, and that there was no intention to grant an estate and so forth. There was another clause that purported to assert 'temporary convenience'.

Notwithstanding all of this, Peart J held that there was a lease. Apart from the one clause that characterised the agreement as a licence, the entire thing was a standard commercial lease. According to Peart J, if that one clause were deleted, and the 'licence labels' replaced with 'tenancy labels', then 'it would bear a significant resemblance to any normal tenancy agreement'. Payments described as 'licence fee' were, in effect, rent. To all intents and purposes, the grantee was in sole dominion of the property. He had 'exclusive possession'. The grantor never inspected, never cleaned and had no responsibility for either security or stock. In addition, the grantee had invested heavily in the business, both by way of initial substantial premium and heavy fitting-out costs. (This seems to have been important: it is not a consideration addressed in other recent Irish cases on the subject.)

All in all, the grantee clearly had more than the 'mere personal privilege' contended for by the grantor. Peart J cited, extensively and approvingly, from the speech of Lord Templeman in *Street v Mountford* ([1985] AC 809).

This case and the above quote were cited with approval by Peart J in *Smith v Córas Iompair Éireann and Iarnród Éireann* (9 October 2002, unreported; see **panel**), who counterpointed Lord Templeman thus: *'The entire document must be looked at … in order to see what the legal consequences of the document may be. This is not simply a question which arises solely from the expressed intention of the parties. It is in essence a matter of law'.*

So the parties to an agreement of which occupancy is a feature may agree that the legal relationship shall be a licence and not a lease, provided that this is accurately reflected in the document embodying the agreement and in the manner in which the agreement is implemented. A legal relationship, which in the manner of its working is one of landlord and tenant, cannot be turned into a licence merely by calling it one.

Exclusive possession

This is a hoary old chestnut, well worn through semantic hair-splitting. By definition, a lessee is entitled to possession, as against everyone, including his lessor. The lessor's right of entry, where it arises, has to be provided for. Almost three decades ago, Professor Wylie wrote that if a grantee of land has not possession of it, he is not a tenant; if he does have possession, he may or may not be a tenant. This is still true, and has probably not been better expressed. Agonising over whether a party has 'possession' as opposed to 'occupation', or whether – Heaven preserve! – a party might have 'exclusive occupation' as opposed to 'exclusive possession' serves only to confuse things further.

Much must depend on whether the agreement between the parties, and the circumstances under which it was entered into, manifest an intention by the owner to part with an estate. This is often determined by looking to see which of the parties is in effective control of the property. The example sometimes taken is that of the lodger or hotel guest, who can readily be said to have 'exclusive possession' of his or her room, but can in no meaningful sense be regarded as having dominion over it.

In *Whyte v Sheehan* ([1943] Ir Jur Rep 38), Judge Shannon observed that enjoyment of land would be on foot of a licence only *'if a person is not to have the exclusive possession of or sole dominion over the matter'*. He added: *'Terms of art cannot conceal or alter the truth, and no matter what words are used if it is clear from the document that it was intended to part with an estate in the property and to confer an exclusive right of occupation, so that the grantor had no right to come upon the premises without the consent of the occupier, a tenancy or demise is created although no words of letting are used, and although the remuneration is not spoken of as rent'*.

The importance of 'control', and whether or not an estate was intended to be granted, remains just as vital today as 60 years ago. In *National Maternity Hospital Dublin v McGouran* ([1994] 1 ILRM 521), a licence was given to the defendant to operate a coffee dock and shop in the hospital. Notwithstanding several clauses and responsibilities consistent with the grantee's being a tenant, Morris J held that the fact that the occupation was specified as non-exclusive, and the premises where the grantee's trading activities took place were liable to be substituted by other premises at the behest of the hospital, meant that there could not be a tenancy. According to Morris J, even though the grantee could be said to have had 'exclusive possession' to the extent that she was the sole key-holder, 'the reality is that the hospital continued to operate and exercise dominion'. A similar outcome followed in *Kenny Homes and Company Ltd v Leonard* (11 December 1997, High Court, unreported; 18 June 1998, Supreme Court, unreported), a case involving the licence of a petrol filling station to facilitate the hire of equipment and sale of produce manufactured by the grantor. Once again the licensee was the sole key-holder, but, according to Costello P, the licensors 'had contractual rights over the site which they could enforce at any time'. Occupation of the site by the licensees was not exclusive possession, because, in successive written agreements, they had specifically agreed otherwise.

Personal relations

Where occupancy arises under a personal agreement between the parties rather than a commercial one, it is deemed to be on the basis of a licence (*Bellew v*

Bellew, [1982] IR 447). In such a situation, exclusive possession is not decisive. If the occupation derives from personal circumstances, such as a family arrangement or an act of friendship or generosity, the intention to create a tenancy is negatived (*Facchini v Bryson*, [1952] 1 TLR 1389). Accordingly, in each case 'we have to see whether it is a personal privilege given to a person (in which case it is a licence) or whether it grants an interest in land (in which case it is a tenancy)' (*Shell-Mex v Manchester Garage*, [1971] 1 WLR 612, *per* Lord Denning MR; approved in *Irish Shell and BP Limited v John Costello Limited (No 1)*, [1981] ILRM 66), *per* Griffin J).

Unconcluded negotiations

Similarly, occupation permitted to the party treating for a legal entitlement to occupy is by way of licence. This arises regardless of whether there had earlier been a landlord and tenant relationship between the parties, with the interim occupation taking place on a 'caretaker's agreement' only (*Gatien Motor Company Limited v Continental Oil*, [1979] IR 406). It can also happen where a party goes into possession and makes an advance payment of rent pending the outcome of negotiations for a tenancy (*Davies v Hilliard*, [1965] 101 ILTR 50). Likewise in the case of occupancy under a contract for sale (*Street v Mountford*, [1985] AC 809).

In such circumstances, exclusive possession is irrelevant: there is an absence of intention to grant an estate unless and until agreement has been concluded. It makes sense that occupation in this context is by way of licence, since the effect of negotiations being on-going is that the legal entitlement of the grantor to occupation is implicitly acknowledged. The court will also hold that possession has been by way of licence where agreement is not struck on certain terms fundamental to a lease (*Law and Fry v Murphy and Dooly*, 12 April 1978, High Court, unreported).

Those who seek to discern trends in such matters will inevitably see the decision of Peart J in *Smith v Córas Iompair Éireann and Iarnród Éireann* as embodying a reversal of a sometime trend towards giving paramount importance to clever legalistic drafting. There seems little doubt but that recent litigation on the licence versus lease controversy is the bitter fruit of over-reliance on word processor and precedent book. The blend of landlord-and-tenant-type language with the label of licence is no sure elixir to solve all woes. Rather the reverse.

Lawyers who advise clients seeking to enter legal relations that involve occupancy and on-going payment need to be clear in advance as to what the relationship is – then advise and draft accordingly. To proceed otherwise is the wrong way, and done at peril. G

Dr Albert Power is a solicitor and the author of Intangible property rights in Ireland.

Lost in TRA

A solicitor's work is inextricably linked not only with the law, but also with justice. And when alternative methods of resolving disputes evolve, they should be embraced in the interests of justice, argues Fergus Armstrong

MAIN POINTS

- Role of solicitors
- The meaning of 'justice'
- Alternative dispute resolution

A man once asked me: 'what's your crust?' Well, what *do* I work at? One might say: 'I'm a lawyer in a corporate law firm; one of Dublin's magic circle'. Or one might venture: 'We're a general-service law firm'.

I want to offer some comments on the solicitors' profession in Ireland. My focus is on the large commercial firm, but I hope that they may be of some general relevance. I want to explore whether we can find some kind of essence that is at the core of what people do in such a firm. This means looking for something that permeates all our work, that transcends specialisation – finding some correspondence between activities in every department of a firm. It's just possible that, if we can identify a common thread, it may be connected with where the buzz or energy comes from. We might find that if we became more conscious of this element, we would become better practitioners, make better choices, and enjoy our working lives a little more.

I want to propose – implausibly, perhaps – that our skill, our working life, and the life in our work are founded in an ecology of justice. I will also suggest, tentatively, that when we see signs of the 'alternative' appearing in legal practice, it is because the gap between justice and what the legal system can provide has become unacceptably wide.

How we got here

The evolution towards large law firms in Ireland is recent. When I first joined my firm it had, I think, seven partners. It was the largest in town, a consequence of a merger in 1965. What we thought were envious people disparagingly called us 'the legal factory'.

The profession was split, then as now, between solicitors and barristers. But the roles were rather more sharply delineated. Solicitors 'did the business': work was centred around situations that were likely to produce meaningful sums, and incomes came from slicing a percentage off the top in three main categories – property conveyances, estates, and 'running downs'.

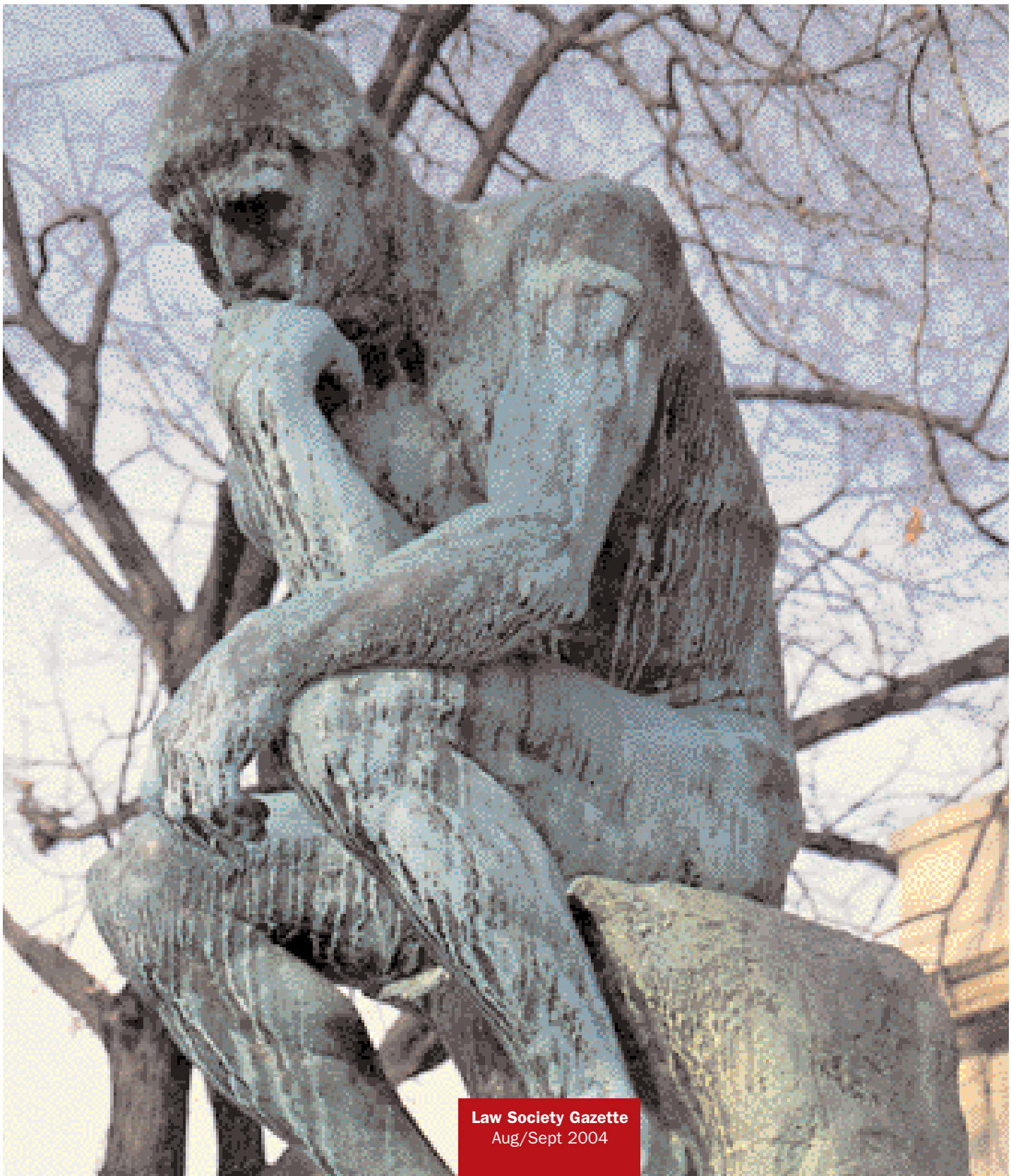
Now *law* was something else. That was for barristers, learned counsel. Occasionally, a solicitor arrived on the scene who attracted some awe around him and was marked down as a 'real' lawyer, that is to say, someone who knew about law.

When I came to my firm, all parts of the office consulted counsel regularly. Indeed, much of our work consisted in gathering the facts of a situation into elegantly ribboned packages to be advised on by counsel. This was not just the case for litigation matters, but throughout the firm. Counsel were in frequent use. I will never forget the excitement of climbing the steps of the house of Raymond O'Neill for the privilege of a consultation with the supreme master in the field of company law. Unlike, perhaps, the heavy-hitting solicitors of these times, we took a *soupçon* of self-respect, bless us, from the power to give or refuse work to such deities.

Now, commercial law firms have a wealth of resources, supported by technology, that allows research into any aspect of the law. Occasionally, counsel will be consulted on a fine point but it seems that, save for work that is destined for the courts, barristers are rarely employed. We have built our specialisations; in many fields, it would be difficult for them to match our capability. From the standpoint of a firm like ours, counsel are needed as advocates, and otherwise on rare occasions.

We belong now to what is seen as a professional elite – we do high-value business. We capitalised on sophisticated electronic systems that support efficient service delivery. We would distinguish ourselves from large accounting firms and, indeed, would aggressively assert that our contribution is special and different, but in fact we increasingly work the same turf. We 'deliver' legal products, many of which are in the category of specialist

NSLATION?



JUSTICE, EQUALITY AND PROPORTIONALITY

Is there any criterion for justice? The French philosopher Compte-Sponville suggested that the core principle is to favour 'equality, reciprocity, or equivalence between individuals'. This is the origin of the word *equity* (from the Latin *aequus*, meaning equal), reflected in the symbol of the scales. Justice, he says, is the virtue of order and exchange – equitable order and honest exchange. For an exchange to be just, it must take place between equals, or at least there ought to be no difference between the parties to the exchange (in terms of wealth, power or knowledge) that might make them accept an exchange contrary to their interests or contrary to their free and enlightened interest as expressed in a situation of parity.

The key point is that he suggests that equality is not so much about the objects exchanged, as between the *subjects* involved in the exchange. It presupposes that they are equally informed and free. We get from all this a 'golden rule of justice': *'In any contract and exchange, put yourself in the other's place, but knowing everything you know and supposing yourself to be as free from need as it is possible for someone to be and see if, in his place, you would approve this exchange or contract'*.

I find this a mighty sentence. I like the empathic tone: put yourself in the others' place, do as you would be done by. This principle could provide a yardstick as to when a dismissal might be fair and it gives a context to investor protection legislation, consumer protection, financial regulation, and all aspirations for a 'level playing field'.

information, packaged in a fashion that is tailored to client needs.

Is it possible that in the transition from an earlier model of legal practice, something has got lost in translation?

Our particular crust

If we look at what people actually do in the various departments of a large firm, we might ask what is really the essence of our work product? If we haven't got an answer to that, are we exposed? Perhaps we could look at a few examples and ask what exactly it is that we bring to the party:

- We are able to design clever articles of association, first refusal, roulette provisions, and so forth. Yet it's the clients who say what it is they want: they define their deals and the components of it. Sometimes we are put to work only after the term sheet has been designed and signed – the creative work already done, you might say. Are we simply scribes? Smart programmers?
- I recently attended an in-house seminar on withdrawing money from companies. Accountants might have tried the same thing. They offer tax advice, as do we
- We advise on building contracts. How do we stand alongside the professional expertise of construction experts, engineers and architects? Take environmental law or planning law: do we have the beating of the planners or the scientists?
- In the human resources field, we tune in to developments in pay bargaining, headcount reductions and the nature of discrimination. But who are the real experts? Who defines what bullying is? Where would a legislator go for guidance? To a lawyer? Surely this is the realm of the industrial relations expert, the sociologist and the psychologist
- With regard to competition law, are the economists supreme? Do we gather our skirts of self-esteem around us by getting to understand economic theories? But as economists we will surely always be second-raters. It's not our chosen discipline.

These may be indications that our territory is not securely held. So this is the question: what's your crust?

We might perhaps assert that we hold our place in the scheme of things for three reasons. First, we are educated generalists. We know a bit about many things, intermediating through the various disciplines and making business that way. Second, we know or have access to, and can index and retrieve, knowledge as to law, statutes and decisions. Third, we are reasonably skilled in the use of language; we draft with clarity.

Is this as good as it gets? Or do I detect issues of self-esteem – identity crisis even?

The sleep of the just

Enter justice. 'Justice!', you may say, 'what does justice have to do with us? Our job is to represent clients, push their interests to the max that's legal. Justice is a word for judges!'

Many will consider the lady justice as irrelevant to the macho realities of modern corporate practice. It is true that the justice dimension is elusive. It is difficult to sense, in the day-to-day work of a large law firm, that we are practitioners of a justice system. I believe, however, that the issue has as much relevance for the specialist in derivatives contracts or the take-over/M&A artist as for people who practise in contentious business. I believe, as well, that it links vitally with the issue of self-respect in our profession.

When we speak about justice, we normally mean one of two things:

- Conformity to the law, or
- Fairness, which seems to have something to do with ideas of equality or proportionality.

The first of these concepts comes easy. We could refer to it as *legality*. We know a lot about that. We dispense advice in that regard. The second is more problematic, but the two concepts overlap. There is a general hope, not always realised, that what is legal is also fair.

As practitioners, we may figure that philosophical notions of equality or proportionality have little to do with us. The public law, we may say, needs to aim at fairness, but that's not our preoccupation. Moreover, people are manifestly not equal. Equality and proportionality are not easy concepts (see **panel** above).

I believe the justice ideal is somewhere near the heart of the question as to what is the lawyer's unique contribution.

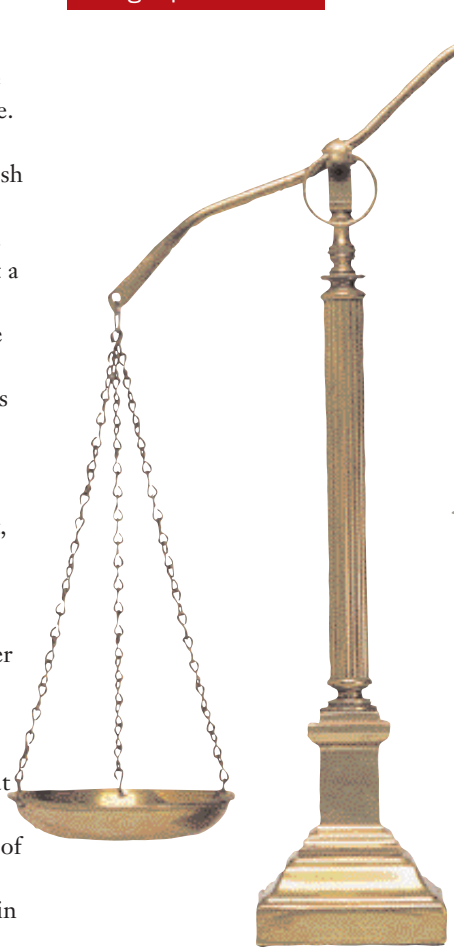
True, we work with the law as it is. We tell people what it is. But people come to us with live situations. They need to know what is permissible. If it was a case of accessing a database where statements of law are to be found, then any English speaker of average intelligence with relevant computer skills could give the answer. But what a client has is a set of facts, a problem, and it is not a case of slotting that in somewhere. The point is this: we wouldn't be able to reason well about the particular situation and how the law affects it without a developed sense of what the law intends – how justice is to be served.

And what is going on in our heads when we attempt a piece of legal drafting? It's hardly a matter of report writing. When we think about it, as we pick and choose how we will express a commitment, aren't we doing something rather more dynamic? Are we not, in fact, envisaging situations and conjuring up cases that test whether the way we propose to say a thing is sufficiently succinct, not too broad and not too narrow, meaning this but not that? The words we write ought to catch this situation but not that one; that wouldn't be fair! This is the exercise of the lawyer's imagination, weighing cases in a context of an interest in what is just. That's not to say we won't often strain to extend our client's interests in the situation, by wide or narrow drafting. But we may have to defend our draft, to resist assertions that in some specific instance it would lead to unfairness. We have to be ready with our own arguments as to what would be just in the circumstances.

I want to suggest that the justice ideal informs our work in two ways. First, there is an overarching ideal, something the law aims at in regulating activity, in righting wrongs. But second, justice is somehow implicated in the way we do things, our *modus operandi*, our core skill. Here we are speaking of the talent for deliberating wisely, weighing things up, acting with 'good judgement'. Lawyers (if we claim to be such) ought to be better at this than other sorts of professionals.

Masters of none?

Anthony Kronman, dean of Yale University and author of a powerful critique of the US legal profession, says that if we think of the lawyer as a jack-of-all-trades, with a dilettante's understanding of many fields but no expertise of his own, serving only as an intermediary between other disciplines, then his position will be one marked by deference towards the real experts in those areas. He asserts, however, that if the lawyer is an amateur in the fields of these other experts, they are amateurs in his – and when it comes to the imaginative probing of specific cases, it is the lawyer who is best equipped by training and temperament to lead the way. He says that 'the ability to fashion cases and empathetically to explore both real and invented ones is the lawyer's professional forte'.



As the new Irish paradigm of corporate legal practice matures, as our profession comes of age, we ought to consider whether this issue is not at the heart of what we do, whether it is in part definitive of the unique contribution we can make, is worthy of our respect and is implicated in our self-respect. Think of those instances where professional self-respect has been annihilated. Was it a formalistic approach to rules, uninformed by a living ecology of justice, that brought to the world of business the collapse of Enron and the disappearance of a global professional organisation?

A mutation of the solicitors' profession has occurred. The full-service law firm, responding to new market needs, has appropriated to itself many areas of work that were formerly the preserve of the practising bar. Counsel work with cases; they read them, cite them, live them. The process begets something of the judicial mind. Solicitors, it must be said, even those attending court, stand at one remove from the pure legal chemistry of success or failure, even if they be the ones to experience first hand the anguish or elation of a client.

'Ought we to encourage the emergence of more "real lawyers"? Practitioners might think of finding more time to read judgments as opposed to potted summaries'

If what I am saying about the justice backdrop to practice is right, then it may be asked if law firms ought to increase their level of engagement with the justice system, in working with cases as opposed to what can seem like packaged legal outcomes. Ought we to encourage the emergence of more 'real lawyers'? Practitioners might think of finding (resisting the pressures of the chargeable hour) more time to read judgments as opposed to potted summaries. Those who detect in themselves a talent for advocacy might be encouraged in that.

Moreover, if we could fully accept that it is the link to justice that gives a moral grounding for what we do as advisers, litigators and deal-makers, no matter how specialised, would our unease with the workings of the justice system come to the fore? Are there features of that system – built as it now is with vastly expensive discovery procedures, inefficient structures in the profession, 'follow me' pricing and so on – that produce, in institutional form, what may in fact be anything but justice? Mr Justice Kevin Lightman of the English High Court has recently said that a party's performance at a trial *'turns very much on the investment made by the respective parties in the litigation: at all stages in the*

litigation, money talks loud and clear. The human right to equality of arms has little, if any, meaning or practical effect and the judge, however fair-minded and interventionist, has limited scope to redress the balance. A litigant purchases the quality of justice he can afford'.

The last sentence is damning. As practitioners, we might reflect whether this describes the Irish case as well? If so, do we or should we feel a level of responsibility for that? There is a close relationship between the processes of specialisation and institutionalisation in human activity. We identify special skills – market openings, if you like – and we hone them and want to give exclusivity to them. Thus professions grow and become rigid.

The road less travelled

A consideration of limitations in the justice system opens the way for a discussion of alternative dispute resolution (ADR). The expression 'alternative' may conjure up suggestions of the freakish, the anti-establishment. Yet if the umbilical link to justice in the work of a practitioner can be accepted, then we surely ought to see as mainstream a system that assists parties to exercise personal power and autonomy to settle their differences through the facilitating skills of a third party. The process allows the placing on the scales, in the making of a just settlement, of extraneous *quid pro quo*, separate from the rights and wrongs of the case, that help to level up the bargain.

The Court of Chancery was needed to advance justice beyond the limitations of the common-law courts. Is it stretching things to see mediation as a modern analogue of that development? Recall the origin of the profession of solicitor: it was distinguished from that of attorney. Attorneys prepared cases for the common-law courts, argued there by barristers. Solicitors were their equivalent in Chancery.

But is not the judge the natural third party? And if the need is for negotiation, isn't this what barristers and solicitors do every working day? A low proportion of cases actually go to trial, it is true – but when does settlement occur? Often, as we know, on the steps of the court. Cynics will say that's when the brief fees are marked. I think this is not the whole truth. In human affairs, settlements are made when it's down to the wire, in the small hours of the morning, when the chance to make a deal is about to vanish. That is true of the *Nice treaty*, the *Good Friday agreement*, and the Round Hall at the Four Courts. Mediation sets up an earlier stage in the process when the parties can make a do-or-die attempt to settle on the day. They have invested in it, financially and otherwise, so they want to succeed. Most commercial mediations do succeed.

There is no redundancy here for conscientious lawyers. On the contrary, you ought not, as party, risk a settlement save in a context where you have a fix on what your legal prospects are, what the law says that's relevant to your case. Experience suggests to me that the mediation process gives scope for the purest and most intensely satisfying of legal work, which is to examine a client's position in a measured way with consideration of all relevant authority and to be prepared to discuss that in civil dialogue with an opposing colleague, whether barrister or solicitor. Moreover, since costs of mediation are much below the typical expenses of the litigation process, there is better scope to allow this task the time it needs. Mediation offers an opportunity for members of the solicitors' profession to reinforce their sense of the worth of what they do, obtaining satisfaction in the justice business.

'Experience suggests to me that the mediation process gives scope for the purest and most intensely satisfying of legal work'

Lest ye be judged in turn

Mediation does not diminish the role of judges. Cases are settled against the backdrop of rights emerging from decided case law. The fact that success in mediation depends in some measure on parties having the confidence to disclose their points of weakness to a third party, so that he or she can help the fashioning of a settlement, means that this is a role that is complementary to what judges do but cannot be done by judges. Why? Because if no settlement emerges, the judge may have to decide the case. Thus, a party cannot safely disclose its vulnerabilities to a judge. The mediation process, on the other hand, ought to nest comfortably within the framework of the courts system, as the rules of the new Irish Commercial Court envisage.

Mediation will also allow lawyers to stick with their clients rather than deliver them to specialists in litigation. We see a flow in the opposite direction as well, if we look at the number of categories of advisory work that are now done by litigation practitioners in employment law, intellectual property, regulation, product liability and insurance. In the process of specialisation, where services become more like commodities, there is always something that gets left out. I think that something of the kind may have happened as law firms took over activity that barristers used to do.

In the same way, I think that in time it may be seen as an unhappy result of specialisation that we so completely segregated work that we called a distinct speciality – litigation – from other categories. The amputation may have caused us to lose sight of what distinguishes us as lawyers. I suggest that casework and the outcomes of the justice system are central to the endeavours of all lawyers.

If you care to see work as art, then much of our activity can be described as an art of composition. We compose arrangements, enforceable commitments and deal transactions for our clients. We help them (or ought to help them) compose their differences, and we do all this within an ecology of justice.

That's our crust! G

Fergus Armstrong is a partner in the Dublin law firm McCann FitzGerald. He would welcome feedback on this article, and can be contacted at fergus.armstrong@mccannfitzgerald.ie.

Finding that TRAINING contract

With ever-increasing numbers wishing to pursue a career in law, competition for training contracts is at an all-time high. Responding to this demand, the Law Society recently hosted a one-day seminar for students looking for training contracts

Students registered on the Law Society's trainee recruitment register were recently invited to a one-day seminar on 5 August. The aim of the day was to provide practical help to these solicitors of the future. Speakers from both industry and practice were invited to participate, and some 40 students attended.

Eyleen de Brun from the Dublin Business School took the morning session. Her job is to advise the 6,500 DBS students about interview techniques and the best avenues to follow in their careers. This part of the seminar looked in detail at how to give the best interview performance. Many of those who attended on the day had already been to several interviews without success. De Brun explained the preliminaries of the interview process and how to use certain techniques to establish a connection with the interviewer in order to make that lasting impression.

Establishing a rapport

The use of role-playing helped to demonstrate both the mistakes interviewees commonly make and how to avoid them in order to establish that much-needed rapport. De Brun also individually reviewed the CVs of those who attended in order to help maximise the chances of success in securing an interview.

Trainee recruitment officer at Matheson Ormsby Prentice, Janet Slattery, explained how a large firm recruits its trainees. Some 700 applications for 20 trainee positions were submitted to the firm last year, and the number of applications is expected to be even higher this year. Of these 700 applicants, only 100 potential trainees are ever interviewed. Application forms were distributed and the common mistakes made by candidates in completing the form were highlighted.

Slattery stressed the importance of being yourself and that, when asked who you would most like to have to dinner, be honest. Candidates choosing Michael O'Leary fail to show originality, she said. Revealing your personality is as important as your educational achievements. The talk helped to demystify the process: yes, the odds are not good, but a stint in their firm on a summer placement could shorten those odds greatly!

The Law Society's training executive, Fionna Fox, spoke about recent developments within the society. The trainee recruitment register is now displayed on

the Law Society website. Each and every solicitor in Ireland has been told of this development through the *Gazette*. Efforts have also been made to raise the profile of those solicitors who take on trainees in that they now have their own area on the society's website.

The day ended with a talk from James MacGuill, a member of the Law Society Council and a sole principal with a very successful practice. MacGuill offered an insight into the mentality of the smaller firm. Such firms rarely have any recruitment strategy, he said, and securing a contract with a smaller firm can be more a game of persuasion.

Firms might have to be convinced that they need a trainee,. If a candidate can do that, they are half-way there.

Tightening purse strings

Many firms will see the withdrawal of personal injury claims as a threat to their business and may well be tightening their purse strings, especially when it comes to taking on new staff. However, MacGuill explained that some small practices could be persuaded that changes often create opportunities. Candidates with good research and IT skills could capitalise on these developments and opportunities.

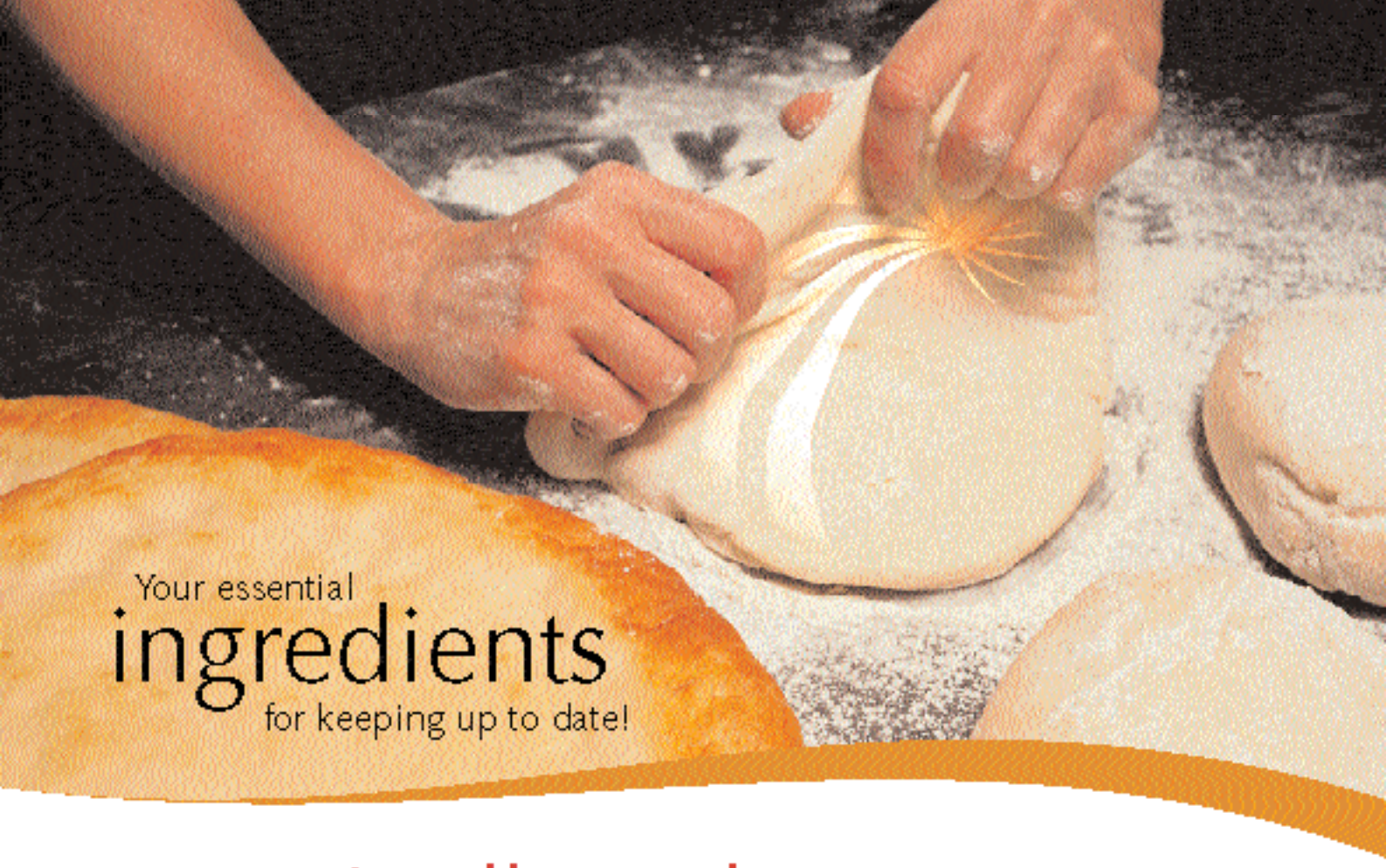
His up-beat and original thinking gave those who attended much food for thought.

An informal question and answer session followed, with a few urban myths being destroyed in the process. G

Consideration is being given to hosting a similar seminar next year after the release of the forthcoming FE1 results.

MAIN POINTS

- Demand for training contracts
- Law Society seminar
- Trainee recruitment register



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Second edition

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Book review

Road traffic law (third edition)

Robert Pierse. FirstLaw (2004), Merchant's Court, Merchant's Quay, Dublin 8. ISBN: 1-904480-12-8 (vol 1), 1-904480-13-6 (vol 2). Price: €210 (vol 1, commentary); €110 (vol 2, legislation); plus €10 p&p.

Robert Pierse is a renowned solicitor, writer, man of letters, and the senior partner of Pierse & Fitzgibbon, Solicitors, Listowel, Co Kerry. Sharing the limelight with distinguished professors (including Prof Richard Susskind, adviser to the lord chancellor and the lord chief justice of England and Wales on information technology matters) and renowned jurists (including Lord Justice Brooke), Robert Pierse was the only Irish lawyer invited to contribute to Sweet and Maxwell's celebration of its bicentenary in 1999, with the publication of their book *Now and then*.

Robert Pierse's epigraph to his chapter in *Now and then*, from Tennyson's *Aylmer's field*, must be quoted in the context of the two volumes on road traffic law under review:

> *'Mastering the lawless*
> *science of our law,*
> *That codeless myriad of*
> *precedent,*
> *That wilderness of single*
> *instances,*
> *Through which a few, by*
> *wit or fortune led,*
> *May beat a pathway to*
> *wealth and fame'.*

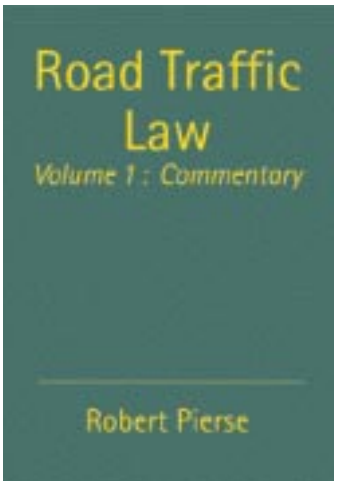
I cannot testify as to Robert Pierse's wealth, but I can testify to his 'fame' – in a sense of the words of Tennyson – because he has contributed handsomely to the science of our law and to making every best endeavour to making sense (among many other matters) of our 'codeless myriad of precedent'. That he has achieved masterfully in his two-volume work on road traffic law.

The author (modestly) states in the preface to the first volume that this edition attempts to state, in outline, the present law on road traffic in this jurisdiction. One of the strengths of the volume is that the author concentrates on Irish statute law and case law, but does not ignore the law of our neighbouring jurisdiction for comparative purposes.

Each one of us knows how important road traffic law is. Each one of us who drives or sits as a passenger in a motor vehicle is vaguely conscious of the myriad of statute and case law on road traffic. There is not a lawyer among us who has not been requested to advise on some aspect of road traffic law – be it professionally, at a party or in the pub.

Mr Justice Richard Johnson wrote the foreword to the first edition and noted that the motor car had been the major cause of litigation on both the criminal and civil sides over the past 80 years. This is not surprising, considering the number of vehicles that negotiate their way along one side of a thin white line at extraordinary speed.

What's in the book?



Volume 1 contains 1,223 pages of commentary and tables; volume 2 contains 350 pages. In a review of this nature, it is only possible to give an indication of what is contained in the book. In volume 1, chapters cover subjects such as control of vehicles, dealing in part with sale of goods and services law, control of lighting and weight, vehicle tests, registration and licensing of vehicles, control of animal traffic and control of fuel. Chapter 2 considers the law of public service vehicles. Driving licences are the subject of chapter 3 – this includes the most pressing issues of disqualification and endorsements. The other headings of chapters are control of speed and main offences (other than intoxicants), intoxicant offences (the law on so-called 'drunken-driving'), control of traffic law, road traffic insurance, enforcement of road traffic law generally and, finally, matters pertaining to court issues such as process on indictment or summons, who is entitled to prosecute, sentencing and appeals.

Volume 2 contains the legislation. In his preface, the author states that this volume is produced in response to his view that the *Road Traffic Acts, 1961-2002* 'are in an almost incomprehensible jungle of laws'. Pierse notes that, in each of the previous two editions, he observed that it was extraordinary in this technologically advanced country that the 2002 act was not a consolidating as well as a reforming act. The author is convinced that the law of road traffic is now part of the 'lawless science of the law'.

Road traffic law is peerless in its field, graced with a most practical commentary and written in an easy, lucid and lively style. It is the definitive commentary on a focal aspect of our law.

Anyone involved in road traffic law, and this includes judges, practitioners, court officials, the gardaí and those involved in making road traffic law, should have easy access to this book. Robert Pierse has achieved a remarkable work of synthesis and commentary. G

Dr Eamonn Hall is the chief solicitor of Eircom plc.

Report of Law Society Council meeting held on 16 July 2004

Meeting with presidents, secretaries and PROs of bar associations

The president noted that a number of important policy developments had occurred over recent months. On the recommendation of the Co-ordination Committee, the Council agreed that an information meeting should be held in early autumn with the presidents, secretaries and PROs of the local bar associations to brief them on the report of the Regulatory Review Task Force, the Competition Authority study, the introduction of the Personal Injuries Assessment Board and any other relevant policy matters.

Proposed third money-laundering directive

John Fish outlined the principal features of the proposed third money-laundering directive, together with those areas of concern that had given rise to correspondence between the CCBE and the European Commission, and which had also been raised by the society in a recent meeting with the Department of Justice, Equality and Law Reform.

Society's obligations under section 57 of the *Criminal Justice Act, 1994*

Simon Murphy reported on the society's obligations under section 57 of the *Criminal Justice Act, 1994*. He noted that the society, being 'a person charged by law with the supervision of a person or body to whom section 32 of the *Criminal Justice Act* applies' had an obligation to report to the gardaí and the Revenue where it suspected that a money-laundering offence had been or was being committed by a solicitor.

He noted that, for the moment, the Council had delegated the power to make such reports to the Compensation Fund Committee. He outlined the legal advice obtained by the committee in relation to the scope of the society's obligations, together with the options available to the society in terms of its internal reporting procedures.

James MacGuill said that, while the society obviously had a duty to fulfil the statutory requirements, it also had an obligation not to act in an arbitrary or capricious manner. Colleagues were entitled to the presumption of innocence and to the principles of fair procedures. These fundamental principles should inform the society's procedures.

Donald Binchy suggested that, in relation to the most standard forms of transaction, the society should seek to take a general view as to whether such transactions were, *prima facie*, suspicious. He also believed that the implications of section 57 and the society's new reporting obligations should be briefed to the presidents and secretaries of the bar associations.

Security at the Four Courts

The president informed the Council of new security arrangements that were to be introduced at the Four Courts. Initially, it had been proposed that airport-style security should be introduced and should apply to all users of the Four Courts. However, following discussions, it had been agreed that accredited persons, including solicitors, barristers and law clerks, would be issued with an identification card to assist in access to and egress from the Four Courts complex.

Stamp duties on court documents

The president reported that stamp duties on court documents would be increased with effect from 1 August 2004, with a small increase in duties on 'run-of-the-mill' documents and a substantial increase in licensing documents. However, there was also to be a significant reduction in the types of document that required to be stamped. A letter would issue to the profession as soon as possible and details were also available on the Courts Service website. The president noted also that the Courts Service had amended its system for refunds on incorrectly-stamped documents and, for the future, unless there were exceptional circumstances, no refunds would issue.

Council election dates 2004

The Council appointed Monday 27 September 2004 as the final date for receipt of nominations for the Council elections 2004 and Thursday 4 November 2004 as the close of poll date.

Personal Injuries Assessment Board

Ward McEllin outlined the contents of a letter from Patricia Byron, CEO of the PIAB, to the director general, which indicated that the PIAB's remit would be extended to motor and public liability claims from midnight on 21 July 2004, that is, less than one week later.

The president said that the very short notice given of the extension of PIAB's remit would place significant pressures on the resources of the Courts Service at a very busy time in the court calendar. Nevertheless, the Courts Service had confirmed that extra staff resources would be allocated during the following week and, if necessary, the Central Office would extend its opening hours. Ward McEllin confirmed that, provided civil bills were delivered to county registrars' offices by the deadline, this was sufficient to comply with the law and it was not necessary that the proceedings actually be issued.

Civil Liability and Courts Bill, 2004

The president said that the society's efforts to secure amendments to the *Civil Liability and Courts Bill, 2004*, had been largely successful. The proposed one-year time-limit for personal injury actions had been increased to two years, the proposed two-month time-limit for issuing a letter of claim had been amended so that the letter should issue within two months or 'as soon as practicable', three specific provisions had been secured in relation to the *in camera* rule and a number of judicial appointments had been provided for.

The director general said that a shuge amount of hard work by a small number of individuals in the society had been required to secure the amendments, including in particular, efforts by the Tipperary Bar Association. The society had also engaged with other agencies, who had supported the society's proposals and he was satisfied that, were it not for the efforts of the Law Society and others, the bill would have remained as drafted. He noted that the Law Society and its submissions had been mentioned favourably in Dáil Éireann by at least ten TDs.

Philip Joyce noted that the efforts of the Tipperary Bar Association had been largely led by Maura Derivan and Eugene Tormey.

Stage payments

The Council noted that, while the campaign by the society in opposition to stage payments had received some positive media coverage, the private member's bill that would have outlawed stage payments was not supported by the government and had been defeated. The Council particularly commended the efforts of Patrick Dorgan in regard to the matter. G

Practice notes

CRIMINAL LEGAL AID SCHEME: NEW TAX CLEARANCE PROCEDURES FOR EXPERT WITNESSES

The Department of Justice informed the Law Society on 29 July 2004 that, with effect from 1 August 2004, expert witnesses engaged under the criminal legal aid scheme would be required to produce a tax clearance certificate. Following representations made by the Criminal Law Committee, the implementation date has been revised to **1 October 2004**.

With effect from that date, expert witnesses whose cumulative fees under the legal aid scheme exceed €6,500 in any 12-month period will be required to produce a tax clearance certificate in order to have their fees discharged by the department. Experts based outside the state will be required to furnish either a tax clearance certificate* or a 'statement of suitability for tax purposes'. This requirement will only apply to those experts engaged with effect from 1 October 2004 – experts engaged before this date are unaffected. Solicitors engaging experts under the scheme from 1 October 2004 may wish to advise them of the above requirement.

It should be noted that, from 1 October 2004, where a solicitor engages an expert and pays the expert's fees 'up front' with a view to seeking reimbursement of the fees as outlay, the department will not entertain the claim for reimbursement unless the expert has the appropriate clearance certificate.

* *Applications for tax clearance certificates for companies or individuals not resident in the state should be sent to the Office of the Collector-General, Sarsfield House, Limerick, or by e-mail to nonrestaxclearance@revenue.ie.*

Criminal Law Committee

NEW MIBI AGREEMENT

Practitioners should note that a new MIBI agreement has been put in place which will be applicable to all accidents occurring after 1 May 2004. The 1988 agreement will continue to apply to all accidents occurring before that date.

The new agreement retains many of the features of the original agreement but also introduces some new elements. These relate to new conditions precedent to the bureau's liability.

The principal new conditions are as follows:

1) Any accident giving rise to a claim made to the MIBI shall be reported by the claimant to An Garda Síochána within two days of the event or as soon as the claimant reasonably could
2) In cases involving untraced motorists, the claimant must make himself available for interview by authorised agents on behalf of the MIBI. The reasonable costs of same to be discharged by the MIBI
3) As before, the claimant must demand insurance particulars from the owner or user of the vehicle. However, from now on, only if no response is received within three months or written confirmation can be provided from An Garda Síochána or the owner/user within that time period, can notification to the MIBI take place
4) Where notice of proceedings is given, the MIBI will be entitled to offer a sum in settlement not later than ten days before trial, which will operate in a similar manner to a tender (replacing the old rule which stipulated that it must be 14 days after the close of pleadings)
5) The time for notification of the MIBI of a personal injuries claim will be the same as the statute of limitations that applies to personal injuries claims and in the case of property damage not later than one year after the accident
6) Condition 3.15 now sets out a definitive list of information that must be supplied to the MIBI unless good cause is shown why it is not available.

The above points represent the main issues arising from the new agreement, but they are not an exhaustive analysis of the alterations. Practitioners should carefully read the agreement in full and familiarise themselves with its contents. The agreement can be downloaded from the public area of the Law Society website at *www.lawsociety.ie.*

Litigation Committee

SECTION 82 OF THE *SUCCESSION ACT, 1965*

The Registrar's Committee would like to remind the profession that, under section 82 of the *Succession Act, 1965,* gifts under a will to an attesting witness or spouse of a witness are void.

A testator may provide by will that an executor may charge. This is frequently the case where a solicitor is appointed. The necessity for a charging clause arises from the general rule in trust law that a trustee cannot profit from his office and therefore is not entitled to profit costs unless the will creates an entitlement or beneficiaries being *sui juris* permit costs to be charged.

(For further details, see Spierin and Fallon, *The Succession Act, 1965*, third edition.)

Registrar's Committee

TAKING UP HIGH COURT LODGMENTS

Practitioners should note the provisions of SI89/2003, which state that when taking up a High Court lodgment where the amount lodged exceeds €1,000, the Office of the Accountant will deduct €1 for every €100, up to a maximum fee of €500. The party taking up the lodgment is liable for this fee. Therefore, in the vast majority of cases, it will fall to the plaintiff to discharge the fee. In order to ensure that the plaintiff receives the full amount of the lodgment, the plaintiff's solicitor should ensure that the amount of the deduction is included in the bill of costs.

Litigation Committee

Practice direction

SUCCESSION ACT, 1965, SECTION 34(1)

From 1 September 2004, it shall not be required of a person applying for administration to furnish a surety or sureties in addition to an administration bond unless required to do so by the High Court, the probate officer or in the case of a grant from a District Probate Registry, the district probate registrar.

Joseph Finnegan,
president of the High Court,
26 July 2004

SOLICITORS DISCIPLI

These reports of the outcome of Solicitors Disciplinary Tribunal inquiries are published by the Law Society of Ireland as provided for in section 23 (as amended by section 17 of the *Solicitors (Amendment) Act, 2002*) of the *Solicitors (Amendment) Act, 1994*

In the matter of Keith Finnan, solicitor, carrying on practice under the style and title of Keith Finnan & Company at Humbert Mall, Main Street, Castlebar, Co Mayo, and in the matter of an application by the Law Society of Ireland to the Solicitors Disciplinary Tribunal and in the matter of the *Solicitors Acts, 1954 to 2002* [4346/DT397]
Law Society of Ireland (applicant)
Keith Finnan (respondent solicitor)

On 11 March 2004, the Solicitors Disciplinary Tribunal found that the respondent solicitor was guilty of misconduct in his practice as a solicitor in that he had:

- Failed to respond to correspondence from the society and in particular to the letters dated 12 November 2002, 26 November 2002, 5 December 2002, 18 December 2002, 5 February 2003 and 24 February 2003.

The tribunal ordered that the respondent solicitor:
a) Do stand censured
b) Pay a sum of €250 to the compensation fund
c) Pay the whole of the costs of the Law Society (including witnesses' expenses) as taxed by a taxing master of the High Court in default of agreement.

In the matter of Derek Stewart, solicitor, practising under the style and title of Stewart & Company at 12 Parliament Street, Temple Bar, Dublin 2, and in the matter of an application by the Law Society of Ireland to the Solicitors Disciplinary Tribunal and in the matter of the *Solicitors Acts, 1954 to 2002* [4498/DT407]
Law Society of Ireland (applicant)
Derek Stewart (respondent solicitor)

On 29 April 2004, 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 comply in a timely manner with the letter of undertaking dated 5 July 2002 and in particular failed to furnish the complainant solicitors in a timely manner with a memorial to enable them to register the deed of release, the subject matter of the undertaking, in the registry of deeds
b) Failed to attend at the Registrar's Committee meeting on 17 December 2002 despite being requested to do so
c) Failed to respond to the society's correspondence and in particular the society's letters of 11 October 2002, 25 October 2002, 6 November 2002, 5 December 2002, 19 December 2002, 25 March 2003, 7 April 2003 and 12 May 2003.

The tribunal ordered that the respondent solicitor:
a) Do stand admonished
b) Pay a sum of €500 to the compensation fund within 12 months from the date of the tribunal's order
c) Pay a sum of €750 (as agreed by the parties) towards the costs of the Law Society of Ireland within 12 months of the date of the tribunal's order and, if sought, a further €250 towards the witness expenses of the complainant solicitor.

In the matter of Derek Stewart, solicitor, practising under the style and title of Stewart & Company at 12 Parliament Street, Temple Bar, Dublin 2, and in the matter of an application by the Law Society of Ireland to the Solicitors Disciplinary Tribunal and in the matter of the *Solicitors Acts, 1954 to 2002* [4498/DT419]
Law Society of Ireland (applicant)
Derek Stewart (respondent solicitor)

On 29 April 2004, 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 respond to the society's correspondence in a timely manner or at all
b) Failed to attend at the Registrar's Committee meeting on 27 May 2003 despite being requested to do so
c) Failed to comply with an undertaking given to the complainant solicitor on 31 May 2001 in a timely manner and in particular the following matters:
   i) The furnishing of a certified copy of the head lease
   ii) The furnishing of the landlord's consent to the assignment, and
   iii) The furnishing of the deed of assignment duly signed and witnessed.

The tribunal ordered that the respondent solicitor:
a) Do stand admonished
b) Pay a sum of €500 to the compensation fund within six months from the date of this order
c) Pay a contribution of €750 (as agreed by the parties) towards the costs of the Law Society of Ireland within six months from the date of this order and a contribution of €250 towards the witness expenses of the complainant solicitor.

In the matter of Vivian C Matthews, solicitor, carrying on practice under the style and title of Vivian C Matthews at 7 Main Street, Dundrum, Dublin 14, and in the matter of an application by the Law Society of Ireland to the Solicitors Disciplinary Tribunal and in the matter of the *Solicitors Acts, 1954 to 2002* [2652/DT387]
Law Society of Ireland (applicant)
Vivian C Matthews (respondent solicitor)

On 24 May 2004, 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 apply for a practising certificate for the year 2003 in a timely manner, having only applied for same on 6 March 2003
b) Practised as a solicitor without a practising certificate for the period 1 January 2003 to 6 March 2003 in breach of the provisions of the *Solicitors Acts, 1954 to 2002*.

The tribunal ordered that the respondent solicitor:
i) Do stand advised
ii) Pay a sum of €500 to the compensation fund
iii) Pay the whole of the costs of the Law Society of Ireland to be taxed in default of agreement.

In the matter of William JP Egan and Liam T Cosgrave, solicitors, carrying on practice under the style and title of

NARY TRIBUNAL

Egan Cosgrave and Associates at 101 Lower Baggot Street, Dublin 2 and 138 Sundrive Road, Crumlin, Dublin 12, and in the matter of the *Solicitors Acts, 1954 to 2002* [3730/3724 DT321]
Law Society of Ireland (applicant)
William JP Egan (first-named respondent solicitor)
Liam T Cosgrave (second-named respondent solicitor)

Reference to 'regulation' is a reference to the *Solicitors' accounts regulations (no 2) of 1984*, statutory instrument no 304 of 1984.

On 1 June 2004, the Solicitors Disciplinary Tribunal found the respondent solicitors guilty of misconduct in their practice as solicitors in that:

a) The solicitors created a substantial deficit on their client account in the main by lodging client monies to the office account in breach of regulation 7
b) The solicitor, Mr Egan, created a portion of this deficit when he lodged £27,000 to the office instead of the client account, which monies had been received for the purposes of stamping a deed
c) The solicitor, Mr Egan, failed to stamp the deed referred to at (b) above
d) The solicitors failed to maintain proper books of account, which included not writing up the books of account on a timely basis, entering entries in respect of a client in the wrong client ledger and recording insufficient detail on client ledgers in breach of regulation 10
e) The solicitors maintained very poor documentation of client transactions both on client files and in relation to client account cheques, thereby placing client monies at risk
f) The solicitors wrongfully lodged substantial outlays, including counsel's fees, to the office account in breach of regulation 3
g) The solicitors failed to discharge substantial amounts of outlay so lodged in a timely manner
h) The solicitor, Mr Cosgrave, drew costs in the amount of £5,500 on 30 November 1999 in respect of a transaction relating to a named client, but, as of 18 December 2000, in excess of one year later, had failed to record the costs in the office account in breach of regulation 10
i) The solicitor, Mr Egan, in relation to the estate of a named person, incorrectly recorded a payment of £10,000 to himself as a bequest in breach of regulation 10
j) The solicitor, Mr Egan, failed to record in the office account that, of the amount of £208,452.72 drawn on the client account and transmitted to AIB Bank, £66,000, on his instructions, were paid into the practice capital account in breach of regulation 10
k) The solicitors failed to record in the books of account the receipt of costs of £12,294.53 in relation to a named case in breach of regulation 10 and were subsequently unable to identify what became of the monies
l) The solicitors failed to record on the ledger account of the case referred to at (k) above outlay disbursed in breach of regulation 10
m) The solicitors failed to record as a debit on the client ledger account of a named case £1,612.32 paid to counsel in breach of regulation 10
n) The solicitor, Mr Egan, in breach of section 68(2) of the *Solicitors (Amendment) Act, 1994*, charged a percentage fee to the client in relation to the case
o) The solicitors in a named case transferred fees from the client to the office account without delivering a bill of costs or other written intimation to the client in breach of regulation 7
p) The solicitors wrongfully withdrew monies for fees in the amount of £2,500 on 26 August 1999, notwithstanding that the transaction had still not been concluded by 27 November 2000
q) The solicitors failed to record as a receipt in the relevant office ledger account the transfer of the fees in the amount of £2,500 referred to at (p) above in breach of regulation 10
r) The solicitors failed to record adequately in the books of account seven payments from the client account totalling £74,997 in relation to a named client in breach of regulation 10
s) The solicitors lodged costs including outlay to the office account in relation to a named case which should have been lodged to the client account in breach of regulation 3
t) The solicitors received the costs referred to at (s) above in May 2000, which included counsel's fees of £31,355.24, but as of 28 November 2000 had failed to discharge the said fees
u) The solicitors failed to adequately document in the books of account in relation to a named case two sums of £4,923.40 and £6,526.80 in breach of regulation 10 so that the source of these monies could not be adequately vouched
v) The solicitor, Mr Cosgrave, deducted fees in the amount of £2,750 in relation to a named matter on 18 March 1999 without furnishing a fee note or other written intimation in breach of regulation 7
w) The solicitor, Mr Egan, failed to stamp a purchase deed relating to the acquisition of property by a named client in 1999 so that, as of 28 November 2000, there remained to the credit of the client account the sum of £11,899.66
x) The solicitors drew a number of cheques from the client account which were made payable to cash in breach of regulation 10
y) The solicitors' level of supervision exercised over their practice accounts was deficient.

The tribunal made an order:

a) Censuring the respondent solicitors
b) Directing the respondent solicitors to pay a sum of €1,000 to the compensation fund
c) Directing the respondent solicitors to pay the whole of the costs of the Law Society of Ireland as taxed by a taxing master of the High Court in default of agreement.

The tribunal, although they recognised they had no power to enforce their recommendation, nevertheless recommended that the above payments be made by the second-named respondent solicitor, Liam T Cosgrave.

In the matter of John McKenna, solicitor, practising in the firm of Peter J McKenna at 18 Sandymount Green, Dublin 4, and in the matter of the *Solicitors Acts, 1954 to 2002* [4544/DT354]
Law Society of Ireland (applicant)
John McKenna (respondent solicitor)

On 24 May 2004, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Was in serious delay in registering his client's title to her property
b) Was in serious delay in lodging all documentation in relation to his client's conveyancing transaction with his client's building society
c) Failed to reply to telephone calls from his client enquiring about the situation
d) Failed to reply to correspondence from the society about the matter
e) Failed to attend a meeting of the Registrar's Committee when requested to do so
f) Misled the Registrar's Committee in a letter dated 30 July 2001 when he represented that he was forwarding the title deeds to his client's building society
g) Misled the Registrar's Committee in a further letter dated 19 March 2002 when he represented that he had forwarded his client's title deeds to her building society when he had not
h) Failed to comply with a notice pursuant to section 10 of the *Solicitors (Amendment) Act, 1994*.

The tribunal made an order:

a) Censuring the respondent solicitor
b) Directing the respondent solicitor to pay a sum of €1,500 to the compensation fund
c) Directing the respondent solicitor to pay the whole of the costs of the Law Society of Ireland as taxed by a taxing master of the High Court in default of agreement.

In the matter of John McKenna, solicitor, practising in the firm of Peter J McKenna at 18 Sandymount Green, Dublin 4, and in the matter of the *Solicitors Acts, 1954 to 2002* [4544/DT355]
Law Society of Ireland (applicant)
John McKenna (respondent solicitor)

On 24 May 2004, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Failed to reply to multiple correspondence from his client about the purchase of property
b) Failed to reply to multiple correspondence from his client's new solicitor about the above purchase
c) Failed to register his client as owner of the property and failed to disclose to him and his new solicitor that he had lost the title documents to the property
d) Failed to account to his client for interest accrued on monies held by him on behalf of his client
e) Further seriously prejudiced his client in failing to co-operate with the efforts of his client's new solicitor to register his former client's title to the property
f) Failed to reply to correspondence and telephone calls from the society about the matter
g) Misled the Registrar's Committee on 8 May 2001 when he represented that the purchase deed had been stamped when he knew it had not
h) Misled his client's new solicitor in a telephone conversation on 13 February 2001 when he represented that the purchase deed had been stamped
i) Further prejudiced his client in exposing him to considerable potential interest penalties arising out of his failure to stamp the purchase deed and his representation that it had been stamped
j) Failed to write to his client's new solicitor as requested by the Registrar's Committee on 8 May 2001 to agree a figure for interest
k) Falsely represented to his client's new solicitor in a letter dated 29 May 2001 that he was in the process of reconstructing the title to the property when in fact he was doing nothing to remedy the situation
l) Failed to comply with a direction of the Registrar's Committee pursuant to section 8(1) of the *Solicitors (Amendment) Act, 1994* that he hand his client's file over to his new solicitor
m) Failed to co-operate with his client's new solicitor in his efforts to reconstitute the title.

The tribunal made an order:

a) Censuring the respondent solicitor
b) Directing the respondent solicitor to pay a sum of €1,500 to the compensation fund
c) Directing the respondent solicitor to pay the whole of the costs of the Law Society of Ireland as taxed by a taxing master of the High Court in default of agreement.

In the matter of Bernard O'Beirne, solicitor, practising as BJ O'Beirne & Co, Solicitors, at Main Street, Arklow, Co Wicklow, and in the matter of an application by the Law Society of Ireland to the Solicitors Disciplinary Tribunal and in the matter of the *Solicitors Acts, 1954 to 2002* [3057/DT422]
Law Society of Ireland (applicant)
Bernard O'Beirne (respondent solicitor)

On 26 May 2004, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Falsified his books of accounts
b) Concealed the appropriation of fees in his books of account
c) Did not raise VAT invoices in a number of cases
d) Breached regulation 7(a)(iv) of the *Solicitors' accounts regulations (no 2) of 1984* in drawing solicitor and client fees from the client account without delivering to the client a bill of costs or other written intimation of the amount of the costs incurred
e) The respondent solicitor breached regulation 5(2) of the *Solicitors' accounts regulations, 2001* by holding monies to which he was beneficially entitled in a client account for longer than three months
f) The respondent solicitor breached regulation 8(2) of the *Solicitors' accounts regulations, 2001* in withdrawing monies from a client account other than by way of cheque drawn on the client account in favour of himself and other than by a transfer from the client to the office account
g) The respondent solicitor breached regulation 8(3)(a) and (b) of the *Solicitors' accounts regulations, 2001* in that the payee details on certain cheques drawn on the client account were false
h) The respondent solicitor breached regulation 12(1) and (2)(a) and (b) of the *Solicitors' accounts regulations, 2001* in failing to maintain proper books of account which showed the true financial position in relation to the respondent solicitor's transactions with clients' monies and, in respect of each client, failing to distinguish separately between clients' monies and other monies transacted by him
i) The respondent solicitor breached regulation 12(4)(b) of the *Solicitors' accounts regulations, 2001* in that the records of transactions with clients' monies were recorded in fictitious clients' ledgers
j) The respondent solicitor, in relation to transactions prior to 1 January 2002, breached regulation 8(1) of the *Solicitors' accounts regulations (no 2) of 1984* by failing to withdraw monies from the client account either by a cheque drawn on the client account in favour of himself or by the transfer from the client account to an account

in the name of the respondent solicitor not being a client account
k) The respondent solicitor, in relation to transactions prior to 1 January 2002, breached regulation 10(1) of *Solicitors' accounts regulations (no 2) of 1984* by failing to maintain proper books of account to show all his dealings with client's money received, held or paid by him.

The tribunal ordered that the respondent solicitor:
a) Do stand censured
b) Pay the maximum sum permissible under section 7 of the *Solicitors (Amendment) Act, 1960*, as amended, being €15,000 to the compensation fund
c) Pay the whole of the costs of the Law Society of Ireland to be taxed in default of agreement.

In the matter of Damian P Moynihan and Sean A Mulvihill, solicitors, formerly carrying on practice under the style and title of Moynihan Mulvihill & Co at 6 Cornmarket Street, Cork, and in the matter of the *Solicitors Acts, 1954 to 2002* [S8171/ S8208/DT]
Law Society of Ireland (applicant)
Damian P Moynihan (first respondent solicitor)
Sean A Mulvihill (second respondent solicitor)

Reference to 'regulation' is a reference to the *Solicitors' accounts regulations (no 2) of 1984*, statutory instrument no 304 of 1984.

On 12 July 2004, the president of the High Court made an order that the name of the first respondent solicitor, Damian P Moynihan, be struck off the roll of solicitors.

The president had before him the report of the Disciplinary Tribunal dated 18 May 2004 in which the tribunal found that the first-named respondent had been guilty of misconduct in his practice as a solicitor in that he had:
i) Failed to maintain proper books of account in breach of regulation 10 so that there was uncertainty as to the true position in respect of client funds
ii) Failed to enter full details, and in some cases failed to enter any details at all, on cheque stubs and lodgment stubs in breach of regulation 19 (1)(c)
iii) Failed to enter virtually any information in the books of account as to the sources of money received and details of cheque payees in breach of regulation 19(1)(c)
iv) Created debit balances on the client account in breach of regulation 7
v) Allowed a deficit to arise in client monies which stood at £31,805 as at 8 October 2001 and which subsequently rose to £56,662 in breach of regulation 7
vi) Failed to disclose the misappropriation of client monies of £7,500
vii) Misled the reporting accountant by leading him to believe that a sum of £7,500 introduced into the client account in 2001 was to clear a deficit arising in the financial practice year end 31 December 2000 when in fact it related to the misappropriation of monies by Mr Moynihan in July 2001 to purchase a car
viii) Misled the Compensation Fund Committee on 6 December 2001, representing to the committee that the sum of £7,500 had been introduced into the client account to clear a deficit arising in the financial practice year end 31 December 2000 when in fact it related to the misappropriation of monies by Mr Moynihan in July 2001 to purchase a car
ix) Advanced approximately £10,000 of clients' monies to a client when these monies did not stand to the credit of that client and therefore advanced to him other client monies in breach of regulation 7
x) Concealed from the society and the reporting accountant the misappropriation of £7,500 by Mr Moynihan
xi) Failed to file the accountant's report covering the firm's financial year ended 31 December 2000 within six months of the accounting date in breach of regulation 21(1).

The tribunal further found that there had been misconduct on the part of the first-named respondent solicitor, Damian P Moynihan, in that he:
a) Misappropriated £7,500, being stamp duty and outlay received from a client
b) Falsified the books of account to conceal his misappropriation of client monies
c) When questioned about the matter, untruthfully stated that the deed had been stamped
d) Falsely stated to the Compensation Fund Committee at its meeting on 4 October 2001 that £15,000 had been introduced into the client account to clear the deficit when no such monies, or any monies, had been paid into the client account
e) Untruthfully advised the society's accountant that an army deafness case had been settled for £47,500 and that the settlement cheque was awaited when the case had not in fact been settled
f) Advanced £10,615 and £15,357, totalling £25,972, to the client, the claimant in the army deafness case referred to at (e), when there were no monies to the credit of the client and thereby advanced other clients' monies to him
g) Forged his partner's name on the cheque for £15,357 advanced to the client in the army deafness case referred to at (f) above
h) Falsely represented to the credit union of the client referred to at (e) and (f) above in a letter of undertaking that the client's case had been settled for £47,500
i) Caused his client's credit union to advance £20,000 on foot of the false representation referred to at (g) above
j) Allowed a further undertaking to be given to the said credit union by Mr Mulvihill causing the said credit union to advance a further £12,000
k) Falsely represented to the practice's reporting accountant that a loan of £7,500 was lodged to the client account to clear a deficit identified by the reporting accountant for the practice year ended 31 December 2000
l) Falsely represented to the society that he had obtained a loan of £7,500 which was to be paid into the client account to rectify the deficit in this amount caused by his own misappropriation
m) Forged and uttered a document purporting to be an order of the District Court contrary to sections 3 and 6 of the *Forgery Act 1913*.

On 22 April 2004, the Disciplinary Tribunal found the second-named respondent solicitor, Sean A Mulvihill, guilty of misconduct in his practice as a solicitor in that he:
a) Failed to maintain proper books of account in breach of regulation 10, so that there was uncertainty as to the true position in respect of client funds
b) Failed to enter full details, and in some cases failed to enter any details at all, on cheque stubs and lodgement stubs in breach of regulation 19(1)(c)
c) Failed to enter virtually any information in the books of account as to the sources of money received and details of cheque payees in breach of regulation 19(1)(c)
d) Created debit balances in breach of regulation 7
e) Allowed a deficit to arise in client monies which stood at £31,805 as at 8 October 2001 and which subsequently rose to £56,662 in breach of regulation 7
f) Failed to disclose the misappropriation of client monies by the first-named respondent solicitor of £7,500
g) Advanced approximately

£10,000 of clients' monies to a client when these monies did not stand to the credit of that client and therefore advanced to him other client monies in breach of regulation 7

h) Failed to file an accountant's report covering the firm's financial year ended 31 December 2000 within six months of the accounting date in breach of regulation 21(1).

The tribunal made an order in respect of the second-named solicitor as follows:

a) Censuring the respondent solicitor
b) Directing the respondent solicitor to pay a sum of €5,000 to the compensation fund
c) Pay the whole of the costs of the Law Society of Ireland as taxed by a taxing master. G

LEGISLATION UPDATE: 22 JUNE – 16 AUGUST 2004

Details of all bills, acts and statutory instruments since 1997 are on the library catalogue at *www.lawsociety.ie* (members' and students' areas) with updated information on the current stage a bill has reached and the commencement date(s) of each act.

ACTS PASSED

Central Bank and Financial Services Authority of Ireland Act, 2004

Number: 21/2004

Contents note: Amends the *Central Bank Act, 1942*, as amended, for the purposes of establishing the Financial Services Ombudsman's Bureau and prescribing the functions and powers of that ombudsman, providing for the establishment of consultative panels to advise the Irish Financial Services Regulatory Authority on certain matters. Amends the *Central Bank Act, 1997* for the purposes of making further provision for auditing and accounts of financial service providers and providing for the regulation of money transmission and *bureaux de change* businesses. Makes miscellaneous other amendments to financial services legislation

Date enacted: 5/7/2004

Commencement date: Commencement order(s) to be made (per s1(2) of the act); 1/8/2004, 1/10/2004, 1/1/2005 and 1/4/2005 for various provisions of the act listed in the schedule to SI 455/2004 – see SI for details

Civil Liabilities and Courts Act, 2004

Number: 31/2004

Contents note: Provides for procedural and other changes in actions to recover damages for personal injuries; provides that an action for personal injuries shall not be brought after the expiration of two years from the date of accrual of the cause of action or the date of knowledge of the cause of action, whichever occurs later; provides that where a plaintiff in a personal injuries action gives false evidence, the court may dismiss the plaintiff's action; makes provision in relation to the assessment of damages in a personal injuries action; makes provision in relation to the publication of reports of, and production of documents prepared for the purposes of, proceedings to be heard otherwise than in public; and provides for related matters. Amends the *Statute of Limitations (Amendment) Act, 1991* and the *Civil Liability Act, 1961* and certain other enactments

Date enacted: 21/7/2004

Commencement date: 21/7/2004 for ss2, 3, 4, 31 and 32, chapter 1 (ss33 to 38) of part 3 and ss49 and 56; commencement order(s) to be made for all other sections (per s1(2) and 1(3) of the act)

Commissions of Investigation Act, 2004

Number: 23/2004

Contents note: Provides for the establishment from time to time of commissions to investigate into and report on matters considered to be of significant public concern, and provides for the powers of such commissions

Date enacted: 18/7/2004

Commencement date: 18/7/2004

Criminal Justice (Joint Investigation Teams) Act, 2004

Number: 20/2004

Contents note: Provides for the implementation of the EU council framework decision of 13/6/2002 on joint investigation teams. Joint investigation teams may be set up for a specific purpose and limited period, by mutual agreement of the competent authorities of two or more member states, in order to carry out criminal investigations with a cross-border dimension in one or more of the member states setting up the team. Amends the *Criminal Justice Act, 1994*, the *Garda Síochána Act, 1989* and repeals s5 of the *Europol Act, 1997*

Date enacted: 30/6/2004

Commencement date: Commencement order(s) to be made (per s17(2) of the act)

Education for Persons with Special Educational Needs Act, 2004

Number: 30/2004

Contents note: Makes further provision for the education of people with disabilities; provides that people with disabilities shall have the same right to avail of, and benefit from, appropriate education as do their peers who do not have disabilities; assists children with disabilities to leave school with the skills necessary to participate, to the level of their capacity, in an inclusive way in the social and economic activities of society and to live independent and fulfilled lives; provides for consultation with parents of children with disabilities in relation to the education of those children; for these purposes establishes the National Council for Special Education and defines its functions; confers certain functions on health boards in relation to the education of people with disabilities; enables certain decisions made in relation to the education of people with disabilities to be the subject of an appeal to an appeals board; provides for related matters

Date enacted: 19/7/2004

Commencement date: Commencement order(s) to be made (per s53(2) of the act)

Electricity (Supply) (Amendment) Act, 2004

Number: 25/2004

Contents note: Amends section 4 of the *Electricity (Supply) (Amendment) Act, 1954* (as amended by the *Electricity (Supply) (Amendment) Act, 1982*) to raise the ESB's statutory borrowing limit to €6 million

Date enacted: 18/7/2004

Commencement date: 18/7/2004

Equality Act, 2004

Number: 24/2004

Contents note: Amends the *Employment Equality Act, 1998* and the *Equal Status Act, 2000* to give effect to directive 2000/43, implementing the principle of equal treatment between persons, irrespective of racial or ethnic origin; directive 2000/78, establishing a general framework for equal treatment in employment and occupation; and directive 2002/73, amending directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. Substitutes some provisions in ss19 and 22 of the *Employment Equality Act, 1998* as previously amended by the *European Communities (burden of proof in gender discrimination cases) regulations 2001* (SI 337/2001)

Date enacted: 18/7/2004

Commencement date: 18/7/2004

International Development Association (Amendment) Act, 2004
Number: 26/2004
Contents note: Enables the government to make a total payment of €50 million to the 13th replenishment of the International Development Association (IDA 13)
Date enacted: 19/7/2004
Commencement date: 19/7/2004

Maritime Security Act, 2004
Number: 29/2004
Contents note: Gives effect to the United Nations *Convention for the suppression of unlawful acts against the safety of maritime navigation* (1988) and the protocol to that convention for the suppression of unlawful acts against the safety of fixed platforms on the continental shelf (1988)
Date enacted: 19/7/2004
Commencement date: 19/7/2004

Maternity Protection (Amendment) Act, 2004
Number: 28/2004
Contents note: Amends and extends the *Maternity Protection Act, 1994* and provides for related matters
Date enacted: 19/7/2004
Commencement date: Commencement order(s) to be made (per s27(3) of the act)

National Monuments (Amendment) Act, 2004
Number: 22/2004
Contents note: Amends and extends the *National Monuments Acts, 1930 to 1994*. Clarifies certain matters relating to the division of responsibilities between the ministers concerned, together with the Commissioners of Public Works. Replaces s14 of the *National Monuments Act, 1930* in relation to injury to national monuments, allowing the minister for the environment, heritage and local government to grant a consent for the carrying out of works to a national monument, notwithstanding the fact that such works may involve injury to, interference with, or the destruction in whole or in part of the monument. Makes provision for works relating to approved road development that affect national monuments
Date enacted: 18/7/2004
Commencement date: 18/7/2004

Residential Tenancies Act, 2004
Number: 27/2004
Contents note: Provides for a measure of security of tenure for tenants of certain dwellings; specifies minimum obligations applying to landlords and tenants; provides for the establishment of a Private Residential Tenancies Board to resolve disputes arising in the sector, operate a system of tenancy registration and provide information and policy advice. Also contains provisions relating to rent setting and reviews and procedures for the termination of tenancies, including notice periods linked to the duration of a tenancy, and provides for related matters. Implements the reforms of the private rented sector recommended in the *Report of the Commission on the Private Rented Residential Sector* (2000)
Date enacted: 19/7/2004
Commencement date: Commencement order(s) to be made (per s2 of the act); 1/9/2004 for part 1, part 4, part 5 (other than ss71 and 72), part 7, part 8 (other than s159(1)), part 9 (other than ss182, 189, 190, 193(a), 193(d), 195(4) and 195(5)) and the schedule (per SI 505/2004). These provisions deal with security of tenure, tenancy terminations, registration of tenancies and the Private Residential Tenancies Board, together with preliminary and general provisions in part 1 and some miscellaneous provisions in part 9 of the act

State Airports Act, 2004
Number: 32/2004
Contents note: Provides for the restructuring of Aer Rianta and the establishment of Dublin, Cork and Shannon airports as independent airport authorities under state ownership
Date enacted: 21/7/2004
Commencement date: 21/7/2004. Appointment day orders to be made for the new airport authorities

SELECTED STATUTORY INSTRUMENTS

Central Bank and Financial Services Authority of Ireland Act, 2003 *(commencement) order (no 1) 2004*
Number: SI 454/2004
Contents note: Appoints 1/8/2004 as the commencement date for ss28 and 33 of the act. These sections provide for the establishment of the Irish Financial Services Appeals Tribunal

Children Act, 2001 *(commencement) order 2004*
Number: SI 468/2004
Contents note: Appoints 29/7/2004 as the commencement dates for the following provisions of the act: (a) part 1 (other than s5), ss78 to 87, 267(2) and 268; (b) s5 and schedule 2, insofar as they relate to the repeals of legislation listed in the schedule to SI 468/2004. The primary purpose of this order is to bring into operation the provisions of the *Children Act, 2001* that provide for the operation of a family conference, convened by the probation and welfare service on the direction of the Children's Court

Circuit Court (fees) order 2004
Number: SI 445/2004
Contents note: Provides for the fees to be charged in Circuit Court offices with effect from 1/8/2004. Provides for the exemption from fees of certain proceedings, including family law proceedings
Revokes: SI 88/2003
Commencement date: 1/8/2004

Companies (Amendment) Act, 1982 *(section 13[2]) order 2004*
Number: SI 506/2004
Contents note: Declares that the provisions of s376 of the *Companies Act, 1963* (prohibition of partnerships with more than 20 members) shall not apply to the formation of a limited partnership registered under the *Limited Partnerships Act 1907* consisting of not more than 50 partners, where such a partnership is formed for the purpose of, and whose main business consists of, the provision of investment and loan finance and ancillary facilities and services to persons engaged in industrial or commercial activities
Commencement date: 9/8/2004

District Court (fees) order 2004
Number: SI 446/2004
Contents note: Provides for the fees to be charged in District Court offices with effect from 1/8/2004. Provides for the exemption from fees of certain proceedings, including family law proceedings
Revokes: SI 87/2003
Commencement date: 1/8/2004

Environmental Protection Agency (licensing) (amendment) regulations 2004
Number: SI 394/2004
Contents note: Stated in the explanatory note to the SI (though not in the SI) is that the purpose of these regulations is to amend the *Environmental Protection Agency (licensing) regulations 1994* (SI 85/1994) for the purpose of ensuring that the integrated licensing system operated by the Environmental Protection Agency under the *Environmental Protection Agency Act, 1992* (as amended by the *Protection of the Environment Act, 2003*) complies in all respects with the provisions of directive 96/61 concerning integrated pollution prevention and control. The regulations also require the agency to publish, every four years, its report on the state of the environment. The explanatory note says that while the agency currently publishes the report on a four-year cycle, the regulations give legal effect to the current practice and are a first step towards transposing into Irish law directive 2003/4 on public access to environmental information and repealing directive 90/313

Amends: SI 85/1994
Revokes: SI 85/1994, article 21
Commencement date: 12/7/2004

European Communities (amendment of SI no 68 of 2003) regulations 2004
Number: SI 490/2004
Contents note: Implement certain provisions of directive 2000/31 on the processing of personal data and the protection of privacy in the electronic sector. Clarify who the director of consumer affairs may appoint as authorised officers under regulation 21 of the *European Communities (directive 2000/31/EC) regulations 2003* (SI 68/2003)
Leg-implemented: Dir 2000/31
Commencement date: 26/7/2004

European Communities (environmental assessment of certain plans and programmes) regulations 2004
Number: SI 435/2004
Contents note: Give effect to directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment (the strategic environmental assessment (SEA) directive)
Leg-implemented: Dir 2001/42
Commencement date: 14/7/2004

European Communities (organisation of working time) (activities of doctors in training) regulations 2004
Number: SI 494/2004
Contents note: Implement the provisions of directive 2000/34, which bring the activities of doctors in training within the scope of directive 93/104 concerning certain aspects of the organisation of working time. Prescribe maximum hours of work and minimum hours of rest for doctors in training and require employers to keep records of each employee's hours of work, rest and such other records in the form prescribed by these regulations
Leg-implemented: Dir 93/104 as amended by dir 2000/34 insofar as it applies to the activities of doctors in training
Amends: SI 11/2000
Commencement date: 1/8/2004

European Communities (pet passport) regulations 2004
Number: SI 423/2004
Contents note: Give effect to regulation 998/2003 as amended by regulation 592/2004
Commencement date: 1/7/2004

European Communities (recreational craft) (amendment) regulations 2004
Number: SI 422/2004
Leg-implemented: Dir 2003/44 amending dir 94/25
Amends: SI 40/1998
Commencement date: 1/1/2005, except for regulation 9(b), which comes into force on 1/7/2004

Finance Act, 2004 *(section 33) (commencement) order 2004*
Number: SI 425/2004
Contents note: Appoints 1/1/2004 as the date on which s33 of the *Finance Act, 2004* is deemed to have come into operation. Section 33 substitutes a new s766 (tax credit for research and development expenditure) into the *Taxes Consolidation Act, 1997*

Finance Act, 2004 *(section 52) (commencement) order 2004*
Number: SI 407/2004
Contents note: Appoints 30/6/2004 as the commencement date for section 52 (vehicle registration) of the *Finance Act, 2004*

Personal Injuries Assessment Board Act, 2003 *(commencement) (no 3) order 2004*
Number: SI 438/2004
Commencement date: Appoints 22/7/2004 as the commencement date for ss3(b), 3(c) and 3(d) of the act. This means that from 22/7/2004 all personal injury claims arising from motor and public liability accidents and any other personal injury claims, other than those involving medical negligence, must be referred, in the first instance, to the Personal Injuries Assessment Board

Planning and development (strategic environmental assessment) regulations 2004
Number: SI 436/2004
Contents note: Amend the *Planning and development regulations 2001* (SI 600/2001) to facilitate the implementation into Irish law of the strategic environmental assessment (SEA) directive (dir 2001/42) on the assessment of the effects of certain plans and programmes on the environment. The regulations relate to consideration of the likely significant effects on the environment of a development plan, a variation of a development plan, a local area plan (or an amendment thereto), regional planning guidelines or a planning scheme in respect of a strategic development zone
Amends: SI 600/2001
Revokes: SI 173/2003, article 6
Commencement date: 21/7/2004

Refugee Act (section 22) order 2004
Number: SI 500/2004
Contents note: Amends the *Refugee Act, 1996 (section 22) order 2003* (SI 423/2003) in order to provide that where a person to be transferred to a council regulation country (that is, a country to which council regulation (EC) 343/2003, which 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, applies) is detained pending transfer, the detention is in a place prescribed for the detention of persons being removed from the state under s5 of the *Immigration Act, 2003*
Commencement date: 30/7/2004

Road traffic (removal of exemption from wearing seat belts by taxi drivers) regulations 2004
Number: SI 402/2004
Contents note: Amend article 8(1) of the *Road traffic (construction, equipment and use of vehicles) (amendment) (no 3) regulations 1991* (SI 359/1991) by the deletion of paragraph (g), thereby re-moving the exemption whereby the driver of a taxi, hackney or limousine is not required to wear a seat belt while driving such a vehicle
Commencement date: 1/7/2004

Road traffic (signs) (amendment) regulations 2004
Number: SI 403/2004
Contents note: Amend the *Road traffic (signs) regulations 1997* (SI 181/1997), as amended, in relation to the application of certain regulatory traffic signs in connection with the on-street running of light-rail vehicles
Amends: SI 181/1997 as amended by SI 273/1998 and SI 97/2003
Commencement date: 28/6/2004

Road traffic (traffic and parking) (amendment) regulations 2004
Number: SI 404/2004
Contents note: Amend the *Road traffic (traffic and parking) regulations 1997* (SI 182/1997) and the *Road traffic (traffic and parking) (amendment) regulations 2003* (SI 98/2003) in relation to the application of certain traffic and parking regulations in connection with the on-street running of light-rail vehicles and designate specified streets (or part thereof) in the city of Dublin as tram-only streets
Amends: SI 182/2003, SI 98/2003
Commencement date: 28/6/2004

Social Welfare (Miscellaneous Provisions) Act, 2004 *(sections 13 and 16) (commencement) order 2004*
Number: SI 406/2004
Commencement date: Appoints 1/1/2004 as the commencement date for ss13 and 16 of the act. Sections 13 and 16 provide for technical amendments to the PRSI definitions contained in the *Social Welfare (Consolidation) Act, 1993* consequential on the decision in the 2003 budget to charge PRSI and levies on certain benefits-in-kind

Supreme Court and High Court (fees) order 2004
Number: SI 444/2004
Contents note: Provides for the fees to be charged, with effect from 1/8/2004, in the Office of the Registrar of the Supreme Court, the Central Office, the Examiner's Office, the Office of the Official Assignee in Bankruptcy, the Taxing Masters' Office, the Accountant's Office, the Office of Wards of Court, the Probate Office and District Probate Registries. Provides for the exemption from fees of certain proceedings, including family law proceedings
Revokes: SI 89/2003
Commencement date: 1/8/2004

Taxes Consolidation Act, 1997 *(prescribed research and development activities) regulations 2004*
Number: SI 434/2004
Contents note: Specify the categories of activities that are and are not research and development activities for the purpose of s766 of the *Taxes Consolidation Act, 1997* (inserted by s33 of the *Finance Act, 2004*)
Commencement date: Deemed to have come into operation on 1/1/2004

Waste management (licensing) regulations 2004
Number: SI 395/2004
Contents note: Provide for the continued operation of the system of licensing by the Environmental Protection Agency of waste recovery and disposal activities under part V of the *Waste Management Act, 1996*. Set out procedures for the making of waste licence applications, reviews of licences and consideration by the agency of objections, including the holding of oral hearings. Also provide for the licensing of mobile plant used for the recovery and disposal of waste at more than one site

Circuit Court Rules (section 39,* Criminal Justice Act, 1994) *2004
Number: SI 448/2004
Contents note: Amend the *Circuit Court Rules 2001* (SI 510/2001) by the addition of order 69, which sets out the procedure for applications brought under section 39 of the *Criminal Justice Act, 1994* for the forfeiture by the court of cash seized under section 38 of the act that directly or indirectly represents any person's proceeds of drug trafficking or is intended by any person for use in drug trafficking
Commencement date: 27/7/2004

Rules of the Superior Courts (order 130 (amendment) rules) 2004
Number: SI 471/2004
Contents note: Amend order 130 (as inserted by SI 325/1998) of the *Rules of the Superior Courts* in relation to the *Freedom of Information Act, 2003*
Commencement date: 20/7/2004

Leg-implemented: Dir 75/439 on the disposal of waste oils, as amended by dir 87/101; dir 75/442 on waste, as amended by dir 91/156; dir 80/68 on the protection of groundwater against pollution caused by certain dangerous substances; dir 85/337 on the assessment of the effects of certain public and private projects on the environment, as amended by dir 97/11; dir 87/217 on the prevention and reduction of environmental pollution by asbestos; dir 91/689 on hazardous waste; dir 96/59 on the disposal of polychlorinated biphenyls and polychlorinated terphenyls; dir 96/61 concerning integrated pollution prevention and control; dir 99/31 on the landfill of waste
Revokes: SI 185/2000, except for articles 3 and 4 and the first schedule; SI 397/2001; SI 336/2002; SI 337/2002
Commencement date: 12/7/2004 G

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Personal injury judgment

Limitation of actions pursuant to the *Statute of limitations 1957* and *Statute of Limitations (Amendment) Act, 1991* (three years from the date of cause of action accrued or the date of knowledge, whichever is the later) of the person injured – unnecessary removal of ovary – whether the person injured could prove that she could show that she first had 'knowledge' of her injury within the prescribed three-year period of limitation

CASE

***Rosemary Cunningham v Michael Neary, Margaret Quinn, Veronica Tarpey, Ann Marie O'Gorman, Kathleen Mary Shea and Barney McEneaney*, High Court, judgment of Ó Caoimh J; Supreme Court (McGuinness, Hardiman and Fennelly JJ), judgment of the Supreme Court delivered by McGuinness and Fennelly JJ on 20 July 2004, Hardiman J concurring with both judgments.**

THE FACTS

Mrs Cunningham, a dental nurse who already had two children, was attended by Dr Neary, a consultant obstetrician and gynaecologist at Our Lady of Lourdes Hospital in Drogheda, Co Louth, in July and August 1991. She recalled that Dr Neary was extremely rude to her. This preoccupied her for a considerable period of time.

Mrs Cunningham had a ruptured ectopic pregnancy when she was admitted to hospital on 14 August 1991. She was in great pain. She was operated on for this condition on 15 August 1991. On recovery from the anaesthetic, Mrs Cunningham says that Dr Neary told her he had removed her fallopian tube, which he said was necessary to deal with the ectopic pregnancy. However, he also told her that he had removed one of her ovaries.

The central complaint by Mrs Cunningham against Dr Neary was that it was completely unnecessary and, therefore, negligent to remove the ovary.

When she asked some days later why Dr Neary had removed her ovary, she recalled him answering 'I did not like your bloody ovary anyway'. Mrs Cunningham also testified that when she attended for a six-week check-up, Dr Neary was again extremely rude, telling her, in effect, that 'by church law, I should not have laid a finger on you and you would be six feet under. I saved your life and you should be grateful'.

Mrs Cunningham subsequently discussed the entire matter with her general medical practitioner, who informed her that, in the circumstances, she was lucky to be alive and that, on the basis of what he (the general practitioner) had learned from Dr Neary, it had been necessary to remove the ovary. Mrs Cunningham says that at no stage did she realise that the removal of the ovary had been unnecessary. She trusted her general practitioner and accepted what he had told her. Accordingly, she took no action against Dr Neary during the normal three-year period from the date of the injury of which she complained.

In October 1998, Mrs Cunningham was admitted to the Coombe Hospital, Dublin, where she had a hysterectomy. While there, she told a nurse about her experience with Dr Neary; the nurse encouraged her to complain about him to the Medical Council. This she did in December 1998. Subsequently, a plenary summons issued on 22 March 2002, alleging professional negligence in 1991 against Dr Neary who, at that time, was a consultant obstetrician and gynaecologist in the employment of the other named persons who, in effect, operated Our Lady of Lourdes Hospital, Drogheda, Co Louth.

JUDGMENT OF THE HIGH COURT

The case proceeded in the High Court before Ó Caoimh J, who heard the evidence and determined on a preliminary point of law that the claim of Mrs Cunningham for damages for the negligent removal by Dr Neary of the ovary was not barred by the provisions of section 3 of the *Statute of Limitations (Amendment) Act, 1991*.

Evidence had been given that Mrs Cunningham did not go to a solicitor until May 2000, some 18 months after she had the hysterectomy in the Coombe Hospital, where the nurse had encouraged her to complain about Dr Neary to the Medical Council. Mrs Cunningham wrote to the Medical Council on 19 December 1998. The letter ran to some three-and-a-half pages and set out all her complaints against Dr Neary. She mentioned the two occasions in 1991, the first time in hospital and the second six weeks later, when she asked Dr Neary why he had removed her ovary.

In April 2001, Dr Richard Porter, an independent expert obstetrician, provided a report in which he advised that the removal of Mrs Cunningham's ovary had been unnecessary and represented incompetent medical practice. Mrs Cunningham testified in the High Court that she then learned that fact for the first time.

The *Statute of Limitations (Amendment) Act, 1991* provides that time begins to run in cases of action for damages for personal injury 'from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured'. The entire case depended on whether Mrs Cunningham could show that she first had 'knowledge' of her injury within the period of three years before 22 March 2002, the date she issued the plenary summons in the High Court.

Section 2 of the *Statute of Limitations (Amendment) Act, 1991* was pivotal to the case in the High Court and in the Supreme Court, and may be quoted here:

'*2(1) For the purposes of any provision of this act whereby the time within which an action in respect of an injury may be brought depends on a person's date of knowledge (whether he is the person injured or a personal representative or dependant of the*

person injured), references to that person's date of knowledge are references to the date on which he first had knowledge of the following facts:

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

b) That the injury in question was significant

c) That the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty

d) The identity of the defendant, and

e) If it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant; and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

2) For the purposes of this section, a person's knowledge includes knowledge which he might reasonably have been expected to acquire

a) From facts observable or ascertainable by him, or

b) From facts ascertainable by him with the help of medical or other appropriate expert advice, which it is reasonable for him to seek.

3) Notwithstanding sub-section (2) of this section:

a) A person shall not be fixed under this section with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice, and

b) A person injured shall not be fixed under this section with knowledge of a fact relevant to the injury which he has failed to acquire as a result of that injury'.

In the High Court, Ó Caoimh J held that Mrs Cunningham's claim was not statute-barred. Reference was made to the case of *Gough v Neary* ([2003] 3 IR 92). Ó Caoimh J held that knowledge for the purposes of section 2(1) of the 1991 act was 'that the operation had been unnecessarily performed'. He held that Mrs Cunningham had neither actual nor constructive knowledge of the fact that the operation had been unnecessarily performed in 1998 or at any time prior to receipt of the report of Dr Porter in April 2001.

JUDGMENT OF THE SUPREME COURT

Dr Neary and others appealed to the Supreme Court. The matter came before McGuinness, Hardiman and Fennelly JJ. Judgments were delivered by McGuinness and Fennelly JJ on 20 July 2004, Hardiman J concurring with both judgments.

Fennelly J set out the factual background to the proceedings in his judgment, which is referred to above.

Senior counsel for Dr Neary stated in the course of written submissions that Mrs Cunningham had knowledge of the unnecessary operation identified in section 2(1)(c) of the *Statute of Limitations (Amendment) Act, 1991* at least as early as December 1998, when she wrote to the Medical Council. He argued that she knew that the operation was unnecessary in the sense that she was dissatisfied with the lack of explanation from Dr Neary, and he argued that her lack of knowledge that the operation was necessary was equivalent to knowledge that it was unnecessary.

Both Fennelly and McGuinness JJ considered in some detail the case of *Gough v Neary and Others* ([2003] 3 IR 92), where the Supreme Court (Geoghegan and McCracken JJ, Hardiman J dissenting) held that Mrs Gough had neither actual nor constructive notice within the ordinary limitation period and that the injury caused by an unnecessary hysterectomy on her was attributable in whole or in part to the act or omission that was alleged to constitute negligence on the part of Dr Neary. Both McGuinness and Fennelly JJ emphasised that there was an important difference between the facts of the two cases.

Fennelly J stated that he was prepared to accept that Mrs Cunningham was entitled reasonably to rely on the advice of her medical general practitioner, given some time after the operation, probably in late 1991, that the removal of her ovary had been necessary. The question was whether she took 'all reasonable steps to obtain advice and to act upon it'. He stated that the general practitioner is a natural first port of call for a patient; he is the expert, so far as the lay person is concerned, in choosing consultants and explaining the results of their work. On that basis, Mrs Cunningham did not have knowledge that the operation was unnecessary in 1991 and the statute did not commence to run.

However, Fennelly J stated that the position changed significantly in late 1998. While Mrs Cunningham had, understandably, been greatly upset by the rude behaviour of Dr Neary, she clearly carried with her unhappy memories of her medical treatment at his hands. Fennelly J returned to the issue of Mrs Cunningham having a conversation with a nurse in the Coombe Hospital that revived her own unhappiness at the way she had been treated both medically and personally by Dr Neary. The nurse had encouraged her to complain about Dr Neary to the Medical Council. The letter of 19 December 1998 to the Medical Council makes a number of grave allegations against Dr Neary, among them an account of two separate complaints about the absence of an explanation for the removal of an ovary. In addition, Mrs Cunningham, according to Fennelly J, learnt from media reports that a number of women had made serious complaints against Dr Neary. Accordingly, the court held that, at the stage of writing the letter to the Medical Council (19 December 1998), Mrs Cunningham had knowledge of the fact that Dr Neary had removed her ovary in 1991, that the she had twice asked him why he had done so, that she had received no explanation at all, and that other women had made serious complaints about him. This knowledge was such that it was then reasonable for her to seek medical or other expert advice.

When Mrs Cunningham went to her solicitor in May 2000, it took a further 11 months to obtain the report of a specialist doctor.

Fennelly J stated that this could no doubt be explained by the time needed to obtain Mrs Cunningham's medical records from the hospital. It shows, however, that if Mrs Cunningham had gone to a solicitor in December 1998, she would have obtained the sort of advice that would have made out a case in negligence against Dr Neary. Therefore, the key fact that the removal of the ovary had been unnecessary was 'ascertainable' and, for the purposes of the *Statute of Limitations (Amendment) Act, 1991*, Mrs Cunningham was deemed to have had knowledge of it as of that date. Consequently, the three-year period commenced running against Mrs Cunningham's claim no later than 19 December 1998. Therefore, by the time she commenced her action by plenary summons on 22 March 2002, her claim was out of time. For the reasons above stated, the Supreme Court allowed the appeal and determined the preliminary point to the effect that the claim was barred under the provisions of section 3 of the *Statute of Limitations (Amendments) Act, 1991*. Mrs Cunningham's claim should therefore be dismissed. G

This judgment was summarised by solicitor Dr Eamonn Hall.

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APPEAL

Domestic violence, judicial review

Mootness – appeal – protection orders – Domestic Violence Act, 1996 – *whether the applicant's application for judicial review was moot*

The proceedings arose from matrimonial difficulties between the plaintiff and the fifth-named respondent. On 14 May 2002, a protection order was granted by the District Court in favour of the applicant and against Mr Gallagher. Subsequently, on 18 September 2002, a protection order was granted by the District Court in favour of Mr Gallagher and against the applicant. The applicant was arrested on two separate occasions and certain criminal proceedings were instituted against her in relation to alleged breaches of the protection order obtained against her. On 30 September 2002, the applicant obtained an *ex parte* interim barring order against Mr Gallagher; however, that order was discharged by the District Court on 16 October 2002. Subsequently, on 21 November 2002, the applicant and the fifth-named respondent reached an agreement which provided that the protection order that had been granted in Mr Gallagher's favour was to be discharged and that Mr Gallagher would withdraw the complaints made by him to An Garda Síochána regarding the applicant's alleged breaches of the protection orders. On 29 January 2003, the charges against the applicant were dismissed. Prior to that, on 9 October 2002, the Supreme Court delivered its judgment in the case of *DK v Crowley* ([2002] 2 IR 744), which declared that section 4(3) of the *Domestic Violence Act, 1996* was invalid having regard to the provisions of the constitution. Subsequently, on 17 December 2002, the applicant obtained leave to bring judicial review proceedings in which she sought a declaration that section 5, sub-sections 1 and 4, of the 1996 act were invalid having regard to the provisions of the constitution, an order of *certiorari* quashing the protection order made against her, and orders prohibiting the DPP from further prosecuting the proceedings against the applicant. At the hearing of these proceedings in the High Court, the respondents applied to the trial judge to try, as a preliminary issue, the question of whether or not the application for judicial review was moot. McKechnie J, in his judgment of 7 April 2003, held that the claims in relation to the reliefs as set out in paragraphs 3 and 4 were moot and he stayed the proceedings in respect of those reliefs. The respondents appealed against a portion of the order of the High Court on the basis that the other reliefs were also moot.

The Supreme Court (Hardiman, Geoghegan, Fennelly JJ) allowed the appeal and stayed the applicant's proceedings for the relief set out at paragraphs 1 and 2 of her notice of motion, thereby staying the entire proceedings. It held that:

1) The applicant, like every other citizen, was entitled to her good name. However, any person who formed a view adverse to the applicant's good name or reputation on the basis that she had been the subject of an *ex parte* order of any kind would be acting unreasonably in the legal sense of that term. Such a conclusion would be logically and legally unsupportable, would fly in the face of common sense, and would be most unjust. It followed that no court would be justified in allowing the mere fact that *ex parte* relief had been granted against the applicant to tilt the balance of that litigation in any way against her
2) A proceeding is said to be moot when there is no longer any legal dispute between the parties. The question of mootness should be judged after the commencement of the proceedings and therefore the applicant was incorrect in her contention that mootness should have been assessed at the date leave was obtained. Mootness was of particular relevance in this case, where the point on which a decision was sought involved the constitutionality of a statutory provision
3) The present case was moot in the sense that it did not feature a live, concrete dispute between the parties: a decision on the outstanding issues would have had no direct impact on the parties. Specifically, the protection order which was sought to be quashed and the statutory authority for the making of which was impugned as unconstitutional was discharged on consent by reason of an agreement between the applicant and the fifth-named respondent
4) The applicant had no reasonable expectation that she would again be subjected to the making against her of an *ex parte* protection order. The District Court proceedings against the applicant had come to an end by agreement. There was no evidence to show that any consequential or collateral *sequelae* of the *ex parte* protection order had damnified the applicant in the manner alleged or at all.

***Goold v Mary Collins, a District Court judge*, Supreme Court, 12/7/2004** [FL9368]

CHILDREN AND YOUNG PERSONS

Child abduction

Application for return of child to place of habitual residence – defence to application – grave risk that child would be placed in intolerable situation by return – factors for consideration – whether welfare of child relevant consideration – whether clear and compelling evidence that order for return of child to place of habitual residence would create grave risk of intolerable harm – Hague convention, *article 13(b)* – Child Abduction and Enforcement of Custody Orders Act, 1991

The respondent took the child from its place of habitual residence in the UK following marital difficulties. The applicant applied for the return of the child under the *Hague convention*. It was accepted that the removal of the child was a wrongful one in terms of the convention, but it was contended by the respondent that there was a grave risk that the child's return to the UK would place it in an intolerable situation. That contention was founded upon an alleged history of violence between the father and mother and that the respondent would be unable to protect herself and the child from such risk owing to fear of or dominance by the applicant and that the welfare of the child would be compromised thereby.

In holding that the respondent had not made out a defence under article 13(b) of the *Hague*

convention and ordering the return of the child to the UK, Finlay Geoghegan J held that the court was obliged, pursuant to article 12 of the convention, to order the return of the child forthwith unless the respondent established, by reason of one of the exceptional defences provided for in article 13 of the convention, that the court had a discretion to decide otherwise and should, on the facts, decide otherwise. The exception provided for in article 13 of the *Hague convention* had to be strictly construed and the decision as to whether such grave risk to the child outlined in article 13(b) had been made out had to be assessed summarily by the court determining the application for the return of the child on the presumption that the abducting parent would take all reasonable steps to protect herself and her children and that she could not rely on her unwillingness to do so as a factor relevant to the risk. The convention's policy was that the welfare of the child had to be determined by the courts of the state of the child's habitual residence and that, accordingly, was not a proper consideration for the courts of the state where the request for the return of the child was made. Accordingly, the applicant had not discharged the onus of proving that the child would be placed in an intolerable situation.

***EH v SH*, High Court, Miss Justice Finlay Geoghegan, 27/4/2004** [FL9274]

Family law

Application for recognition and enforcement of order of English High Court relating to contact by father with daughters – Child Abduction and Enforcement of Custody Orders Act, 1991 – Luxembourg convention

This was an application brought by the father of two girls pursuant to part III of the *Child Abduction and Enforcement of Custody Orders Act, 1991* and article 7 of the *Luxembourg convention* for the recognition and enforcement of the order of the principal registry of the family division of the English High Court relating to contact by the father with the girls.

Finlay Geoghegan J refused the application for recognition and enforcement, holding that the respondent had established facts that constituted grounds under article 10(1)(b) and article 10(1)(d). It was manifestly no longer in accordance with the welfare of either of the girls that the order be recognised and enforced.

***W(R) v C(C)*, High Court, Miss Justice Finlay Geoghegan, 26/3/2004 [FL9230]**

CRIMINAL

Environmental law, planning and development

Case stated – planning and environmental law – waste – criminal prosecution – whether waste licence audit report and records inadmissible in criminal trial as involuntary confessions

The EPA brought prosecutions against three accused. The accused contended that a waste licence audit report was not admissible on the basis that the records maintained by the accused were not maintained voluntarily but pursuant to the *Waste Management Act, 1996* and if they were admitted it would constitute the admission of involuntary confessions against an accused person in a criminal trial. The district judge stated a case for the High Court on whether the reports were admissible.

In answering the question in the affirmative, Kearns J held that the waste licence audit report and records could not properly be characterised as 'confessions' for the purposes of the confessions rule.

***Environmental Protection Agency v Swalcliffe* Ltd, High Court, Mr Justice Kearns, 21/5/2004** [FL9224]

Extradition, *res judicata*

Requirements for successful plea of res judicata *– whether same question decided in previous judicial proceedings – prior warrant defective – new warrant issued in respect of same offence – fresh application for extradition on foot of new warrant – whether applicant precluded from applying for extradition of respondent on foot of fresh warrant in respect of same offence*

In the High Court, the applicant resisted an application for his extradition on the grounds that an earlier warrant had been issued arising out of the same set of facts that had been the subject of an application to the District Court under the then procedure and the District Court had declined to make an order for extradition on the grounds that the warrant was defective in that it did not show correspondence between the offence alleged against the respondent and an offence in the state. On that basis, it was submitted that the matter was *res judicata*. The High Court (Kearns J) held that he was not precluded by the doctrine of *res judicata* and granted the applicant an order for the extradition of the respondent to England on a certain charge specified in the warrant produced to him, on the basis that that warrant was a second and different warrant from the one which had founded the District Court application. The respondent appealed that decision to the Supreme Court.

The Supreme Court (Keane CJ, Denham and McCracken JJ) dismissed the appeal and affirmed the decision of the High Court, holding that the mere fact that a warrant for an order of extradition had been issued on an earlier occasion arising out of precisely the same alleged offence, and had been adjudicated upon by any court of competent jurisdiction, did not, of itself, preclude a subsequent application to a court of competent jurisdiction for an order of extradition. *Bolger v O'Toole* (unreported, Supreme Court, 2 December 2002) followed. As the fresh warrant set out facts that corresponded to an offence in the state and which had not been before the District Court, the issue before the High Court was a different one in law from the issue which the district judge had resolved on the first application.

Obiter dictum: the extradition procedure was a judicial procedure that did not result in any adjudication on the merits of the particular charge with which the accused was confronted but which only involved the court in determining whether the specific requirements of the *Extradition Act, 1965* had been complied with.

***The Attorney General v Peter Gibson*, Supreme Court, 10/6/2004** [FL9273]

FAMILY LAW

Adoption

Rights of natural parents in respect of child – child in foster care for 12 years – application by foster parents for adoption – whether abandonment of parental rights – conduct amounting to abandonment – factors to be considered – reasons for conduct – illness and condition of parent – standard of proof in assessing whether parental rights abandoned – Adoption Act, 1988, *section 3(1)*

The notice party's child had been in foster care with the second and third applicants for 12 years prior to their application pursuant to section 3 of the *Adoption Act, 1988* to adopt her. The notice party, who was diagnosed as having mental illness, chronic severe depression and a mild impairment of mental function, had agreed to the applicants fostering her daughter and had visited her occasionally in that period but expressed anxiety at the application on the grounds that, if she received support and her illness improved, she might be able to care for her daughter in the future. The uncontroverted evidence was that the notice party was incapable of caring for herself or her child adequately. The infant gave evidence that she would prefer to remain with the applicants but continue to visit the notice party.

Herbert J made an order

authorising An Bord Uchtála to make an adoption order in relation to the infant in favour of the second and third applicants, holding that the conduct of the notice party had been such as to indicate an abandonment of her parental rights. A failure, for physical reasons, in parental duties amounting to abandonment could be due to mental illness, chronic severe depression and a mild impairment of mental function. The word 'abandonment' was used in a special legal sense in section 3(1)(i)(c) of the 1988 act, which did not connote any blameworthiness. In the absence of some overwhelming disability or incapacity, a total failure of parental duty to a child where the parent could have cared to some extent for the child, even though inadequately and not without the maximum available amount of family and public assistance, must give rise to a presumption of fact that such parent had abandoned the rights as well as the duties as a parent. This presumption could be rebutted by evidence, including statements of the parent, inconsistent with abandonment and the standard of proof in relation thereto was on the balance of probability. However, because of the gravity of the situation and the potential consequences for everyone affected by the application, the court should within that ordinary standard of civil proof require a higher than usual degree of cogency from the evidence to establish the alleged abandonment so that any facts or inferences suggesting the contrary should carry a proportionally greater weight. A refusal to consent to adoption, even where long persisted in and combined with an expressed desire for communication with, including opportunities to see the child, was not in itself, in the face of a total failure of all parental duty towards the child, sufficient evidence of non-abandonment of parental rights in respect of the child.

***A Health Board, WH and PH v An Bord Uchtála and PO'D*, High Court, Mr Justice Herbert, 3/5/2002** [FL9293]

PERSONAL INJURIES

Damages, road traffic

General damages – assessment – road traffic accident – plaintiff's pre-existing arthritic symptoms

The plaintiff's car was struck by the defendant's in September 1999, as a result of which he suffered an impact injury to his knee. He also complained of injury to his right elbow and shoulder. His shoulder had cleared up by the time of the trial of the action. At the time of the accident, the plaintiff already had pre-existing degenerative changes in his elbow and right knee.

In awarding €54,800 damages (including special damages of €1,800) plus costs to the plaintiff, Peart J held that a sum of €6,000 was appropriate in respect of the plaintiff's shoulder injury, which should be discounted by 50% for his failure to wear a seat belt, and that a sum of €30,000 was appropriate in respect of past pain and suffering and €20,000 in respect of future pain and suffering for the plaintiff's elbow and knee injuries, which had not been affected by the failure to wear a seat belt. The accident had aggravated the plaintiff's pre-existing arthritic symptomology, which made it more likely than not that the plaintiff would need a knee replacement sooner than he would otherwise and accelerated his pre-existing symptoms by five years.

***Rogan v Walsh and the MIBI*, High Court, Mr Justice Michael Peart, 22/4/2004** [FL9159] 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

The revised *Brussels II regulation*

'Complete automatic enforcement' is the basis of the new council regulation repealing *Brussels II*. It has become known as *Brussels II bis*, although I refer to it in this article as the 'the revised *Brussels II*' (council regulation no 2201/2003 *Concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters relating to parental responsibility repealing regulation (EC) no 1347/2000*, [2003] OJ L 338/1). It will come into force, according to article 72, on 1 August 2004, though will apply in its entirety from 1 March 2005. As with *Brussels II*, the revised *Brussels II* applies to the member states of the European Union (excluding Denmark) but including the ten new EU member states.

A fully automatic enforcement regime takes no account of the fact that circumstances change rapidly in child matters. Indeed, the interlocutory nature of a parental responsibility order makes it unsuitable for automatic recognition and enforcement. For example, while the remedy of automatic return works well in child abduction cases if the abductor is a non-custodial parent, it is inappropriate when the abductor is a primary carer who is seeking protection from the other parent's violence.

No explanatory report accompanies the revised *Brussels II*, in that this instrument originated as community legislation. The lack of an equivalent to the *Borras report* accompanying the new regulation is a major deficiency. The recitals, 33 in number, have therefore added weight (in the absence of an explanatory report) as a guide to interpreting the regulation.

Scope of the revised regulation

The revised *Brussels II* makes few changes to the provisions on divorce, though it does make clear that the regulation is confined to the status issue and does not apply to ancillary orders (recital paragraph 8 of the revised *Brussels II* provides: 'As regards judgments on divorce, legal separation or marriage annulment, this regulation should apply only to the dissolution of matrimonial ties and should not deal with issues such as the grounds for divorce, property consequences of the marriage or any other ancillary measures'). The principal changes are in relation to children, where the expression 'parental responsibility' is greatly extended. The current regulation confines parental responsibility to the children of both spouses in connection with a divorce, legal separation and marriage annulment and protective measures concerning those children that were taken at the time of the dissolution of a marriage. The revised *Brussels II* brings about significant changes in respect of jurisdiction, recognition and enforcement for measures pertaining to the protection of children.

Article 1(2) of the revised regulation provides some instruction on the scope of parental responsibility. It 'may, in particular, deal with:

a) Rights of custody and rights of access
b) Guardianship, curatorship and similar institutions
c) The designation and functions of any person or body having charge of the child's person or property, representing or assisting the child
d) The placement of a child in a foster family or in institutional care
e) Measures for the protection of the child relating to the administration, conservation or disposal of the child's property'.

It should be noted that article 1(3) excludes the application of the regulation to the establishment or contesting of a parent-child relationship, adoption and 'measures taken as a result of criminal offences committed by children'.

Article 2 defines 'parental responsibility' to mean 'all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect'. It also provides that the term is to include 'rights of custody and rights of access'. Article 2(4) provides that agreements between the parties, which are enforceable in one member state, shall be regarded as judgments for the purpose of recognition and enforcement in all other member states.

The revised regulation will apply not merely in private law, but also in public law cases. It will cover both biological and adopted children of the couple, as well as stepchildren and non-marital children. The revised *Brussels II* will apply to all civil matters relating to the 'attribution, exercise, delegation, restriction or termination of parental responsibility' (see article 1(1)(b) of council regulation 2201/2003).

The interrelation between the revised *Brussels II* and the 1996 *Hague convention on the protection of children* is detailed in article 61 and will be important to watch. The current regulation, which merely covers parental responsibility on a particular occasion, takes precedence over the 1996 convention, which governs private international law matters with regard to children at a global level. While parental responsibility is widely defined in the revised regulation, conflict may occur between the instruments due to the differences in geographical scope. This is likely to lead to uncertainty and increased costs for the individual litigant.

Jurisdiction

The new rules governing jurisdiction on divorce, legal separation and marriage annulment broadly mirror the current *Brussels II* provisions. Article 3 of the revised regulation governs the issue of jurisdiction. A court will have the power or jurisdiction to litigate a matter relating to divorce, legal separation or marriage annulment in the following cases:

- Where the spouses at the time of the application, are 'habitually resident' in the territory over which the court has jurisdiction
- Where the spouses were last 'habitually resident' together in the territory over which the court has jurisdiction, provided that one of the parties remains 'habitually resident' there
- Where the respondent to the

action is 'habitually resident' in the territory over which the court has jurisdiction
- If both parties make a joint application, where either spouse is 'habitually resident' in the jurisdiction
- Where the applicant has been 'habitually resident' in the territory for at least one year immediately prior to the application being made, or
- Where the applicant has been 'habitually resident' in the territory, once he or she has resided there for six months before the application and is either a national of or domiciled in that state.

Each of these grounds is broadly based on the habitual residence of one or both parties. The term 'habitual residence' is not defined in the revised regulation and should be interpreted in a manner similar to that adopted by the ECJ in relation to other instruments, an approach that may cause some difficulty, more on which later. There is, however, an additional alternative avenue based on either the nationality or domicile of the parties. In the case of all member states except Ireland and the United Kingdom, nationality is the relevant criterion. For the jurisdictions of Ireland, Northern Ireland, England and Wales and Scotland, the concept of domicile is used.

Article 5 of the revised regulation provides that the forum with jurisdiction for the initial separation shall maintain jurisdiction for conversion of the separation into divorce, subject to the caveat that such conversion is possible under the domestic law of the member state in question. Unlike the revised *Brussels I* (see article 23 of the revised *Brussels I*), the revised *Brussels II* forecloses the possibility of a pre-selection of jurisdiction (see article 12 of the revised regulation) except in respect of matters relating to parental responsibility. That said, a number of practitioners in the member states are now inserting 'full and final settlement' clauses in separation agreements, which include a provision to the effect that a stated ground of jurisdiction, in article 3 of the revised regulation, for example, is to apply in the event of a divorce. While such a practice has many advantages, it is likely to cause some difficulty, as the revised regulation does not include a provision providing for jurisdiction founded exclusively on the agreement of the parties. It could also result in the case being heard in a member state in which neither of the spouses has a meaningful connection.

The interaction between articles 6 and 7 of the revised *Brussels II* will be interesting to watch. Article 6 provides that a spouse who (a) is habitually resident in the territory of a member state or (b) is a national of a member state, or, in the case of the United Kingdom and Ireland, has his or her 'domicile' in the territory of one of the latter member states, may be sued in another member state only in accordance with articles 3, 4 and 5.

Yet article 7(1) states that, where no court of a member state has jurisdiction pursuant to articles 3, 4 and 5, jurisdiction is to be determined, in each member state, by the national law of that state. Take, for example, Tony (domiciled in Wales) and his wife Máire (Irish domiciled), who married during a working holiday in Turkey (a third state). The marriage breaks down after a short period of time. Tony returns to Cardiff. Article 3 of the revised regulation requires a minimum of six months' residence in Cardiff before applying for a divorce. Under article 7(1) of the revised regulation, however, Tony could apply immediately for a divorce under the English residual jurisdiction rules (Tony could rely on section 5(2)(b) of the *Domicile and Matrimonial Proceedings Act 1973*, which allows jurisdiction on the basis of the domicile of either spouse, as he is domiciled in Wales). This situation is made possible by the fact that article 6 does not take precedence over article 7. It is clear that the conflict evident in the application of both provisions has the potential to undermine the aims of the revised *Brussels II*.

This anomaly needs to be considered in the context of the exclusive nature of articles 3 to 5 of the revised regulation. Such an approach derives support from paragraph 48 of the *Borras report*, which says: 'Taking into account the grounds of jurisdiction laid down in articles 2 to 6 of the convention [articles 3 to 5 of the revised regulation], [article 8] paragraph 1 [of the current regulation (article 7(1) of the revised regulation)] sets the boundary between grounds of an exclusive nature established by the convention and the principle of applying internal rules of jurisdiction, thus demonstrating the geographical limits of the convention'.

The consequence of attributing exclusive jurisdiction to articles 3 to 5 of the revised regulation would prevent the Welsh court from assuming jurisdiction until after six months' residence. Further, such an approach would appear to be consistent with the language in article 7(2) of the revised *Brussels II* that says: 'As against a respondent who is not habitually resident and is not either a national of a member state or, in the case of the United Kingdom and Ireland, does not have his "domicile" within the territory of one of the latter member states, any national of a member state who is habitually resident within the territory of another member state may, like the national of that state, avail himself of the rules of jurisdiction applicable in that state'.

In the final analysis, this logjam will be resolved by the ECJ.

Jurisdiction and parental responsibility

Article 8(1) of the revised regulation governs the issue of jurisdiction in matters of parental responsibility and is modelled on article 5 of the 1996 *Hague convention*. It attributes jurisdiction to the state of the child's habitual residence and provides as follows: 'The courts of a member state shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that member state at the time the court is seised'.

Essentially, jurisdiction is to be based on the child's habitual residence at the time the court is seised. This is a significant departure from the current regulation, where parental responsibility is linked to the divorce. It is to be noted that article 16(1) defines 'seised' broadly as the lodging of the documents or equivalent documents that institutes the proceedings. There are, however, a number of limited exceptions.

One such exception is to allow jurisdiction in respect of access to a court in the child's former habitual residence for three months following the child's acquisition of a new habitual residence for the purpose of modifying a judgment on access

rights issued in the former state of habitual residence, provided the holder of the access rights continues to have his or her habitual residence in that state (article 9). This appears to be a sensible transitional provision but seems to be founded on the assumption that a child automatically acquires habitual residence on moving to the new state. What, then, is the meaning of the term 'habitual residence'? Habitual residence has not been defined in the revised regulation. It has long been argued that there is no need for such a definition and that the words should bear their ordinary and natural meaning and are not a term of art (*CM and OM v Delegacion de Malaga and Others*, [1999] 2 IR 363; see Rogerson, ICLQ 49 [2000] 86, 87 and McClean (Morris) p34 justifying this policy).

As previously stated, in the absence of a definition, habitual residence will be interpreted in a manner similar to that adopted by the ECJ in relation to other community instruments. In case C-90/97, *Robin Swaddling v Adjudication Officer* ([1999] ECR I-1100), the ECJ held, in considering the applicant's entitlement for social security, that the length of residence in the member state in which payment of the benefit at issue is sought cannot be regarded as an intrinsic element of the concept of residence (see also *Gingi v Secretary of State for Work and Pensions*, [2002] 1 CMLR 20). While this interpretation of habitual residence may be distinguished on its facts, and the outcome justified as serving a different purpose, if it were applied to the revised *Brussels II* it would signpost a significant departure from the current interpretation of the word in the UK and Ireland.

The term 'habitual residence' has been interpreted in both the UK and Ireland to mean not only an intention to reside, but also as implying a physical presence in the jurisdiction for an appreciable period of time. In the case of *CM and OM v Delegacion de Malaga and Others*, McGuinness J held habitual residence to be a factual concept based on residence for a reasonable length of time. The judge summarised the position as follows:

'It seems to me to be settled law in both England and Ireland that "habitual residence" is not a term of art, but a matter of fact, to be decided on the evidence in this particular case. It is generally accepted that where a child is residing in the lawful custody of its parent (in the instant case the mother), its habitual residence will be that of the parent. However, the habitual residence of the child is not governed by the same rigid rules of dependency as apply under the law of domicile and the actual facts of the case must always be taken into account. Finally, a person, whether a child or an adult, must, for at least some reasonable period of time, be actually present in a country before he or she can be held to be habitually resident there'.

(See also *Re J (A Minor)(Child Abduction: Custody Rights)*, [1990] 2 AC 562.)

Whether the approach adopted by the ECJ in *Swaddling* will be applied in the future remains to be seen. Will it be that the ECJ approach will apply over the approach adopted by the national law of the member states? Article 59 of the new *Brussels I* addresses the issue in the context of domicile. It provides:

1) In order to determine whether a party is domiciled in the member state whose courts are seised of a matter, the court shall apply its internal law
2) If a party is not domiciled in the member state whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another member state, the court shall apply the law of that member state.

No such provision is included in the revised regulation in respect of habitual residence. This would suggest that habitual residence is not to be determined according to national law, but requires a community-wide approach.

If the Irish and English definition of habitual residence is adopted, the article 9 exception in the revised regulation may not apply, as the child may have abandoned his or her previous habitual residence but may not have yet acquired a new habitual residence (a person may cease to be habitually resident in a particular member state in a single day; see *Family Law*, 1997, 27 (Dec), 782-783). Article 9 is, it would appear, contingent on the child acquiring 'a new habitual residence'.

There is the possibility of conflicting judgments where a child acquires habitual residence in the new member state before the three months elapse in circumstances where the court in the new member state has already made an order under article 13 of the revised regulation. The latter order is entitled to benefit from the automatic recognition procedure provided for in article 41 of the revised regulation. In the interests of clarity and certainty, the revised regulation should have left the definition of habitual residence as a matter of national law.

The other exceptions to attributing jurisdiction to the courts of the member state in which the child is habitually resident at the time the court is seised are confined to a provision on prorogation of jurisdiction (article 12) and cases involving the wrongful removal or retention of a child (article 10).

Agreement with third states

No provision has been made in the revised regulation for agreements with third states. Article 16 of the current regulation enables a member state to enter into an agreement with a non-member state. Any such agreement can provide that a member state does not have to 'recognise a judgment given in another member state' where jurisdiction is 'founded on grounds … other than those specified in articles 2 to 7'. Community law will, under the revised regulation, determine third party negotiations so that individual member states will no longer be in a posi-

tion to negotiate agreements with third party states to the extent that such agreements will affect the revised *Brussels II* rules.

Prorogation of jurisdiction

Article 12 of the revised regulation, modelled on article 10 of the 1996 *Hague convention*, provides for prorogation of jurisdiction and thereby addresses one of the criticisms levelled at the current regulation. Under article 12(1) of the revised *Brussels II*, the forum exercising jurisdiction in respect of matrimonial proceedings has jurisdiction 'in any matter relating to parental responsibility connected with that application', where at least one of the spouses has parental responsibility in relation to that child and 'the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility at the time the court is seised, and is in the superior interests of the child'. The use of 'the superior interests' rather than 'the best interests' of the child is to be regretted, in that it signposts a departure from the approach adopted in the 1989 UN *Convention on the rights of the child*. What practical impact this will have is difficult to assess in the absence of any guidance on the matter.

The jurisdiction of a state over parental responsibility under article 12(1) is linked with the substantive application and thus will cease when the judgment allowing or refusing the application for divorce, separation or annulment has become final (article 12(2)a). Where those proceedings have finished but where proceedings in relation to parental responsibility are still pending, the state retains jurisdiction until they also end (article 12(2)b). Article 12(3) provides that the courts of a member state will have jurisdiction in relation to parental responsibility in proceedings other than divorce, legal separation or marriage annulment, where the child has a substantial connection with that member state (by, for example, being a national of that state) or where one of the spouses having parental responsibility in relation to the child is habitually resident in that member state. In this regard, that jurisdiction must be accepted by both spouses and be in the best interests of the child. This will prevent parallel proceedings being brought and conflicting custody decisions, in that only the courts of one member state will have jurisdiction.

Article 13, which broadly mirrors article 6 of the 1996 *Hague convention*, provides that, if a child's habitual residence cannot be established and jurisdiction cannot be determined under article 12, then the member state in which the child is present shall, by default, assume jurisdiction. Therefore, for article 13 to apply, it must be proven that jurisdiction cannot be established on the basis of prorogation.

Article 14 provides that where no court of a member state has jurisdiction in matters relating to parental responsibility pursuant to articles 8-13, jurisdiction shall be determined in each member state by the laws of that state. I believe the article 14 residual rules of jurisdiction will be invoked more often than was, perhaps, anticipated by the drafters, given the extent and breadth of the jurisdiction rules in the regulation. This may result in proceedings being brought on the basis of nationality, for example, notwithstanding the fact that the child is resident thousands of miles away in a different country. Alarmingly, such a judgment would be entitled to recognition and enforcement under the revised *Brussels II*. G

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Recent developments in European law

ADVERTISING

Cases C-262/02 and C-429/02, *Commission of the European Communities v French Republic*; *Bacardi France SAS v Télévision Française 1 SA (TFI), Groupe Jean-Claude Darmon SA, Girosport Sarl*, 13 July 2004. A French law (the *Loi Evian*) bans direct or indirect television advertising for alcoholic beverages in France. A breach of this law is a misdemeanour. A code of conduct drawn up by the state and French television companies sets out detailed rules for the application of the ban to the re-transmission in France of foreign sporting events. The code distinguishes between multinational sporting events, pictures of which are re-transmitted in a large number of states and which are not, therefore, regarded as mainly concerning the French public, and bi-national sporting events whose re-transmission is specifically aimed at a French audience. For the latter events, French broadcasters must use all available means to prevent the appearance on their channels of advertising for alcoholic beverages. Two cases concerning these rules were referred to the ECJ. One of these is a European Commission enforcement action. The commission argued that the French rules were incompatible with the freedom to provide services guaranteed by the *EC treaty*, as they create obstacles to the re-transmission in France of foreign sporting events. The other action concerned proceedings brought by Bacardi. TFI had requested Darmon and Girosport, who negotiate on its behalf for television re-transmission rights for football matches, to prevent the appearance on screen of brand names of alcoholic beverages. As a result, a number of foreign football clubs refused to rent advertising hoardings around their playing fields to Bacardi France.

The ECJ first considered the application of directive 89/552 – the *'Television without frontiers' directive*. It held that the directive was inapplicable. Indirect television advertising for alcoholic beverages resulting from hoardings visible during the re-transmission of sporting events does not constitute a separate announcement broadcast to promote goods or services. However, the ECJ went on to hold that the *Loi Evian* restricted the freedom to provide services. The effect of the rule is that the owners of advertising hoardings must refuse, as a preventative measure, any advertising for alcoholic beverages if a sporting event is to be re-transmitted in France. The French rules hinder the provision of broadcasting services for television programmes. While it is technically possible to mask the images in order to conceal alcohol advertising, the use of such techniques involves substantial extra costs for the French broadcasters. The court then turned to consider whether the prohibition is justified. The French rules seek to protect public health. They are appropriate to ensure that this objective is achieved. The rules restrict the situations in which advertisements for alcohol can be seen on television, thereby reducing the occasions on which television viewers might be encouraged to consume alcoholic beverages. Thus, the ECJ held that the freedom to provide services does not preclude a ban such as that imposed by France on indirect advertising for alcoholic beverages.

INTELLECTUAL PROPERTY

Cases C-46/04, C-203/02, C-338/02 and C-444/02, *Fixtures Marketing Ltd v Oy Veikkaus AB*, *The British Horseracing Board Ltd and Others v William Hill Organisation Ltd*, *Fixtures Marketing Ltd v Svenska Spel AB*, *Fixtures Marketing Ltd v Organismos prognostikon agonon podofairou (OPAP)*, opinion of Advocate General Stix-Hackl, 8 June 2004. Fixtures Marketing grants licences for exploitation outside the United Kingdom of the fixture lists for the English premier league and Scots football league. The fixture list of up to 2,000 matches is drawn up at the start of each season, stored electronically and sent out in printed booklets. The cost of developing and administering the fixture list is about €17 million and licensing revenues in respect of the data are only about €10.5 million per annum. Oy Veikkaus is a Finnish pools operator that uses data from games in these leagues for its betting activities. It did not have a licence to do this from Fixtures and obtained its information from the internet, newspapers, or directly from the football clubs. Its annual turnover from betting on football matches in England amounts to tens of million of euro. Svenska Spel is a Swedish pools operator that uses data for its games, gathered in a similar manner. OPAP is in a similar situation in Greece. The British Horseracing Board (BHB) is the governing authority for the British horseracing industry and is responsible for the compilation of data related to horseracing. Its database contains racing information and the official documents of registration of thoroughbred horses in the UK. Racing information is made available to radio and television broadcasters, magazines and newspapers. The names of participants in races in the UK are made available to the public on the afternoon of the day before the race takes place through newspapers and teletext. William Hill is a major chain of bookmakers in the UK. It also offers internet booking for all the major horse races in the UK. The information on the website is derived from newspapers and a subscription information service. Neither the newspapers nor the information service have any right to sub-licence William Hill to use any information derived from the BHB database on the internet. Fixtures Marketing and BHB argued that the companies that have used their data for the purposes of taking bets have infringed their rights under the *Database directive*. National courts referred the matter to the ECJ.

The advocate general took the view that the term 'database' should be interpreted widely. Thus, lists of football fixtures are covered. The rights conferred by the directive allow the maker of a database to prevent the use of its data under certain circumstances. It is intended to protect databases or their contents without protecting the information they contain as such. The right to protection requires a substantial investment to be have been involved in making the database. It is for the national court to determine whether there has been a substantial investment. Investment in the obtaining, verification and presentation of the contents of a database is capable of protection. The bookmaker's use of the data is a prohibited re-utilisation, even if the data is not obtained directly from the database but indirectly through sources such as newspapers or the internet.

Case C-100/02, *Gerolsteiner Brunnen GmbH & Co v Putsch GmbH*, 7 January 2004. Gerolsteiner bottles mineral water and produces soft drinks with a mineral-water base and markets them in Germany. It has registered 'Gerri' as a trademark in Germany for mineral water, non-alcoholic drinks, fruit-juice based drinks and lemonades. Since the mid-1990s, Putsch has marketed soft drinks in Germany with labels including the words, 'Kerry spring'. An Irish company, Kerry Spring Water, using water from a spring called 'Kerry spring', manufactures these drinks in Co Kerry. Gerolsteiner took proceedings in the German courts against Putsch for infringement of its trademark rights. The matter was referred to the ECJ. The referring court had found a likelihood of aural confusion for the purposes of article 5(1)(b) of the *Trademarks directive* (89/104). Customers generally shorten 'Kerry spring' to 'Kerry' when ordering, and this could be confused with 'Gerri'. The question the court looked at was whether a likelihood of confusion between a trademark and an indication of geographical origin entitles the proprietor of the trademark to prevent a third party from using the indication of geographical origin. The only guidance in the directive is found in article 6(1); that is, whether the indication of geographical origin is used in accordance with honest practices in industrial or commercial matters. The condition of 'honest practice' means a duty to act fairly in relation to the legitimate interest of the trademark owner. The risk of aural confusion is insufficient to conclude that the use of the indication in not in accordance with honest practices. Given the linguistic diversity throughout the EU, there is a large chance of some phonetic similarity between a trademark registered in one member state and an indication of geographical origin from another member state. It is for the national court to carry out an overall assessment of all the relevant circumstances. The circumstances the court will take into account in a case involving bottled drinks include the shape and labelling of the bottle. G

Picture perfect portrait of a past president

The highlight of the society's mid-summer dinner was the unveiling of a portrait by renowned artist David Hone of Council member and former president Moya Quinlan, *writes Ken Murphy*. The portrait was commissioned by the society and will hang in the Council chamber. Only the late former president Peter Prentice has been honoured by the society in this way in the last 100 years.

Moya Quinlan with *Moya Quinlan*

Moya Quinlan is a remarkable and thoroughly unique individual who has given outstanding service to the society and profession since she was first elected to the Council some 35 years ago. The first woman ever to be the society's president, in 1980/81 (it was over 20 years before another woman, Elma Lynch, was elected president), she is still an elected and active member of the Council today.

At the unveiling of the portrait, president Gerard Griffin described her as 'simply the best'.

Pictured *(from left)* are director general Ken Murphy, Moya Quinlan, immediate past-president Geraldine Clarke, Brendan Clarke, president Gerry Griffin, and the artist David Hone

Law Society mid-summer dinner

Pictured are *(from left)* Colette Crotty, senior vice-president Owen Binchy, Eimear Binchy and Kilkenny Bar Association president Martin Crotty

Pictured are *(from left)* Law Society director general Ken Murphy, Law Society president Gerard Griffin and former president Adrian Bourke

Pamela Rogers and Meath Bar Association president Patrick Rogers

Law Society Council member Tom Murran *(left)* with Mark Quinn, author of *The king of spring*, about the life and times of solicitor and athlete Peter O'Connor, at the book's launch in the Shelbourne Hotel

Professor Moriarty, I presume

Solicitor Patrick Moriarty *(right)* was recently presented with a Waterford Crystal vase to mark his 30 years of distinguished service as a law lecturer at the Institute of Technology, Tralee. Also pictured are the institute's director, Michael Carmody *(left)* and Sandrene Moriarty, Patrick's daughter

Down on the farm

At the launch in Blackhall Place of the Teagasc publication *Partnerships and farming* were Ben Roche of Teagasc, editor of the publication, Law Society president Gerard Griffin, and Paddy Horgan of ACC Bank, which sponsored the publication

Pictured at the launch are Josephine Feehily of the Revenue Commissioners, president Gerard Griffin, agriculture minister Joe Walsh, Teagasc director Jim Flanagan, and ACC Bank's Jim Flanagan

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 September 2004)

Regd owner: the county council of the county of Clare; folio: 26379; lands: townland of Shantraud and barony of Tulla Lower; **Co Clare**
Regd owner: William Neylon; folio: 632; lands: townland of Garruragh and barony of Tulla Upper; area: 54.5466; **Co Clare**
Regd owner: Mary O'Connell; folio: 410; lands: townland of Kilmihill and barony of Clonderalaw; area: 4.1733 hectares; **Co Clare**
Regd owner: Fiona Cavanagh; folio: 30262F; lands: plots of ground being part of the townland of Carrig in the barony of Barrymore and county of Cork; **Co Cork**
Regd owner: Sean Patrick Hurley; folio: 26153; lands: plots of ground being part of the townland of Lahard in the barony of Imokilly and county of Cork; **Co Cork**

Regd owner: Charles F Main (deceased); folio: 5846F; lands: plots of ground being part of the townland of Maulagallane in the barony of Carbery West (West Division) and county of Cork; **Co Cork**
Regd owner: Matthew J and Rosemary J Murphy; folio: 2812F; lands: plots of ground being part of the townland of Cahergal in the barony of Carbery West (East Division) and county of Cork; **Co Cork**
Regd owner: John O'Connor and Kathleen O'Connor; folio: 19661; lands: lands at Ballyhooly South containing 37 acres or thereabouts, situate in the townland of Ballyhooly South in the barony of Fermoy and county of Cork; **Co Cork**
Regd owner: David O'Regan and Mary O'Regan; folio: 25565F; lands: County Cork; **Co Cork**
Regd owner: Daniel M Sullivan (deceased); folio: 26921; lands: plots of ground being part of the townland of Drom North in the barony of Bear and county of Cork; **Co Cork**
Regd owner: Thomas and Eileen Fitzgerald; folio: 35751; lands: a plot of ground containing 3 roods, 2 perches, being part of the townland of Ballyhooly South in the barony of Fermoy and county of Cork; **Co Cork**
Regd owner: Patrick Deady; folio: 29581F; lands: plots of ground being part of the townland of Bellvelly in the barony of Barrymore and county of Cork; **Co Cork**
Regd owner: Murpet Fish Company Limited; folio: 19844F; lands: plots of ground being part of the townland of Coulagh in the barony of Bear and county of Cork; **Co Cork**
Regd owner: Dan Twohig (deceased); folio: 10924; lands: plots of ground being part of the townland of Glenaglogh North in the barony of Muskerry East and county of Cork; **Co Cork**
Regd owner: Hugh T Boyle and Phyllis Boyle, Magheraclogher, Bunbeg, Co Donegal; folio: 25919; lands: Magheraclogher; area: 2.4810 hectares; **Co Donegal**
Regd owner: Daniel Proctor and Lorraine Armstrong; folio: DN114901F; lands: property known as site no 72 Glenaulin Green, Oakcourt Avenue, Palmerstown; **Co Dublin**
Regd owner: Anne Dowling; folio: DN95990F; lands: property situate in the townland of Stillorgan and barony of Rathdown; **Co Dublin**
Regd owner: Michael J Henry and Margaret Philomena Totterdell; folio: DN55346L; lands: property known as 75 Begnets Villas situate in the parish of Dalkey, borough of Dun Laoghaire; **Co Dublin**
Regd owner: Robert Carrick; folio: DN18625 and DN18313; lands: property situate in the townland of Rush and barony of Balrothery East; **Co Dublin**
Regd owner: Christopher Anderson; folio: DN13731; lands: property known as 37 Marian Park situate in the townland of Baldoyle and barony of Coolock, shown as plan 206; **Co Dublin**
Regd owner: Michael Casey; folio: DN62680L; lands: property situate in the townland of Castleknock and barony of Castleknock; **Co Dublin**
Regd owner: Edward and Catherine Delaney; folio: DN104934f; lands: property known as 1 Inver Road, Cabra West, situate in the parish of Grangegorman and district of North Central; **Co Dublin**
Regd owner: John Harris; folio: 17714; lands: a plot of ground situate to the east of Thormanby Road, in the parish of Howth and in the district of Howth and in the county borough of Dublin, containing 0.2960 hectares; **Co Dublin**
Regd owner: Derek Kelly and Eimear Kelly; folio: DN105773F; lands: a plot of ground being part of the townland of Ballymacartle and barony of Coolock; **Co Dublin**
Regd owner: the county council of the county of Dublin; folio: DN2191; lands: property situate in the townland of Grange, part of the barony of Coolock; **Co Dublin**
Regd owner: the county council of the county of Dublin; folio: DN15504; lands: property situate in the townland of Lusk and barony of Balrothery East; **Co Dublin**
Regd owner: Richard Moore and David Moore; folio: DN10289; lands: property situate in the townland of Meakstown and barony of Coolock; **Co Dublin**
Regd owner: Peter Power; folio: 22655F; lands: a plot of ground known as 40 Brockwood Estate, situate on the west of Brockwood Crescent in the parish of Clontarf and district of Artane East; **Co Dublin**
Regd owner: Emma Scollan and Cian Ferriter; folio: DN147202F; lands: a plot of ground known as site 192 Kelly's Bay Pier, north of the main railway line in the parish of Holmpatrick and town of Skerries; **Co Dublin**
Regd owner: Derek Horgan and Bernadette Horgan; folio: DN42736F; lands: property known as 51 Marino Green, situate in the parish of Clonturk and district of Clontarf; **Co Dublin**
Regd owner: CAS Limited (limited liability company); folio: DN122174F; lands: a plot of ground situate in the townland of Ballycullen and barony of Uppercross; **Co Dublin**
Regd owner: Mary Mulligan; folio: DN18733; lands: property situate in the townland of Killshane and barony of Castleknock (plan 19) and property situate in the townland of Killshane and barony of Castleknock (plan 20); **Co Dublin**
Regd owner: Noel Phelan; folio: DN71060F; lands: property situate in the townland of Coolmine and barony of Castleknock; **Co Dublin**
Regd owner: Matthew (otherwise Mattie) Greene, Parkroe, Ardrahan, Co Galway; folio: 20663F; lands: townland of Parkroe and barony of Dunkellin; area: 0.281; **Co Galway**
Regd owner: James Hickey and Mary Hickey; folio: 19401F; lands: townland of Cloonboo and barony of Clare; area: 0.2302 acres; **Co Galway**
Regd owner: Geraldine Lyster and William G Lyster (as tenant in common); folio: 55092; lands: townland of Carrowbrowne and barony of Galway; **Co Galway**
Regd owner: John and Edna White; folio: 49777F; lands: townland of Cloonagower and barony of Galway; **Co Galway**
Regd owner: Margaret Furey; folio: 55248; lands: Terryland and barony of Galway; area: 7 acres, 2 roods, 29 perches; **Co Galway**
Regd owner: Thomas and Sarah O'Brien; folio: 335; lands: townland of Walterstown and barony of Offaly West; **Co Kildare**
Regd owner: Richard Coe; folio: 3194; lands: townland of Ballyfarsoon and barony of Offaly West; **Co Kildare**
Regd owner: Martin and Marie Gibbons; folio: 5551F; lands: Drakeland Middle and barony of Shillelogher; **Co Kilkenny**
Regd owner: Roger Christopher and Bernadette Greene; folio: 37F; lands: Knocktopher Manor and barony of Knocktopher; **Co Kilkenny**
Regd owner: John and Sheila O'Sullivan; folio: 15175F; lands: Lodge and barony of Galmoy; **Co Kilkenny**
Regd owner: Catherine Woodcock; folio: 12831; lands: Grange and barony of Shillelogher; **Co Kilkenny**
Regd owner: Anne Marie Branigan;

folio: 9497F; lands: Kilrush and barony of Crannagh; **Co Kilkenny**

Regd owner: Gerard and Sheena Flynn; folio: 17470F; lands: Dunmore and barony of Gowran; **Co Kilkenny**

Regd owner: Regals Inns Limited; folio: 8983F; lands: Stradbally and barony of Stradbally; **Co Laois**

Regd owner: Glen Hunter and Karen O'Shaughnessy; folio: 13436F; lands: Cooltedery and barony of Portnahinch; **Co Laois**

Regd owner: John Joseph McNiff, Drumkeel, Killargue, Co Leitrim; folio: 8424; lands: Drumkeel; area: 5.858 hectares; **Co Leitrim**

Regd owner: Paul and Tracey Condon; folio: 17134F; lands: townland of Ballygrennan and barony of North Liberties; **Co Limerick**

Regd owner: John C Edwards; folio: 9920F; lands: townland of Dollas Upper and barony of Coshma; **Co Limerick**

Regd owner: Theresa Neville; folio: 6701F; lands: townland of Castlemungret and barony of Pubblebrien; **Co Limerick**

Regd owner: Patrick McGrane, site 162, Green Acres, Avenue Road, Dundalk, Co Louth; folio: 1579L; lands: Long Avenue; area: 0.0688 hectares; **Co Louth**

Regd owner: Eamon Cresham, Chestnut Grove, Castlebar, Co Mayo; folio: 9856F; lands: townland of Claggan and barony of Carra; area: 0.1600 hectares; **Co Mayo**

Regd owner: John J Smyth; folio: 29322; lands: townland of Garryduff and barony of Carra; area: 23 perches; **Co Mayo**

Regd owner: John McGeever; folio: 5807F; lands: townland of Coolcran and barony of Tirawley; area: 0.663 acres; **Co Mayo**

Regd owner: Ronan Griffin, 18 Blackwater Abbey, Abbeylands, Navan, Co Meath; folio: 26811F; lands: 18 Blackwater Abbey; **Co Meath**

Regd owner: Thomas Mimnagh, Ballickmoyler Road, Carlow; folio: 26050; lands: Cooksland; **Co Meath**

Regd owner: Michael Kelly; folio: 3767F; lands: Ballylin and barony of Garrycastle; **Co Offaly**

Regd owner: Gregory Glynn; folio: 15847 and 3959; lands: Townparks and barony of Philipstown Lower; **Co Offaly**

Regd owner: Stephen Fanning; folio: 16115; lands: townland of (1) Doogary, (2) Ballyformoyle and barony of (1) and (2) Boyle; area: (1) 22 acres, 3 roods, 20 perches, (2) 3 roods, 28 perches; **Co Roscommon**

Regd owner: Kevin Flynn; folio: 4071; lands: townland of Moyne and barony of Frenchpark; area: 0.4046 hectares; **Co Roscommon**

Regd owner: Luke Flynn; folio: 26349; lands: townland of (1) Ballyfeeney, (2) and (3) Drinagh and barony of (1) Ballintober North and (2) and (3) Roscommon; area: (1) 44.236 acres, (2) 0.538 acres; (3) 1.269 acres; **Co Roscommon**

Regd owner: Peter Shannon (deceased); folio: 17277; lands: townland of Castleland and barony of Roscommon; area: 24 acres, 3 roods, 20 perches; **Co Roscommon**

Regd owner: Sarah McAndrew (deceased); folio: 11025; lands: townland of Ballymoate and barony of Corran; area: 0.404 hectares; **Co Sligo**

Regd owner: Norah Marren (deceased); folio: 9568; lands: townland of Carrowmore and barony of Leyny; area: 34 acres, 1 rood, 24 perches; **Co Sligo**

Regd owner: Niall McGrath; folio: 25291F; lands: townland of Derryleigh and barony of Owney and Arra; **Co Tipperary**

Regd owner: Thomas and Breda Tuohy; folio: 36848; lands: townland of Mealclye and barony of Kilnamanagh Lower; **Co Tipperary**

Regd owner: Margaret Armshaw; folio: 25411; lands: townland of Cummer More and barony of Kilnamanagh Upper; **Co Tipperary**

Regd owner: Seamus Browne; folio: 5946; lands: townland of Rossmore and barony of Kilnamanagh Lower; **Co Tipperary**

Regd owner: Patrick J Meghen; folio: 3507; lands: townland of Ballinurra and Lisadober and barony of Iffa and Offa East; **Co Tipperary**

Regd owner: estate of John White, deceased; folio: 29185; lands: townland of Derryluskan and barony of Middlethird; **Co Tipperary**

Regd owner: Michael Trehy; folio: 19862F; lands: townland of Gortlandroe and barony of Lower Ormond; **Co Tipperary**

Regd owner: Mary Josephine and Terence Morrissey; folio: 3529F; lands: plots of ground known as 7 Elm Park, being part of the townland of Ballycarnane in the barony of Middlethird and county of Waterford; **Co Waterford**

Regd owner: Paschal and Breda Roche; folio: 466L; lands: plots of ground situate to the west of Brown's Road, being part of the parish of Trinity without division C1 in the county borough of Waterford; **Co Waterford**

Regd owner: Maurice and Maureen Whittle; folio: 2919F; lands: plots of ground being part of the townland of Killure in the barony of Gaultiere and county of Waterford; **Co Waterford**

Regd owner: Austin Nugent, Clonmorrill, Devlin, Co Westmeath; folio: 6316; lands: Clonmorrill; area: 20.214 hectares; **Co Westmeath**

Regd owner: Francis Foley; folio: 19730; lands: Carricklawn and barony of Shelmaliere West; **Co Wexford**

Regd owner: Mary Holden; folio: 6079F; lands: Templeudigan, Gobbinstown, Ballywilliam, and barony of Bantry; **Co Wexford**

Regd owner: Elizabeth Tierney; folio: 1215F; lands: Askingarran Lower and barony of Ballaghkeen North; **Co Wexford**

Regd owner: Richard and Brendan O'Connor; folio: 17769F; lands: Kilbride and barony of Ballaghkeen South; **Co Wexford**

Regd owner: James Ryan (deceased); folio: 13398; lands: Kilmacoe and barony of Shelmaliere East; **Co Wexford**

Regd owner: Thomas O'Brien; folio: 603L; lands: Pondfields and barony of Bantry; **Co Wexford**

Regd owner: Peter Kavanagh; folio: 994L; lands: townland of Bray and barony of Rathdown; **Co Wicklow**

Regd owner: Ian and Nicola Leggett; folio: 2027F; lands: townland of Kilbride and barony of Rathdown; **Co Wicklow**

WILLS

Atkinson, Benjamin (deceased), late of 25 Weafer Street, Enniscorthy, Co Wexford, and formerly of 556 SW Natura Avenue, Deerfield Beach, Florida, USA. Would any person having knowledge of a will made by the above named deceased, who died on 24 January 2003 at Wexford General Hospital, please contact Clifford Sullivan & Co, Solicitors, Bri Chualann Court, Adelaide Road, Bray, Co Wicklow; tel: 01 276 5226; fax: 01 276 5232

Beatty, Anne (deceased), late of 1 Millbank Court, Rush, Co Dublin. Would any person having knowledge of the whereabouts of a will made by the above named deceased, who died on 6 March 2004 at Beaumont Hospital, Dublin 9, please contact HC Browne, Solicitors, Malahide Road/Kilmore Road Corner, Artane, Dublin 5; tel: 01 832 7849; fax: 01 832 7852

Boland, Elizabeth (deceased), late of 34 Croydon Park Avenue, Marino, Dublin 3. Would any person having knowledge of a will made by the above named deceased, who died on 24 February 2004 at Beaumont Hospital, Dublin, please contact Early & Baldwin, Solicitors, 27/28 Marino Mart, Fairview, Dublin 3; tel: 01 833 3097 or fax: 01 833 2515

Brereton, Philomena, ors Phyllis (deceased), late of 76 North Circular Road, Dublin 7. Would any person having knowledge of a will made by the above named deceased, who died on 7 August 2003, please contact Esmond Reilly, Solicitor, 4 Orchard Rise, Stamullen, Co Meath; tel: 01 841 6022; fax: 01 841 6024; e-mail: esmond@securemail.ie

Clancy, Emma Theresa (deceased), formerly of Retreat Heights, Glaslough, Co Monaghan. Would any person having knowledge of a will for the above named deceased, who died on 13 May 2004, please contact Matheson Ormsby Prentice, Solicitors, 30 Herbert Street, Dublin

2; tel: 01 619 9000; fax: 01 619 9010 (ref: PTM/ACU)

Gilmartin, Sean (deceased), of 25 Lavey Heights, Charlestown, Co Mayo, and formerly of 15 Portland Street, Dublin 1. Would any person having knowledge of the whereabouts of a will for the above named deceased, who died on 18 June 2004, please contact Rochford Gallagher & Co, Solicitors, Tubbercurry, Co Sligo; tel: 071 918 5011 or fax: 071 918 5650

Glancy, Patrick (deceased), late of 142 Captain's Road, Kimmage, Dublin 12. Would any person having knowledge of a will made by the above named deceased, who died on 13 January 2004, please contact James D Aitken & Co, Solicitors, 107 Trees Road Upper, Mount Merrion, Co Dublin; tel: 01 288 2772; fax: 01 288 8204

McGrath, Patrick (Paddy) (deceased), late of Cloughlea, Manorkilbride, Blessington, Co Wicklow. Would any person having knowledge of a will made by the above named deceased, who died on or about 8 May 2004, please contact Catherine M Balfe, Solicitor, Woodend, Blessington, Co Wicklow; tel: 045 865 526; e-mail: catherinebalfe@eircom.net

Neary, Patricia (deceased), late of St Patrick's Street, Co Roscommon. Would any person having knowledge of a will made by the above named deceased, who died on 7 September 2003 at the Cloverhill Nursing Home, Co Roscommon, please contact Claffey, Gannon & Co, Solicitors, Castlerea, Co Roscommon; DX 72001 Castlerea; fax: 094 962 0522; e-mail: alan@clafgann.com; reference: AG/N58

O'Dea, Michael (deceased), late of Ardmore House, Drombana, Co Limerick. Would any person having knowledge of a will made by the above named deceased, who died on 23 April 2004, please contact Robert Bourke of Holmes O'Malley & Sexton, Solicitors, Bishopsgate, Henry Street, Limerick; tel: 061 313 222

O'Driscoll, John (deceased), late of Feighmane East, Valentia Island, Co Kerry. Would any person having knowledge of a will made by the above named deceased, who died on 11 November 1993 at Tralee General Hospital, Tralee, Co Kerry, please contact Rogan & Moran, Solicitors, New Street, Caherciveen, Co Kerry; tel: 066 947 2465; fax: 066 947 2264

O'Neill, John (deceased), (farmer), late of Shragh, Rhode, Co Offaly. Would any person having knowledge of a will made by the above named deceased, who died on 18 March 2004 at the General Hospital, Tullamore, Co Offaly, please contact Byrne Carolan Cunningham, Solicitors, Main Street, Moate, Co Westmeath; tel: 090 648 2090; fax: 090 648 2091; e-mail: bccsolrs@eircom.net

Reidy, Anna, late of 'The Bungalow', Cahercalla, Ennis, Co Clare. Would any person having knowledge of a will made by the above named deceased, who died on 26 June 2004, please contact Desmond J Houlihan & Company, Solicitors, Salthouse Lane, Ennis, Co Clare; tel: 065 684 2244; fax: 065 684 2233

Reville, Graham (deceased), late of Hedgeroad, Garristown, Co Dublin. Would any person knowing the whereabouts of a will made by the above named deceased, who died on 6 December 2003, contact William A James, Solicitor, Hamilton House, 21 Mill Street, Balbriggan, Co Dublin; tel: 01 841 3500; fax: 01 841 3017

Roche, Edward (orse Eddie) (deceased), late of Rathcahill West, Templeglantine, Co Limerick, retired farmer, bachelor, date of death: 30 May 2004. Would any person knowing the whereabouts of the deceased's will please contact Dennison, Solicitors, of Main Street, Abbeyfeale, Co Limerick; tel: 068 31169; fax: 068 31614. If replies are not received within four weeks from the date of this publication, grant of representation will be extracted

Walsh, Joseph (deceased), late of Church Street, Athenry, in the county of Galway. Would any person having knowledge of a will made by the above named deceased, who died on 11 April 2001, please contact Hamilton Sheahan & Co, Main Street, Kinnegad, Co Westmeath; tel: 044 75040 or fax: 044 75041

EMPLOYMENT

Apprenticeship required: hard-working, ambitious, presentable law graduate (2.1), with extensive employment history and excellent references. Impressive communication and computer skills. Ability to work on own initiative and as part of a team. Passed all eight FE1s and Irish exam. Available to start immediately at any location. Tel: 087 652 9849

Assistant solicitor required for busy practice in Donegal – conveyancing/litigation experience preferable. Applications treated in strictest confidence. Please reply to **box no 70/04**

Discovery service. Experienced compliance and legal executive available to a very busy law practice on a per assignment/self-employed basis, to undertake the time consuming, but rather essential, task in litigation work of dealing with all aspects of discovery, including drafting formal requests for discovery and the inspection and analysis of other party documentation

Detailed, accurate, dependable, commercially and technically astute, with a background in insurance-related matters. I am prepared to travel if required. The more complex the subject matter, the better I like the task. References available and absolute confidentiality is assured. To ascertain how I may be of assistance to your firm in reducing costs, please contact: DJ Cassidy; mobile: 086 888 6281

Experienced solicitor available for permanent part-time/job-sharing position from the end of September 2004. Seven years' experience in general practice, including five years working as a sole practitioner. Areas considered: Meath, north Dublin and north Kildare. Contact 086 807 2574

Legal executive – extensive experience in preparation of briefs, attending counsel, management of caseload, research, excellent IT skills, hons business and law degree, postgrad cert research, LLM, seven FE1s – seeking solicitor apprenticeship for 2005 academic year, Dublin area. Please reply to: 086 886 2199

Newly qualified solicitor, computer literate, seeks opportunity to gain post-qualification experience. Please reply to **box no 71/04**

Solicitor required for medium-sized Offaly practice – up to three to five years' post-qualification experience preferred to senior positions. Replies to **box no 72/04** in strict confidence

Solicitor required for general practice in the west Limerick area. Please reply with CV to **box no 73/04**

Solicitor seeks part-time or locum position in Dublin area in general practice. Has one year of PQE (approx). Computer literate. Tel: 01 668 6901

Apprentice solicitor required for well-established, busy, technologically efficient general practice in lively town in Midlands/West of Ireland. Must be highly motivated and capable of working on their own initiative or as part of a team. Good working conditions. Reply to **box no 74/04**

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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

London solicitors will be pleased to advise on UK matters and undertake agency work. We handle probate, litigation, property and company/commercial. Parfitt Cresswell, 567/569 Fulham Road, London SW6 1EU; DX 83800 Fulham Broadway; tel: 0044 2073 818311; fax: 0044 2073 816723; e-mail: arobbins@parfitts.co.uk

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Seven-day publican's on-licence for sale – contact Walter P Toolan & Sons, High Street, Ballinamore, Co Leitrim; tel: 071 964 4004; fax: 071 9644788

Limerick – to let – three rooms, first floor, William Street – suitable professional office, 086 253 0244

Wanted – seven-day pub licence. Contact: Malone and Martin, Solicitors, Market Street, Trim, Co Meath; tel: 046 943 1256; fax: 046 943 6409; e-mail: info@maloneandmartin.com

TITLE DEEDS

Clancy, Emma Theresa (deceased), formerly of Retreat Heights, Glaslough, Co Monaghan. Would any person having knowledge of the whereabouts of the title deeds to the above property, the above named having died on 13 May 2004, please contact Matheson Ormsby Prentice, Solicitors, 30 Herbert Street, Dublin 2; tel: 01 619 9000; fax: 01 619 9010 (ref: PTM/ACU)

Tomkins, Arthur B (deceased), late of Little Grove, 145A Milltown Road, Dublin 6. Would any person having knowledge of the whereabouts of title documents of the above mentioned property please contact Rutherfords, Solicitors, 41 Fitzwilliam Square, Dublin 2; tel: 01 661 6466; fax: 01 6612 071; e-mail: law@rutherfords-solicitors.ie

In the matter of the *Landlord and Tenant Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) Act, 1967*: an application by Frankfort Parts Centre Limited

Take notice that any person having any interest in the freehold estate of the following property: all that premises known as no 6 Arbourfield Terrace, Windy Arbour, Dundrum, in the county of the city of Dublin.

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

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

Date: 3 September 2004

Signed: KMB Solicitors (solicitors for the applicant), 20 Northumberland Road, Dublin 4

In the matter of the *Landlord and Tenant Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978* and in the matter of premises situate at Church Road and Hillside Road, Greystones, Co Wicklow: an application by Joseph Cosgrave, Peter Cosgrave and Michael Cosgrave

Take notice that any person having any interest in the freehold estate of or any superior or intermediate interest in the hereditaments and premises situate at the premises now known as Meridian Point Centre, Church

Road, Greystones, Co Wicklow, and formerly known as Kiora Cottage, Hillside Road, in the town of Greystones, barony of Rathdown and county of Wicklow, which premises are held with others under indenture of lease dated 15 May 1899 made between Peter La Touche of the one part and James Hempenstall of the other part for the term of 200 years from 25 March 1899, should give notice to the undersigned solicitors.

Take notice that the applicants, Joseph Cosgrave, Peter Cosgrave and Michael Cosgrave, intend to apply to the county registrar for the county of Wicklow for acquisition of the freehold interest and all intermediate interests in the above mentioned property, and any party asserting that they hold an interest superior to the applicants in the aforesaid property are called upon to furnish evidence of title to same to the below named solicitors within 21 days from the date hereof.

In default of any such notice being received, the applicants 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 of Wicklow for such direction as may be appropriate on the basis that the person or persons beneficially entitled to such superior interest including the freehold reversion in the aforementioned property are unknown or unascertained.

Date: 3 September 2004

Signed: Sheehan & Company, Solicitors (solicitors for the applicant), 1 Clare Street, Dublin 2

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 John Chris Carroll. Premises: 32 and 33 Lower Clanbrassil Street in the city of Dublin

Take notice that any person having any interest in the freehold estate of the following property: 32 and 33 Lower Clanbrassil Street, Dublin 8, more particularly described along with other property in an indenture of lease dated 29 September 1875 and made between James Fitzgerald Lombard and Edward McMahon of the one part and Thomas Carlton of the other part for a term of 400 years from 29 September 1875 at a yearly rent of £10.80 (ten pounds and 80 pence) (formerly £10.16.00; ten pounds and 16 shillings), apportioned to £3.60 (three pounds and 60 pence)(formerly £3.12.00; three pounds and 12 shillings) and described therein as: all that and those that piece or plot of ground situate on the east side of Lower Clanbrassil Street in the city of Dublin and which is delineated and described in the maps thereof drawn in the margin of these presents which said piece or plot of ground contains in front thereof 54 feet or thereabouts and in depth from front to rear 72 feet or thereabouts, bounded on the north by Lombard Street West, on the south by a passage dividing demised premises from Mr Kavanagh's cottages, on the east by another plot demised to lessee, and on the west by Lower Clanbrassil Street aforesaid, which said premises are situate in the parish of Saint Peter and city of Dublin.

Take notice that John Chris Carroll intends to submit an application to the county registrar for the county/city of Dublin for the acquisition of the freehold interest in 32 and 33 Lower Clanbrassil Street in the city of Dublin, 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, John Chris Carroll intends to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the county/city of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in each of the aforesaid premises are unknown or unascertained.

Date: 3 September 2004

Signed: JP Redmond & Company, Solicitors, Marshalsea Court, 22/23 Merchant's Quay, Dublin 8; (ref: JD/JC/No/13325)

In the matter of the *Landlord and Tenant Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) Act, 1967*: an application by Martin Smith and John Smith

Take notice that any person having any interest in the freehold estate of the following property: all that premises known as no 5 Arbourfield Terrace, Windy Arbour, Dundrum, in the county of the city of Dublin.

Take notice that Martin Smith and John Smith intend to submit an application to the county registrar for the county of Dublin for the acquisition of the freehold interest in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid premises are called upon to furnish evidence of title to the aforementioned premises to the below-named with 21 days from the date of this notice.

In default of any such notice being received, Martin Smith and John Smith 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 of the city of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the aforesaid premises are unknown or unascertained.

Date: 3 September 2004

Signed: BCM Hanby Wallace, Solicitors (solicitors for the applicant), 88 Harcourt Street, Dublin 2

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

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

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

Date: 3 September 2004

Signed: F Hutchinson & Company, Solicitors (solicitors for the applicant), Tirconnell Street, Ballyshannon, Co Donegal

In the matter of the *Landlord and Tenant Acts, 1967-1987* and in the matter of the *Landlord and Tenant (Ground Rent) Act, 1978*: an application by Bernard Carragher

Take notice that any person having an interest in the freehold estate of the following property: all that and those the piece or parcel of ground situate in the north side of Brunswick Street in the city of Dublin, containing in breadth in from 40 feet and in the rear 100 feet and in depth from front to rear 100 feet or thereabouts, bounded on the south by Brunswick Street and on the other and east by ground formerly belonging to William Henry, John Donlen and John Gibson, and on the west by premises formerly in the possession of Patrick Aylmer, Patrick Smith and Stephen Slator, together with the buildings now erected herein which said premises are situate partly in the parish of St Michan's and partly in the parish of St Paul and the county of the city of Dublin.

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

Date: 3 September 2004

Signed: Anthony M Reynolds (solicitor for the applicant), Killilea Reynolds & Whelan, 201 North Circular Road, Dublin 7

In the matter of the *Landlord and Tenant Acts, 1967-1987* and in the matter of the *Landlord and Tenant (Ground Rent) Act, 1978*: an application by Alec Corcoran

Take notice that any person having an interest in the freehold estate of the following property: all that and those the premises at number 9 Stoneybatter in the parish of St Paul and city of Dublin, containing in front to said street 19 feet, six inches in depth, from front to the rear of the shed at the back thereof (the said shed being a portion

of the premises hereby demised) 67 feet, six-and-a-half inches or less, bounded as follows – on the north by premises number 10 Stoneybatter in the possession of H Kearns, hairdresser, on the south by premises of J O'Neill, forage contractor, on the east by a stable and on the west by Stoneybatter.

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

Date: 3 September 2004

Signed: Anthony M Reynolds, (solicitor for the applicant), Killilea Reynolds & Whelan, 201 North Circular Road, Dublin 7

In the matter of the *Landlord and Tenant Acts, 1967-1987* and in the matter of the *Landlord and Tenant (Ground Rent) Act, 1978:* an application by Anthony Gannon

Take notice that any person having an interest in the freehold estate of the following property: all that and those that dwellinghouse messuage or tenement situate in Stoneybatter in the county of the city of Dublin, known by number 11 together with the yard at the rear thereof and all other appurtenances to the same belonging situate lying and being in the parish of Saint Paul and the county of the city of Dublin.

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

Date: 3 September 2004

Signed: Anthony M Reynolds, (solicitor for the applicant), Killilea Reynolds & Whelan, 201 North Circular Road, Dublin 7

To the unknown and unascertainable successors in title of Edwin Angus Swanton. 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 Roy Coogan

Take notice that any person having any estate in the freehold of or superior interest in the following premises: 'all that and those the dwelling house, backyards, out offices and gardens bounded on the east by High Street, on the west by the garden in the possession of Peter Duggan/his successors in title, on the north by the garden and premises in the possession of Nicholas Russell/his successors in title and the houses and premises in the possession of Mary Farrell/her successors in title, and on the south by the house and yards in the possession of Willoughby H Connor and by Agnes Bibby/their successors in title, and by a yard in the possession of Andrew Ryan/his successors in title, and which said premises are situate and known as no 19 High Street, High Street in the parish of St Mary and city of Kilkenny', being the property comprised in an indenture of lease dated 15 June 1937 and made between Edwin Angus Swanton of the one part and John H Fennell of the other part.

Take notice that the applicant, Roy Coogan, intends to apply to the county registrar for the county of Kilkenny for the acquisition of the freehold interest in the aforesaid property, and any party asserting that they hold an interest superior to the applicant in the aforesaid property are called upon to furnish evidence of title to same to the below named solicitor within 21 days from the date of this notice.

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In default of any such notice being received, the applicant intends to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the county of Kilkenny 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 premises are unknown or unascertained.

Date: 3 September 2004

Signed: Reidy & Foley (solicitors for the applicant), Parliament House, Parliament Street, Kilkenny; (ref. C633/EF/RH)

In the matter of the *Landlord and Tenant Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978* and in the matter of premises at Tyrone Place, Inchicore, Dublin 8, in the parish of St Jude and city of Dublin: an application by Logcraft Limited

Take notice any person having any interest in the freehold estate of or superior interest in the following premises: all that and those that part of the lands of Goldenbridge situate at Tyrone Place, Inchicore, in the parish of St Jude and city of Dublin, held under an indenture of lease dated 25 April 1950 and made between Paul Lehane of the one part and Rapid Cleaners and Dyers Limited of the other part for the unexpired residue of a term of 200 years, demised by a lease dated 1 August 1871 and made between Jane Johnstone and Henry Joseph Coulton of the one part and Arthur Murphy Junior of the other part (the 1871 lease), save the last day thereof, subject to the yearly rent of £7.10s.0d (old currency) which said premises form part of the premises demised by the 1871 lease and two superior leases, namely an indenture of lease dated 24 January 1826 and made between William Smith, Martha Smith and Charles Frederick Smith of the one part and Thomas Coulton of the other part for the term of 300 years from 25 March 1826, subject to the yearly rent of £15 sterling and an indenture of lease dated 26 June 1829 and made between William Smith, Martha Smith and Charles Frederick Smith of the one part and Thomas Coulton of the other part for the term of 300 years from 25 March 1829, subject to the yearly rent of £6 sterling.

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

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

Date: 3 September 2004

Signed: Gartlan Winters (solicitors for the applicant), 56 Lower Dorset Street, Dublin 1

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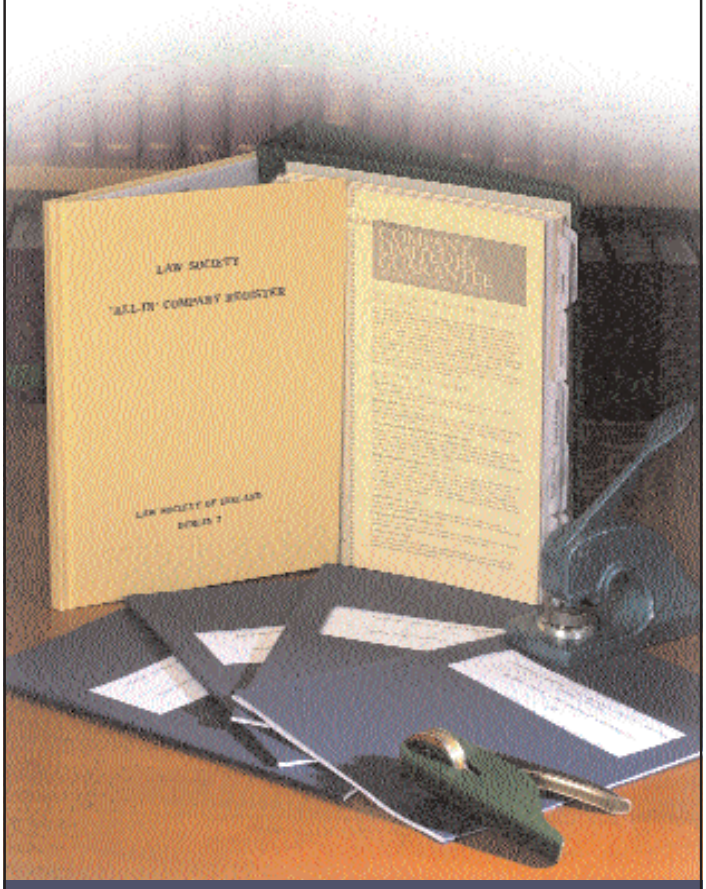

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