Law Society Gazette

Regulars

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Cover Story

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SOUTHSIDE JOHNNIES

The Southside Solicitors' annual dinner will be held in Dun Laoghaire's Royal St George Yacht Club on Friday 12 February at 7.30pm. The black tie bash costs €65 a head and the guest speaker will be Judge Frank O'Donnell. For more information, contact Justin McKenna on tel: (01) 280 0340, e-mail: jmk@pals.ie.

LADY GOLFERS FORE WARNED

The Lady Solicitors Golfing Society's spring outing is in Dublin's City West Golf Club on Friday 23 April. Contact the society's captain, Jane Mathews, at BCM Hanby Wallace, 88 Harcourt Street, Dublin 2, tel: (01) 418 6000, e-mail: *jmathews@bcmhanbywallace.com*.

FRIENDLY PERSUASION

Two former marketing and HR advisers at A&L Goodbody have launched *Persuasion*, a specialist consulting service in marketing, business development and human resources. According to Sharon Scally and Áine Maguire, the consultancy has already signed a number of leading firms in the professional services sector as clients. For further information, see *www.persuasion.ie*.

PrimeTime scoops Law Socie

Sue Nation, a one-hour *PrimeTime* special on bogus and fraudulent personal injury claims, was named overall winner of the Law Society's *Justice Media Awards* competition. This is a competition aimed at rewarding outstanding journalism in the print and broadcast media which contributes to the public's understanding of the law, the legal system or any specific legal issue.

At a ceremony in the Law Society's Blackhall Place headquarters recently, immediate past-president Geraldine Clarke presented the prize to reporter Ken O'Shea and producer Michael Kealy, whose programme also won the television category in the *Justice Media Awards*. As Overall Winner, they received a *Dublin Crystal* vase and a cheque for €1,500.

Explaining the judges' decision, Law Society director general Ken Murphy said: 'This may seem like an odd choice to those who don't know the Law Society very well, but there is no doubt that Ken O'Shea and Michael Kealy's *Sue Nation* was riveting television – and not just for lawyers. The programme exposed examples of fraudulent and exaggerated personal injury compensation claims, backed up by secret footage of the claimants, who were obviously fit and healthy.

Ken O'Shea and Michael Kealy receive their awards from immediate past-president Geraldine Clarke and director general Ken Murphy

'While the society disagreed with much of the analysis and conclusions in *Sue Nation* – not least the insurance industry's own fraudulent claim that lawyers were somehow responsible for the huge hikes in insurance premiums – the society has been consistent in firmly and unequivocally condemning fraudulent personal injury claims. Such bogus claims do exist, of course, but they are a tiny fraction of all claims made. However, Ken and Michael's programme was an excellent example of investigative reporting'.

The winners in each of the four other categories in the competition won a *Justice Award*, comprising a *Dublin Crystal* Joyce plate (and a €750

ONE TO WATCH: NEW LEGISLATION

European Arrest Warrant Act, 2003

The act gives effect to the council framework decision of 13 June 2002 on the European arrest warrant (EAW) and surrender procedures between member states. It came into effect on 1 January 2004. It replaces the existing extradition arrangements based on the Council of Europe's 1957 *European convention on extradition* and will extend to the accession states from May, or as soon as they adopt the necessary legal structures.

The EAW system applies to offences with a penalty of at least 12 months in the issuing state, or a custodial sentence imposed of at least four months. The principle of dual criminality, which requires that an act is criminal under the law of the issuing and receiving states, applies in general, but there are exceptions listed in the framework decision (reproduced in the schedule to the act). Some 32 serious offences are listed, including hijacking, terrorism, sexual exploitation of children and child pornography, trafficking in people, drugs and arms, fraud, money laundering, counterfeiting, murder, kidnapping, rape and illicit trade in nuclear materials. These offences are excepted from the dual criminality principle if they are offences under the law of the issuing state and attract a penalty of at least three years' imprisonment.

An EAW is a court order issued by the court of a member state, and addressed to a court in another member state, to enable prosecution of an offence or enforcement of a custodial sentence. The mechanism involves a central authority, currently the Department of Justice, receiving an EAW, verifying it and presenting it to the High Court for endorsement, whereupon it can be executed by the gardaí.

If the wanted person does not agree to being surrendered, the High Court must decide what order to make on foot of the warrant. If the person sought has not been convicted, a written statement from the issuing judicial authority is required, saying that a decision has been made to charge and try the person sought (section 11). This excludes the use of an EAW if the person is sought merely for investigation or questioning. A person surrendered under the EAW procedure may only be tried for the offences committed before the surrender and specified in the EAW, with certain limited exceptions. A person may not be surrendered to the issuing state, if the issuing state permits surrender to another member state or a third state unless certain safeguards are observed.

When a person is arrested on foot of an EAW, he must be informed of his right to consent to being surrendered to the requesting state, and his right to

ty media award

cheque), with the runners-up receiving a Certificate of Merit (and a cheque for €250).

The winner of the *Justice Award* in the **Daily Newspapers** category was Vincent Power of the *Evening Echo* in Cork for his eight-page supplement entitled *The law and you*, explaining how the justice system works. A Certificate of Merit went to Carol Coulter of the *Irish Times* for her article on the identification of sex offenders in criminal cases, particularly high-profile individuals.

John Burns of the *Sunday Times* won the *Justice Award* in the **Non-Daily Newspapers** category for an article entitled *Putting a hold on freedom*, explaining how the *Freedom of Information Act* had been used very successfully in the past and outlining why proposed changes would undermine the legislation. Certificates of Merit went to Kieron Wood of the *Sunday Business Post* for an article on problems in the family law system, and Tony Galvin of the *Tuam Herald* for an article highlighting the human aspects of the court system.

In the **Magazine** category, the *Justice Award* was presented to Mairead Carey of *Magill* for her story on allegations of Garda brutality, entitled *The heavy hand of the law*. A Certificate of Merit went to Anne O'Carroll of *Consumer Choice* for her articles on *Tenants and landlords* and *Rights of way*.

The *Justice Award* In the **Books** category was presented to Damian McHugh for *Going to court: a consumer's guide*, published by FirstLaw.

Emma O'Kelly of RTÉ's *Morning Ireland* programme won the *Justice Award* in the **Radio** category for her report on the ill-treatment of migrant workers working in this country and their lack of legal protection.

The *Justice Award* for **Television** was presented to RTÉ's Ken O'Shea and Michael Kealy for *Sue Nation*, who also won the Overall Winners award. A Certificate of Merit went to Eileen Magnier of RTÉ's *PrimeTime* for her report on Garda harassment of the *McBrearty family*, broadcast in October 2002.

No quantum leap for personal injuries board

Contracts for the production of a case-management system for the Personal Injuries Assessment Board are expected to be signed by mid-February, according to the Department of Enterprise, Trade and Employment. The department, which has been overseeing the tendering process, also said that a draft book of quantum might be available by the end of the month.

The closing date for receipt of tenders was noon, Friday 14 November 2003, and the tender documentation specified that the department wanted to receive the draft book of quantum 'by January 2004'. The delay in announcing winning tenders has cast doubt on PIAB's ability to get up and running before Easter.

The department told the *Gazette* that once the draft book of quantum was ready, it hoped to consult with interested parties in what it called a 'quality assurance exercise'.

'We haven't made a call on what kind of consultation process there will be yet', a spokesman said. 'It largely depends on our first assessment of what comes back to us. But we'll need some kind of input into it from both the legal and medical professions'.

Commenting on the slow progress of the PIAB, Ward McEllin, chair of the Law Society's PIAB Task Force, said: 'Only this week, the Department of Enterprise, Trade and Employment sought "tenders for service centre for Personal Injuries Assessment Board" with a closing date of 9 March next. It appears that the successful tenderer will run the assessment process. Clearly, we are a number of months away from a start-up date'.

legal advice and, if appropriate, an interpreter. He must be brought before the High Court as soon as possible, which may remand him in custody or on bail. A hearing must be held within 21 days, and again legal advice and an interpreter will be available.

Section 16 sets out the procedure around the making of a surrender order by the High Court and a possible challenge or appeal. If the High Court decides not to make an order, it must give reasons for its decision and release the person from custody. In the event that the High Court makes no decision within 60 days and then 90 days of the wanted person's arrest, there are arrangements for the central authority to pass on the reasons for this to the issuing judicial authority, so that the issuing state is kept informed. For example, section 18 makes for provision for postponement of surrender on humanitarian grounds, including a manifest danger to the life or health of the person concerned.

Section 37 prohibits surrender of a person if this would conflict with the ECHR, the constitution (other than the list of offences to which dual criminality does not apply), if it would facilitate prosecution or punishment for reasons of sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation or if it would leave the person liable to torture or inhuman or degrading punishment, or the death penalty.

The act contains provisions to deal with cases where the person sought is already the subject of criminal investigation, charges or a sentence in this jurisdiction, or a *nolle prosequi* has been entered in respect of the offence which is also the subject of the EAW. Safeguards include provisions to deal with cases where immunity under Irish law has been granted (by pardon, amnesty or change of the law), where too much time has elapsed, under certain circumstances of double jeopardy, if the age of the person would exclude the commission of an offence under Irish law on the facts, and if the offence in question was committed outside the issuing state and would therefore not be an offence under Irish law.

There are also provisions dealing with multiple EAWs, and EAWs conflicting with requests for extradition. Requests for arrests from the International Criminal Court receive priority over EAWs. Further provisions deal with the seizure of property and its return, and the issuing of EAWs by the Irish state. There are provisions to ensure that time spent in custody as a result of an EAW is credited against any sentence. G

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

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UK court sets benchmark for ECHR

A landmark award of damages for breach of the *European convention on human rights* has recently been made by the UK Court of Appeal and may shine some light on how such cases may be handled in Irish courts, *writes Alma Clissmann*.

The plaintiffs in the three cases reported as *Anufrijeva v London Borough of Southwark* ([October 2003] EWCA Civ 1406) were asylum seekers who argued that maladministration by the defendant local authority and the Home Office resulted in breaches of their rights to a private and family life. Although they failed to establish breaches of the convention, the Court of Appeal used the occasion to discuss the question of damages under the UK *Human Rights Act 1998*.

In the first case, the plaintiff Lithuanian Russian family argued that failure of the local authority to perform its statutory duty to provide them with accommodation that met the special needs of one member of the family resulted in the family's quality of life being seriously impaired. In the second case, a Libyan asylum seeker argued that the stress he suffered due to the delay of over two years before being granted refugee status, and the inadequate financial support he received during much of this period, resulted in psychiatric injury. The third case involved an Angolan refugee who had to wait 22 months before his family was given permission to join him. He argued that much of the delay was caused by maladministration and infringed his right to family life under article 8.

In his judgment, Lord Chief Justice Woolf found that damages in public law cases played a different role from damages in private law proceedings. This was based on a consideration of ECHR case law on 'just satisfaction', but also on the approach of the European Court of Justice in dealing with community law. The Court of Appeal then set out the criteria against which awards of damages for breach of the ECHR should be judged.

PIC: SIPA PRESS/REX FEATURES

European Court of Human Rights, Strasbourg

It found that in certain cases comparable awards to those made in tort cases may be appropriate, particularly if the contravention of the convention consists of both a tort and a breach of convention principles. Generally, damages for non-financial loss should be assessed on an equitable basis and suitable comparators were awards made by ombudsmen. In cases of maladministration, the scale of damages should be modest because resources are limited and high awards would deprive other members of the public. Finally, as the cost of proving violation of rights was likely to far exceed any award made, the court set out guidelines to avoid this where possible, for example, by requiring use of appropriate complaints procedures or recourse to an ombudsman before permission for judicial review would be granted.

The *European Convention on Human Rights Act* was enacted in this country in June and came into force at the end of 2003.

• *The Law Society hopes to report regularly on developments in the application of the* European Convention on Human Rights Act, 2003. *Please send any citations of the act in pleadings or judgments to the Law Society's parliamentary and law reform executive Alma Clissmann at a.clissmann@lawsociety.ie.*

FIRST ECHR CASE IN IRELAND

The first legal challenge under the *European Convention on Human Rights Act, 2003* opened before Mr Justice Peter Kelly in the High Court on 27 January. A Cork mother, Marie O'Donoghue, suffered a two-year delay in obtaining legal aid in a family law matter. Her case is that the delay in accessing justice contravened article 6.1 of the convention. If successful, the case could result in additional resources being made available to the legal aid scheme. The solicitors acting for O'Donoghue are Ernest J Cantillon & Co.

Row looms over closure of Galway courts

Galway solicitors have said they will oppose the transfer of Headford District Court to Galway City. The move is part of a proposal to close six rural courts in County Galway, which was announced on 21 December last.

The Courts Service proposal recommends closing Headford and Oughterard courthouses and moving the District Court sittings to Galway. It also wants to close Maam and Letterfrack courthouses and to hear those cases in Clifden. Derreen's court is set to move to Tuam, while the Carna court will transfer to Derrynea, keeping gaeltacht hearings in the gaeltacht area.

At a recent meeting of Headford solicitors, the plan was branded 'totally unacceptable'. According to Dermott Murphy, one of 11 solicitors practising in Headford, the town's population has grown by 20% since 1998 and the plan 'takes no cognisance of the rapid development of the area'.

'Nearly 400 cases are heard in the District Court each year', says Murphy. 'The decision has come as a surprise in view of the fact that the courthouse was renovated just a few years ago'.

According to the Courts Service, Headford District Court sits seven times a year, while the other five courts have five or fewer sittings. 'Given the levels of business and improvements in transport and mobility, it is no longer viable to spend more money where there are only a few sittings each year', it says.

PSYCHOTHERAPY AND THE LAW

Barrister and former law reform commissioner Simon O'Leary will discuss *Legal privilege and psychotherapy* at a lecture in Trinity College's Swift Theatre on Staurday 6 March. The lecture runs from 10.30am to 12.30pm and costs €15. This is the latest in a series of public lectures on psychotherapy and the law.

rochford brady group

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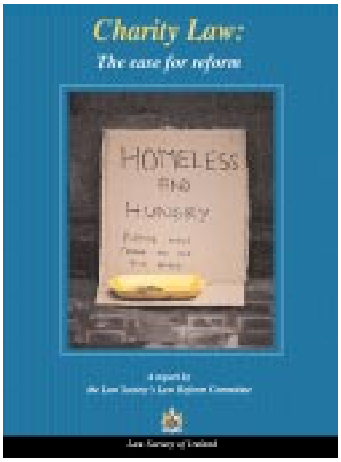
Reforms proposed for charity law

A radical reform of charity law has been proposed in a new 18-page consultation paper from the Department of Community, Rural and Gaeltacht Affairs. The report (which can be found at *www.pobail.ie*) recommends establishing a public register of charities and proposes an integrated system of registration and regulation (including regulation of fund raising).

It also proposes grappling with the definition of 'charity' to bring it into line with modern expectations. The definition of charity is the product of judge-made law over the past 400 years, and a statutory definition would receive a wide welcome, particularly if it was accompanied by way of getting authoritative interpretations without the expense of having to go to the High Court.

The consultation paper suggests putting in place a regulatory framework for registered charities, to be managed by an existing regulatory agency or a new



charities body. In addition to regulation, this would enable rationalisation of the various functions in relation to charities currently undertaken by a range of different bodies including the attorney general, the Commissioners for Charitable Donations and Bequests, the Revenue Commissioners and others. It also recommends codification and clarification of the rules for trustees.

Many of the proposals in the consultation paper echo recommendations made by the Law Society's Law Reform Committee in its 2002 report *Charity law: the case for reform*.

HIBERNIAN LAW LECTURE

The fourth annual *Hibernian law journal* lecture will be held at the Law Society's Blackhall Place premises on 15 March. The subject of the lecture is *Sanctions and international law: connect or disconnect* and the speaker is Professor Andreas Lowenfeld of New York University School of Law. The event will begin with a wine reception at 7.30pm, and all are welcome to attend.

Commercial court open for business

Ireland's first Commercial Court opened its doors on 12 January. This division of the High Court will handle cases where the value of the claim is at least €1 million. Proceedings that fall within the court's remit are defined in the *Rules of the Superior Courts* and include intellectual property cases and judicial reviews.

The court is a five-minute walk from the High Court, on 12-13 Bow Street, Dublin 7. Cases from the commercial list will be heard on the Friday of each week. Relevant cases that are instigated on or after 12 January 2004 can be transferred to the commercial list.

Mr Justice Kelly and Ms Justice Mary Finlay Geoghegan will hear and determine proceedings and applications to the Commercial Court. The registrar is Paula Healy, who can be contacted on tel: 087 292 5771.

• Mr Justice Kelly will give a seminar on the workings of the Commercial Court in the Law Society on 10 March. Details can be found in the CPD brochure circulated with this issue of the *Gazette*.

Solicitors have been a voice fo

The solicitors' profession should be proud that it took a stance for fairness and justice in the PIAB debate, writes Ward McEllin

The enactment of the *Personal Injuries Assessment Board Act, 2003* disadvantages accident victims for the benefit of negligent employers and insurance companies. The Law Society opposed this unfairness on grounds of principle. We were right to do so.

The passage of this measure into law seems like a good time to take stock.

Let me begin by stating again, as has been on the public record for many years, that the society will always welcome any fair and sensible proposals to improve the current system for dealing with personal injury claims. Reform is long overdue. Insurance premiums in Ireland are far too high, although the enormous increases of recent years cannot in any way be explained by the cost of the litigation system.

We have not been in favour of reform only in the abstract. In October 2002, as part of the most comprehensive expert report ever produced on the reform of the personal injury litigation system in Ireland, the society produced no less than 50 specific recommendations that would, at little or no cost, have dramatically improved the system. Major reductions in insurance premiums would have resulted if the savings were passed on to premium payers.

Unfair and uneconomic

However, we feared from the first publication of the Personal Injury Assessment Board report that PIAB, as proposed, would be neither fair to accident victims nor economically sensible. Unfortunately, our views on both of these fronts have been borne out by the final detail that has emerged.

At the time of the government's publication of the PIAB report in March 2001, I was president of the Law Society. I immediately established the society's PIAB Task Force. As a practitioner in the west of Ireland for more than 25 years, I have practised primarily in personal injury litigation, both plaintiff and defence sides. Based partly on that experience, but primarily as president of the society to send a signal in relation to the central importance of this proposal for the profession, it was suggested to me with the full support of the Council that I should chair the taskforce, which I did. My successors as president have re-appointed me as chairman every year since. As a result, I and the other members of the task force have spent countless days away from our offices on this project, meeting every few weeks for almost three years.

The other members of the taskforce appointed by the Council comprise some of the most experienced personal injury litigation solicitors in the profession. We were invaluably assisted by the society's top executives. I take this opportunity to thank some of the most dedicated and able colleagues it has ever been my pleasure to work with.

From the beginning, we took the professional approach of not relying exclusively on our own expertise but of buying in special expertise where necessary. Accordingly, over

Key features of *Personal Injuries Assessment Board Act, 2003*

- Signed into law by president of Ireland on 28 December 2003, but requires commencement orders, which have not yet been made, before personal injuries claims must be submitted to it (section 2)
- Intended to apply (probably from some time after mid-March 2004) initially only to employer liability claims but from 1 June 2004 to all personal injury claims (public comments from tánaiste Mary Harney and chairperson of the board Dorothea Dowling)
- Various terms defined for the purposes of the act (section 4)
- Regulations and rules required to establish the detail of how PIAB will in fact operate (sections 5 and 46)
- Nothing in the act affects proceedings brought before its commencement (section 6)
- Nothing in the act affects the right of any person to seek legal advice in respect of a claim (section 7)
- When an order has been made applying the act to a relevant category of claim (employer liability claims initially) court proceedings may not be brought in respect of such a claim without prior submission to and authorisation by PIAB (section 12)
- Notwithstanding this, a court will be at liberty to grant an interlocutory injunction requiring evidence to be preserved (also section 12)
- If a respondent does not consent to an assessment being made (on the grounds that it has decided to deny liability at this stage), then PIAB will authorise a claimant to bring court proceedings (section 14)
- A respondent's consent to a PIAB assessment in any particular case will not constitute an admission of liability or be capable of being used in evidence in any subsequent proceedings (section 16)
- Charges may be required to be paid to PIAB by applicants and/or respondents (section 22)
- PIAB may require a claimant to submit himself or herself to a medical examination by a PIAB-appointed medical practitioner (section 24)
- Either claimants or respondents can reject PIAB's assessment (section 30)
- If accepted, an assessment can become a legally enforceable 'order to pay' which will operate as if it were a judgment of a court (section 40)
- Fees or expenses incurred by a claimant, 'reasonably and necessarily ' in the opinion of PIAB, may become payable by the respondent (section 44)
- PIAB should make assessments within nine months, which period may be extended by a further six months (section 49)
- Although claimants are free to take advice from solicitors at any time, PIAB will engage in direct communication only with the claimant, although, on request, it will simultaneously copy correspondence to a solicitor (repeated statements in the Dáil by the tánaiste Mary Harney).

Ken Murphy

r fairness for accident victims

Ward McEllin, with members of the Law Society's PIAB Task Force

time, the task force availed itself of professional expertise in a range of areas, including constitutional law, economics, public relations, legal costs accountancy, public affairs and insurance reserving, among others. In addition, we met with solicitors from neighbouring jurisdictions, who were experts in personal injury reform in England and Wales, Scotland and Northern Ireland. We also sought to learn from looking at systems further a field.

More detail emerged over time as to how PIAB would be established and operate. We discussed our deep concerns both in writing and face to face with the minister driving the agenda, the tánaiste Mary Harney. We also met with her colleagues on the cabinet sub-committee on insurance reform and with other cabinet members. We held discussions with a wide range of the interest groups involved in the debate including the Bar Council, the Irish Congress of Trade Unions, ISME, the Alliance for Insurance Reform and many others.

Most importantly, we met with our colleagues in the solicitors' profession. At literally dozens of bar association meetings throughout the length and breath of the country, I, my presidential successors and the director general, briefed many hundreds of members of the profession in great detail on the PIAB campaign. We sought their support, which we readily received, for the actions we were taking. At the end of every briefing we asked the bar association members if they could think of anything which the society should do on this issue which it was not doing. On the rare occasions that a new idea came forward, we always pursued it.

The society's campaign for fairness on this issue is by no means over. We are at present assisting the Human Rights Commission, which is investigating very seriously our complaint that the rights of accident victims are likely to be violated by PIAB. As colleagues will see from the letter sent to all solicitors by the president, Gerry Griffin, on 27 January 2004, the society is keeping its members fully to up-to-date with all relevant information it has about PIAB and is preparing a series of CPD lectures on the subject to be held nationwide soon.

Anti-claimant agenda

The tánaiste has said many times that this 'reform' of the compensation system in Ireland began in the 1970s. Something akin to PIAB was recommended by an Oireachtas committee chaired by Ivan Yeats TD in 1986. Then and since, the society has welcomed sensible reform. But we have consistently opposed the anti-claimant agenda of the business and insurance lobbies, which, with the establishment of PIAB, has regrettably enjoyed a major success over the interest of victims.

The PIAB project has been driven by a political, rather than an economic, agenda. This is clearly demonstrated by the fact that the tánaiste refused to undertake a cost benefit analysis in advance of PIAB and was happy to proceed even in the absence of any guarantee from the insurance industry that, if savings were to result, they would be passed on to premium payers rather that than retained by shareholders. Even though it had been clear for at least 18 months that the establishment of PIAB was politically inevitable, a number of significant achievements resulted from the society's lobbying.

Objectionable personal injuries advertising by solicitors is now prohibited. The right of victims to legal advice was enshrined in section 7 of the act. The tánaiste conceded that a victim's correspondence with PIAB would be copied simultaneously to the victim's solicitor. Section 12 expressly provides a right to obtain a court injunction to preserve evidence of liability even in advance of a claim PIAB. Public representatives of all parties now accept that what has been created is an unfair system. The system as enacted is seriously flawed, and therefore the independent advice and assistance of a solicitor is needed now more than ever by anyone pursuing a claim for compensation for personal injuries.

The only vested interest in this debate that did not have a well-funded and powerful lobby to support it was that of the victims of accidents. As a consequence, their interests have been largely ignored. It should be a source of pride that, despite the vilification which it attracted, the Law Society and the solicitors' profession generally took a stance for fairness and justice in this debate. We were right to do so. G

Ward McEllin is chairman of the Law Society's PIAB Task Force.

Dáil debates focus on unfairn

It's not just lawyers who have been saying that the tánaiste's design for the Personal Injuries Assessment Board will be unfair to claimants, writes Ken Murphy

Solicitors can feel a certain vindication from the fact that many non-lawyer public representatives from all parties have expressed public-interest concerns about the fairness of the Personal Injuries Assessment Board (PIAB) for claimants.

Opposition deputies put forward dozens of draft amendments to the bill that reflect victims' interests. Almost all were rejected by an tánaiste Mary Harney. However, several TDs and senators from her Fianna Fáil partners in government also expressed deep concern at the unfairness of the manner in which she has designed the operation of the PIAB. The last issue of the *Gazette* (December 2003, page 5) gave a flavour of the criticisms of the bill that came from all parties and many independents in the Seanad. Here, I want to concentrate on the subsequent debates at the various stages in the Dáil.

IMPRESSIVE LOBBYING

'Those of us in the house who are dealing with this bill have received submissions from a range of groups, including the Bar Council and the Incorporated Law Society. The latter body, through its various branches and individual members, has re-enforced its case. I believe none of us is unimpressed by the society's ability to lobby as it does. The fact that the profession has a vested interest should not preclude us from giving its submissions the consideration they deserve, as I have tried to do'.

– **Brendan Howlin TD** speaking at the second stage debate 27 November 2003

Committee stage

The Law Society gave numerous direct briefings to deputies – to party spokespersons, in particular – from all sides of the house. It also co-ordinated meetings between bar associations across the country and local deputies. The influence of these briefings became manifest in the course of the Dáil debates. While all parties remained supportive of the bill throughout, solicitors' key criticisms of the unfairness of the bill for the victims of accidents became central to the debates at all stages of the bill.

Scores of deputies revealed genuine unease about the anti-claimant bias in the legislation and the tánaiste's refusal to accept most of the very reasonable amendments put forward by the main opposition parties. They did this both publicly and privately to solicitors who spoke to them. Harney was given a tough time at the Dáil committee stage, particularly by the Fine Gael and Labour spokesmen on enterprise, trade and employment, Phil Hogan and Brendan Howlin, and independent deputy Paddy McHugh. Although she comprehensively lost the debate on many key points, she had the whipped majority she needed to ensure that she always won the votes.

Unfair to the claimant

The Law Society raised two main concerns with the members of the Dáil committee. First, the exclusion of legal representation for claimants, even where it was the claimant's wish to be represented and to pay for it themselves. Second, the fact that the insurance company respondent would be able to put the claimant on full proof of liability in the courts at a later stage, despite having apparently accepted liability for the purposes of the case going to the PIAB.

This second point is the so-called 'two bites at the cherry', which, speaking at the committee stage, Phil Hogan described as 'fundamentally unfair'. He said: 'There is a farcical situation where an insurer can compel a claimant to go to the PIAB. The procedure for reaching an assessment can take up to 16 months. At the end of that process, the insurer can reject the assessment and put the claimant through the legal process in the courts. This puts the claimant in a grossly disadvantageous position'.

Brendan Howlin echoed this point, saying: 'The claimant is put in an invidious position where he or she is lulled into the false sense of security that he or she does not need to accrue basic evidence of liability and responsibility. At the end of the process, he or she may well have to do that despite a time-lapse of perhaps 18 months and in a position of considerable disadvantage'.

Urging the tánaiste to allow the PIAB to communicate directly with solicitors for claimants, Deputy Howlin said: 'I am certain that if I was personally involved in a complicated case, I would take legal advice, despite being able to read legislation reasonably well'. He continued: 'When a person wishes to engage legal advice, as some people will wish to do, the PIAB must be allowed to communicate through his or her solicitor. This is

WITH FRIENDS LIKE THESE!

'I know who mentioned it in the Seanad, and it was not me. I am not the author of this "lawyer-free zone". Some of my best friends are lawyers. I have no doubt in any developed economy lawyers will always do well. If we want to reduce the cost of insurance here, we must do things differently in the future'.

– **Tánaiste Mary Harney** speaking at the committee stage on 10 December 2003

ess of personal injuries board

Phil Hogan: 'Two bites at the cherry fundamentally unfair'

normal procedure'.

Independent TD and Dáil committee member Paddy McHugh said: 'The claimant is totally exposed because he or she must put all their cards on the table from day one. He or she is totally disadvantaged if the case ends up in court. That is unfair to the claimant'.

In the course of one heated exchange with the tánaiste, Brendan Howlin put it well: why should the claimant be the one who is screwed?

Numbed by nonsense

Incredulity was expressed by opposition deputies when the tánaiste brought forward her own lengthy committee-stage amendment which, she said, merely represented a statement of the existing law but which, she had been advised by the attorney general, should be introduced. She said that it met criticisms of the bill that had been raised in the Seanad.

The amendment makes express provision for a claimant to seek an interlocutory injunction requiring evidence to be preserved or restraining interference with the condition of the place in which an accident occurred. Phil Hogan described this as 'a significant change which apparently could be applied to prevent a county council repairing a road!'

Sinn Féin's Arthur Morgan asked: 'What would be the consequences for industry if such an order were granted by the High Court? I can imagine the pints not rolling off in the Guinness factory any more, for example. Factories all over the country could come to a standstill. This is a significant deviation from the original bill'.

Brendan Howlin said: 'I am numbed with shock at what the tánaiste is saying. The attorney general has told her to put this provision into the bill, although it is a complicated procedure which can only be invoked through application to the High Court. The claimant is the only person who can invoke it, yet he is encouraged not to have any legal advice, and if he does take legal advice, he must pay for it himself. This is a sham and a nonsense'.

Second stage

The committee stage of the bill was, of course, followed by the Dáil's second stage, which was held over two days, with speeches from 35 deputies. Most of these were well-prepared and thoughtful contributions. But the public would not have got this impression from the brief media reports that quoted only a handful of deputies. From a public interest point of view, it is regrettable that there should have been so little coverage of this serious and important second-stage debate. Moreover, not a single word of media reporting appeared in relation to the many hours of committee-stage debate.

It was not only opposition members that expressed deep concerns about the unfairness of the PIAB (although all deputies supported the bill in principle and voted in favour of it when required). One of the many Fianna Fáil TDs who called for changes was Noel O'Flynn, who said: 'How will claimants be able to deal with such an unfamiliar ordeal as assembling professional documents and putting forward their case without professional help? The government's implementation group suggested that, where legal representation is not provided for, there could be a *de facto* inequality between the claimant and the insurance company. I agree with that because the insurance company will have a professional team available to it'. G

Ken Murphy is director general of the Law Society of Ireland.

WHO REPRESENTS THE VICTIM?

Jim O'Keeffe TD: 'Who represents the victim in all this? There is no such representation on the interim board that has been established. Big business is represented by the chairperson, Dorothea Dowling. IBEC is also represented'.

Tánaiste Mary Harney: 'That is rubbish, she does not represent big business'.

Jim O'Keeffe TD: 'Of course she represents big business'.

– Dáil exchange during second stage debate on 28 November 2003

NO DIRECT COMMUNICATION

'The difference between direct communication with a lawyer as opposed to the claimant is a control issue. The claimant has to remain in control of his or her case. If the claimant wishes to have a copy of the correspondence sent to their lawyer at the same time, that will be done. But if we accept Deputy Howlin's amendment, there will be a lawyer involved in every case and we do not need that. I have no doubt in complicated actions citizens will take the advice of their family lawyers. My experience as a politician serving in these houses of the Oireachtas for 26 years has taught me that people rarely move from their family solicitor. I often ask constituents in west Dublin why they still travel into town, and it is because the solicitor has been in the family for perhaps two generations, and that is not a bad thing'.

– **Tánaiste Mary Harney** speaking at committee stage on 10 December 2003

Revealed: the first EU *Love*

God forbid that the Eurocrats should ever decide to regulate romance. But on the off-chance that they do, Eamonn Hall takes a tongue-in-cheek look at what at what such EU love legislation might contain

As all romantics know, 14 February is St Valentine's Day. St Valentine is a person of some mystery. Legend has it that Valentine was a priest and secretly married couples, offending the prefect of Rome, who condemned him to death. The legend is that his martyrdom was carried out on 14 February 269AD. His last note on the eve of his death was reported to be 'from your Valentine'. Relics of St Valentine are said to reside in Whitefriar Street Church, Dublin, having arrived from Rome with considerable solemnity on 10 November 1836.

The convention of sending Valentine cards to a loved one on 14 February may also have arisen because 14 February apparently coincided accidentally with the Roman mid-February fertility festival of Lupercalia. There was also a belief that birds began to choose their mates on Valentine's feast day – the beginning of spring. This may also explain the origin of choosing one's object of love as a Valentine. So perhaps it is appropriate to consider the law of romantic love in the days approaching St Valentine's Day.

Let readers be warned! This brief article is neither learned nor profound. For the sake of absolute clarity: it is written in a humorous vein, but in recognition of the deep innate desire of every man and woman (solicitor, barrister, judge and non-lawyer) to love, to be loved and cherished. It examines the issue of romantic love up to an engagement to marry. Accordingly, the laws relating to engagement and marriage are not considered here.

The look of love: but weapons and small children usually don't mix well

Readers are referred to learned authors and scholars in relation to the wider issue of romance in the context of the marriage bond; these include Alan Shatter, Geoffrey Shannon, Muriel Walls, Denis Bergin, Professor William Binchy, Dean Paul O'Connor, Peter Ward, Paul Ward, Kieron Wood, P O'Shea, J Nestor, C Power, Rosemary Horgan, Louise Crowley, Eugene Davy, Sarah Farrell, Brian Gallagher, Eleanor Kiely, Joan O'Mahony, Colm Roberts, Cormac Corrigan, and indeed others.

So, assume a lawyer, at short notice, has been asked to draft an outline of a European law on the approximation of laws governing romance at its early stage of development. Article 34(2)(b) of the *Treaty on European Union* provides that the council may adopt framework decisions for the purpose of approximating laws and regulations of member states. Framework decisions are similar to regulations and directives in the sense that article 34(2)(b) provides that they shall be binding upon member states 'as to the result to be achieved but shall leave to the national authorities the choice of form and methods'. For convenience, however, we shall describe the legislation in question as a European directive.

Peace, love and understanding

Recitals are very common in European legislation. They are statements that explain or lead up to the operative part of a legal instrument. I would suggest a new convention in relation to recitals, considering there is merit in quotations from great jurists, philosophers and writers as a justification for certain action. The first recital suggested is from the great lawyer and statesman Marcus Tullius Cicero (106-34 BC), from his work *On friendship*:

'For what is there, in the name of gods and men! who would wish to be surrounded by unlimited wealth and to abound in every material blessing, on condition that he love no-one and that no-one love him? Such indeed is the life of tyrants – a life, I mean, in which there can be no faith, no affection, no trust in the continuance of goodwill: where every act arouses suspicion and anxiety and where friendship has no place'.

A second recital may be from Archibald McLeish, who wrote in *Time* on 22 December 1958:

'Man can live his truth, his deepest truth, but he cannot speak it. It is for this reason that love becomes the ultimate human answer to the ultimate human question'.

Kingsley (about whom the present author knows little) wrote on the topic, and his words may constitute the third recital:

'A blessed thing it is for any man or woman to have a friend; one human soul whom we can trust utterly: who knows the best and worst of us, and who loves us in spite of our faults; who will speak the honest truth to us, while the world flatters us to our face and laughs at us behind our back; who will give us counsel and reproof in the day of prosperity and self-conceit; but who, again, will comfort and encourage us in the day of difficulty and sorrow when the world leaves us alone to fight our own battle as we can'.

My funny valentine

Any form of legislation without definitions would be most unusual. Accordingly, some definitions are suggested

directive (2004/2/EC)

for the purpose of the proposed directive.

'Love' includes a state of being involving affection, a state of feeling for a person which arises from recognition of attractive qualities in that other person.

'Romantic' is defined as having the character or attributes associated with romance arising out of attractive qualities recognised in another.

'Date' is defined as a meeting of a romantic nature. 'Invitor' and 'invitee' are defined as including a man, woman, boyfriend, girlfriend, lover and significant other. Note that this definition is not exhaustive.

'Relationship' is that sense of existence enjoyed by a person who considers that he or she has a romantic involvement with another person and acts accordingly. 'Relationship' would include such phenomena as dating, seeing each other, courting, 'going steady' and 'going out with someone'.

This charming man

The preliminary legal issue surrounding romantic love may be described as the 'invitation to treat' stage. There should be no expectation of a legally-binding nature on the part of an invitor or invitee in the context of a date at the 'invitation to treat' stage. While it is not mandatory, the invitor seeking a date with another person should give appropriate notice. For example, in relation to a date for a Saturday night, the invitor should telephone or otherwise communicate with the proposed invitee by Wednesday at the latest. Any shorter notice (save in exceptional circumstances) may indicate that the invitee is available on demand.

The invitor is expected to pay for any disbursement on the date. Dinner on a first date will be construed (unless otherwise specifically stated) as signifying serious romantic intent on the part of the invitor. This is so because in some countries of the European Union dinner is significantly expensive. An invitation to lunch in the context of a first date is regarded as a less serious form of intent than dinner. On a first date, an invitation to an establishment where persons gather, *inter alia*, for the purpose of consuming alcoholic or non-alcoholic liquids (commonly referred to as 'pubs') would not be regarded as being invested with any great significance in the context of intent in relation to romantic love.

Non-meal and non-drinking activities, such as a walk in the park or a visit to a museum, are regarded as somewhat inappropriate on a first date because the parties may not be aware of each other's preferences.

'Puffing', either before the first date or on a first or second date, may be acceptable in a mild form, but blatant puffing is not acceptable and puffing should not continue beyond the third date. Puffing may be described as an act of making laudatory notices, a form of advertising. Reference may be made here to *Carlill v Carbolic Smoke Ball Company* ([1893] 1 QB 256, 261 CA), where 'puffing' is considered.

A second or third date should still be regarded as coming within the 'invitation to treat' stage. After the third date involving feelings of romance, this post-third-date stage will be construed as going beyond the invitation-to-treat period. Accordingly, there is a threshold after three dates. One may refer to 'the three-date rule'; that is, after the third date in legal terms, the concepts of offer, acceptance and consideration come into being – always subject, however, to either party having the unique right to terminate the relationship without liability in damages.

In the early stages of a romantic relationship, meeting parents, for example, or going on holidays together signifies a significant degree of romantic intent.

Parties in a romantic relationship owe a significant degree of care to one another. In particular, parties involved in romantic relationships must be aware of the eggshell doctrine: you take a person as you find him. The courts have held that there is no difference in principle between an eggshell skull and an eggshell personality: see *Malcolm v Broadhurst* ([1970] 3 All ER 508 at 511, applying *Love v Port of London Authorities* [1959] 2 Lloyd's Rep 541); see also *Quinn v JW Green (Painters) Limited* ([1966] 1 QB 509, [1965] 3 All ER 785, Court of Appeal) and *Constable v TF Malty Limited* ([1955] 1 Lloyd's Rep 569).

Love don't live here anymore

Implicit in the relationship of romantic love that does not mature into marriage is that either party may terminate the relationship at any time. Once a party has decided to end the relationship, this should be communicated promptly to the other party. The moving party should bear in mind the sensitivity of the other party. 'I am not yet ready for a serious relationship' is regarded as a fair and gentle way of ending a romantic relationship. If the relationship is terminated because of certain behaviour offensive to the other person,

VOX POP

Do you think you would get a fairer deal from the Personal Injuries Assessment Board than you would in court?

Given the high level of small claims that the courts have to face, it is probably in some way beneficial that we'd have a board that would act, but not in an intimidating fashion.
Sam McCarthy, postgraduate student in legal studies

I probably would, but solicitors and barristers mightn't.
Desmond Traynor, TCD graduate, writer

Depending on the make-up of the board – if it's political or how it is judged. I think in the long term it will benefit employers and employees.
Patrick Bennett, Pat's Party Rentals

I feel that the board will probably be very fair and overall very positive for the general public because I think we've become very much a claims society, which causes a lot of problems for employers.
Dolores O'Connor, Grab & Go Snack Food

To be honest, I don't know anything about it. I haven't heard anything in the news. It is not widely publicised.
Carl Lynch, the Bar Council IT department

an oral 'notice to cure' may be demanded. The 'notice to cure' should give an appropriate period for the offending behaviour to be corrected.

In the absence of compelling reasons, a fiduciary duty to each party should exist after the termination of a romantic relationship. This fiduciary duty essentially means that neither party to the romantic relationship should disclose to the world the details of the relationship. This is in the common good and in the interests of both parties who may, most probably, wish to enter into another romantic relationship with some other party.

It should be clearly stated that, in addition to what has been set out above, the entire corpus of jurisprudence and laws set out in the relevant constitutions of member states – including statute law and case law relating to the dignity of the human person, the doctrine of consent, undue influence, duress, warranties, misrepresentation, *uberrima fides*, and the doctrines relating to *ex turpi causa non oritur actio* and *ex delicto* – would apply to the conduct of the romantic relationship.

Second that emotion

If the European commissioner responsible for legal affairs or, indeed, the minister for justice, equality and law reform in Ireland were to address the European parliament or the Dáil or Seanad on the proposed directive, the

Draft EU constitution fails the

The EU's draft constitution contains several serious flaws, which, if not addressed, will prevent its success, argues David Mangan

The advantages of giving the European Union a constitution are enormous. The benefits to stability, fairness and liberty where governing powers are themselves governed by fixed principles are well known to most European states. However, the draft constitution now under discussion possesses none of the virtues of constitutional government. It contains in its structure such flaws and omissions that its great promise will not be realised.

Separation of powers

Nothing could be clearer in principle or better proved by practical experience than the benefit to political liberty of fixing a clear separation of powers in a constitution. There is every sign that, in the draft constitution, the new union unwisely intends to ignore this principle. According to the text, the institutions of the union are to be endowed with a range of overlapping powers, separated one from another according to no clear principle or any definite scheme. The functions of legislating, judging and executing policy are jumbled according to an 'all-in' system of legislating by which no one institution appears to have a monopoly on legislative proposal, amendment, veto or execution. The system of legislating is to remain, as at present, a bewildering muddle, driven by exotic forms of 'co-decision' and 'co-operation'.

The least of the ill-effects promised by the obscurity of this division of powers is that, in a governing system in which no lines of responsibility can be clearly ascertained, government will act – with a certain inevitability – irresponsibly. Worse is to be feared where one or another of the ill-defined branches of government, in the absence of any internal constraints, concentrates a multitude of functions in its own hands, inaugurating a kind of illiberal arbitrary government or bureaucratic tyranny. Such fearful outcomes cannot be dismissed as mere possibilities, since it is the very nature of the job of constitution-making to guard against the worst human instincts and passions and to guarantee individual liberty against the most pessimistic outcomes. To fail to divide the functions of government clearly and to monitor the division by internal or external constraints is a grave error by the drafters and is a frank repudiation of the authoritative experience of the vast majority of constitutional democracies.

The community wants to enjoy the enhanced authority of a constitutional scheme without accepting its discipline. A comprehensive and effective scheme of judicial review, by which enacted laws can be challenged in the courts for their repugnance to or inconsistency with the constitution, is the essential sign that a constitutional government means to bind itself to observe its own fundamental laws. It is plain from the text of the draft that the EU does not take seriously its responsibility to act within constitutional limits. The laws and acts of a reformed union will not receive any serious scrutiny by the judicial powers, since no such power or jurisdiction to do so has been erected by the draft. This remediable defect, however, is overshadowed by more serious defects sown throughout the text – defects which make it clear that, even if an authority for judicial review were to be established or recognised by judicial practice, the text of the draft constitution would prove inadequate to effectively ground a challenge to an unconstitutional law. For example, the union only weakly commits itself in article I-7(1) on fundamental rights to 'recognise' the rights set out in the charter of fundamental rights. Similarly, it is impossible to see how the obligation given in article I-9(2) on fundamental principles – committing the union to act 'within the limits of the competences conferred on it by the member states in the constitution to attain the objectives set out in the constitution' – could be anything other than a dead letter in a case where one of the institutions of the union had exceeded the bounds of its loosely-defined powers. The most effective guarantee that the institutions established under a constitution will generate the benefits of constitutional government is if they constrain themselves to act within the terms of the constitution in all their activities. It is mere logic to express this constraint in the clearest possible terms within the constitution itself, and to police it by a scheme of rigorous judicial review.

No mechanism for impeachment

The conventioneers have saved themselves from the unsavoury task of legislating for the abuse of powers conferred by the constitution in the hands of their EU colleagues. No detailed jurisdiction is provided

commissioner or minister would justify the framework decision as being in the common good. The regulation of romantic love is to the benefit of mankind. Romantic love is a state of being which enhances the human personality and human dignity, subject to the rules set out above. The minister or commissioner could conclude his remarks with the immortal words written in *Sonnet 18* by William Shakespeare:

'Shall I compare thee to a summer's day?
Thou art more lovely and more temperate:
Rough winds do shake the darling buds of May,
And summer's lease hath all too short a date:
Sometime too hot the eye of heaven shines,
And often is his gold complexion dimmed,
And every fair from fair sometime declines,
By chance, or nature's changing course untrimmed:
But thy eternal summer shall not fade,
Nor lose possession of that fair thou ow'st,
Nor shall death brag thou wand'rest in his shade,
When in eternal lines to time thou grow'st,
So long as men can breathe or eyes can see,
So long lives this, and this gives life to thee'.

Happy Valentine's Day! G

Dr Eamonn Hall is company solicitor of Eircom plc.

test of liberal-democracy

for the hearing of trials of impeachment of individual officers for any office created under the constitution, and tenure of office is in no case stipulated to be 'during a period of good behaviour'. This appears to be an impossible oversight, especially as the reality of the everyday abuse of community offices, and routine connivance in concealment of that abuse, is today being reluctantly admitted to the light of public scrutiny. For the high principles of the constitution to have any real weight in practice, a procedure for impeachment ought to be specified for all offices and the tenure of all offices of responsibility be clearly stated as being 'during a period of good behaviour'.

An Taoiseach with European Convention president Valéry Giscard d'Estaing at Government Buildings in Dublin

House rules apply

Though it is clearly the intention of the draft constitution to consolidate the existing body of community law, it contains no provision making it clear that legislation enacted under the old regime will have force under the new constitutional system. What is most striking about this omission is the intention it implies: that the old laws should not be open to constitutional challenge under the new scheme. Taken with other indications of the lack of enthusiasm in the union to submit its acts to effective judicial review, there emerges a clear picture of an organisation that earnestly desires to evade its responsibilities to obey its own 'house rules'. In reality, the constitution cannot be neutral as to the validity of pre-constitutional laws: if the old laws are to be enforced by the newly-empowered institutions, then, at the very least, this enforcement should be consistent with the principles of the constitution. Better still, the old laws should be adopted expressly within the constitutional instrument, and only to the extent that they are not inconsistent with its principles (allowing, as a result, that where there is an opposition between an old law and the principles of the new constitution, the old law should be struck down). If this condition opens the previously existing body of community law to a new type of judicial attack, then so it must be. This new constitutional vigilance is the natural price to be paid for setting all existing community law on a constitutional footing.

Shared competences

The idea that the doctrine of 'shared competences' represents an acceptable compromise or a secure basis for the expansion of union powers and responsibilities is a serious mistake. In reality, the compromise struck in enacting the 'shared competences' doctrine represents the conventioneers' agreement to disagree over the precise border between union and member state powers, an agreement to pass the great inconvenience of future disagreements and disputes on to the constitution's unfortunate inheritors. If it is the job of a good constitution to establish firm principles based on broad agreement which can stand for some – hopefully

significant – interval of time, then the doctrine imports a dangerous kind of uncertainty into the core of this basic political agreement. The division of power and responsibility between member states and the central union administration is perilously obscure in the areas affected by 'shared competences'. Since no institution with a power of final adjudication has been established in this arena, we can assume that the territorial disputes that will naturally result from this failure of political agreement will occupy much of the energy and activity of the new constitutional regime.

Flexibility clause

The presence in the draft constitution of a clause such as that set out in article I-17 is an affront to the very idea of enacting a binding constitution. By the inclusion of a 'flexibility clause', the union is asking the peoples of the member states (however consulted) to delegate not only the powers expressly named in the EU constitution to a supranational authority, but also to empower that authority to endow itself with whatever unforeseen powers it deems 'necessary' at a later stage, without further consultation. This 'blank cheque' has none of the characteristics of the usual constitutional provisions for amendment, such as are found in most written political constitutions. No external obstacles or conditions are imposed for the exercise of this radical power, giving the strong impression that the union does not intend to accept for itself the discipline of obeying its own rules. No provision of this type can be acceptable in a liberal-democratic constitution.

Sovereignty

The 'subsidiarity' principle leaves the residual legislative powers held by the member states in a position of total insecurity. This relic of previous treaty compromises now represents the sole constitutional principle standing between the legislative power of member states and the unjustified encroachments of the central EU administration. As a principle

Letters

Get the point, not the penalties

From: Julian Deale, Dublin 2

I note from the public press that it is the government's intention to introduce legislation to amend the *in camera* rule in family law cases. I note that it is considered to be urgent by the state, and one could not argue with that.

Under the provisions of the *Solicitors (Amendment) Act, 1994*, there was vested in the Law Society a right to investigate complaints in a much more profound way than formerly applied. The act also provides that legislation will be enacted to set out the procedure by which these complaints are investigated. This act is almost a decade old and no regulation has been put in place to control the way in which the Law Society addresses complaints. Many of the sanctions which the Law Society imposes concern financial penalties – that is what they may be called. They are nothing more or nothing less than fines and some of them, from reading the *Gazette*, are quite penal in terms

of the level of the penalty or fine. Indeed, in many cases, the amounts of Law Society penalties are far greater than the jurisdiction, for example, of the District Court in a number of matters which could be considered analogous or otherwise.

By all means, let the state address the difficulties that the *in camera* rule creates in the general category of the administration of justice. However, I think that the state should also concurrently and concomitantly introduce regulations to ensure that there is equity and fairness in all dealings, not just the *in camera* rule, in regard to the powers of the Law Society to impose penalties – or, as I have already said, fines. It is wrong. The act is almost a decade old, yet not one step has been taken to bring order where chaos at present reigns.

A letter to the president

Name and address with editor

Dear Mr Griffin,

I am not writing to you with a complaint; in fact, the opposite. When one receives an excellent service as we did from Messrs X, Solicitors, we feel as a family it would be inappropriate to let it pass without some reference being made.

Some time ago, our only daughter was diagnosed with terminal cancer and she sadly passed away. Our daughter called into a legal firm and made her will with Mr X, solicitor. The manner in which he dealt with our daughter, knowing the sad circumstances of the appointment, was mentioned by her prior to her death.

Subsequently, Mr X's colleague, Ms Y, dealt with our daughter's estate. We have been traumatised by her untimely passing but have been heartened in so many ways by the manner, courtesy and kindness in which all the legal paperwork was processed. A human touch – besides a formal letter, a phone call to explain the legal jargon was made, and we were fully made aware of all pending procedures that had to be followed.

These actions demonstrated the exceptional quality of professional legal service we have received. It is with sadness on one hand that we write this letter, but on the other hand, the legal end was made so easy with an efficient and understanding solicitor and staff.

with an established place in EU law, 'subsidiarity' has already proved its worthlessness as guarantor of legislative sovereignty. In legal practice, it has been ignored by the community's legislators and rejected by the European Court of Justice whenever raised in proceedings. In the draft constitution, the principle has been adopted without alteration, and it promises to have the same disappointing implementation as to date.

The 'subsidiarity' principle demonstrates the weakness of the union's commitment to enforce the legitimate claims of member states in areas where their sovereignty has unjustifiably been encroached upon. Again, the constitution promises to be a fertile source of division and dispute instead of clarity and resolution. Where the drafters might have established a clear jurisdiction and criterion for the adjudication of such disputes, there is an absence. This characteristic evasion of the drafters' cardinal responsibility to promote certainty and discourage disputes, evident in so many other areas of the draft constitution, could not be clearer than in this area.

Obedience as a virtue

The virtues of constitutional government in practice consist in the obedience of the governing power to specified fundamental and enduring principles. It is from this obedience, and the threat of its enforcement, that constitutional government gains its particular authority and secures for those under its protection the advantages of stability, fairness and liberty in the greatest possible measure. According to the scheme proposed in the draft constitution, the institutions of a reformed union will not be put in a position of obedience to the constitution. Neither will they be constrained in any serious way to act within the terms of the powers granted by the constitution. These flaws do not threaten disadvantage merely to isolated aspects of government in the new union: they inhabit its very structure and will prevent its success. G

David Mangan is a trainee lawyer.

Sweeping special conditions in contracts

From: Pierce O'Sullivan, Cootehill, Co Cavan

I have noted the use, with increasing frequency, of a special condition in contracts issued by vendors' solicitors for the sale of second-hand dwellings along the following lines: 'The purchaser hereby acknowledges that this contract constitutes the entire agreement between the parties and hereby admits that he has not entered into this contract in reliance upon any other warranty or representation, either verbal or in writing'.

It seems to me that such a special condition would effectively render meaningless any information obtained from the vendors' solicitors by way of pre-contract enquiry unless the particular issue or matter was then inserted into the contract by way of additional special condition. It seems to me that the practice of putting in such a special condition is highly undesirable in such broad terms and would only be acceptable where it was limited in its scope by referring, for example, to auctioneers' brochures and the like.

I would be interested in the comments of any other practitioners in relation to this practice. On a more general point, it also seems to me to be part of a trend in relation to all contracts issued by vendors' solicitors for all types of property in putting in special conditions that are increasingly more sweeping than was ever intended and, in many cases, some of these conditions are simply farcical.

A dose of salts

From: Mark Felton, County Wicklow

It seems that legal costs are the subject of ever-increasing amounts of scrutiny from the media, the government and from the general public. It was with interest, therefore, that I came across a letter written in July 1974 from James L Burke and Company, Solicitors, to my father, who was then practising in Fred Sutton & Company, Solicitors.

The matter concerned the proposed purchase of a freehold interest by a client of my father in a premises in Dublin. The vendor's solicitor was anxious to seek confirmation that the proposed purchaser was willing to go ahead, notwithstanding the fact that it was stated 'the costs may amount to £150, which is out of all proportion to the amount which he is paying for the property'.

The letter went on to enquire: 'We will require a confirmation from you that your client won't want "smelling salts" to be revived when the bill comes in at the heel of the hunt'.

Clearly, some solicitors were concerned about escalating costs even in those times, although one wonders what would be needed to revive some clients on receipt of bills the magnitude of which are so often discussed in the media today!

Why we should fight the PIAB tooth-and-nail

From: Conor O'Toole, Coughlan White & Partners, Co Kildare

It was with great alarm that I read recently a copy of the *General Scheme of Civil Liability and Courts Bill*, the bill introducing the Personal Injuries Assessment Board (PIAB). Although some of its provisions have been well-documented and criticised, such as the failure to pay for legal representation and the right of the insurer to submit a full defence on appeal, I am not sure that practitioners are fully aware of the radical amendments which are proposed. These amendments need to be highlighted and challenged.

First, it proposes to reduce the time limit for bringing such actions from three years to one year. This is extremely prejudicial to plaintiffs who are receiving protracted medical treatment and plaintiffs who have tried unsuccessfully to resolve their disputes with insurance companies or their employers.

The bill also requires complainants to notify the respondent in writing of their claim within two months of the incident and failure to do so will empower a court to disallow all or part of the costs of the action, which would otherwise be recoverable. Again, this severely prejudices plaintiffs for the reasons outlined above.

I have no difficulty with the verifying affidavit to be provided by a plaintiff where pleadings are filed containing averment of facts, but I think in the interests of fairness the same should apply to defendants. The impression has been conveyed by the insurance industry that many plaintiffs are bringing fraudulent or exaggerated claims, which is misleading, but what about defendants who behave in a similar manner?

The provision that any party to a personal injury may request that a mediation conference be held prior to trial is open to abuse. If a case cannot be settled by the parties where proceedings have issued, why proceed to mediation as this will only introduce an additional tier of costs? And how can a court determine to make such order as to costs as it deems appropriate where it is held that a party has failed to actively participate in the mediation conference? If a plaintiff has been advised by his or her lawyers that the settlement recommended by the mediator is right, will this be held against the plaintiff at the hearing? Mediation is a form of dispute resolution distinct and separate to legal proceedings and should not be a requirement where proceedings have already issued. Also, the requirement that a plaintiff and a defendant must, before the commencement of the trial, exchange written final offers of settlement is unnecessary as a lodgement/tender process already exists and, if the parties have been unable to settle prior to the trial, this procedure is superfluous.

The introduction of a pre-trial hearing to identify evidence that can be agreed and the provision that the court may order witnesses to provide their evidence by way of affidavit are positive changes, and appear to follow the practice in the UK, where an experts' conference takes place prior to the hearing of the action to agree matters that are not in dispute.

There is also provision that account should be taken of any sum payable in respect of the injury under any contract of insurance. This is unfair as, if a plaintiff has paid premiums over a number of years, he should be entitled to benefit from the insurance pay-out and should not have his damages reduced, in effect subsidising another insurer in respect of its ultimate liability to pay the plaintiff. This deduction also flies in the face of the recommendation of the Law Reform Commission in its report in December 2002.

One of the most draconian provisions in the bill relates to the power of a court to have regard to any damages previously awarded or settlement given to a plaintiff arising out of a personal injury. There is also an earlier requirement in the bill that a plaintiff provides details as to the amounts received in previous claims. It is the relevance of the earlier injury and not the award or settlement which should be addressed and is addressed by way of notice of particulars. If a plaintiff receives a six-figure sum arising out of a personal injuries action some years earlier, then subsequently brings a claim arising out of an accident where he actually suffered less serious injuries that are not affected by the earlier injuries, why should a court have regard to the earlier award or settlement when such regard will only have the effect of reducing its award to benefit the insurer?

In this debate, the insurance industry has emphasised from the start that it has no difficulty in compensating genuine plaintiffs with genuine injuries. If that is so, why penalise a genuine plaintiff who has had a previous claim that is unrelated to the present one? Surely this is unconstitutional and it should be challenged.

There is also a provision which provides that interest should not apply to costs until such time as those costs are agreed or taxed. This is completely unfair. Practitioners are well aware of the delay encountered in recovering costs from insurers, and the purpose of the current interest provisions is to penalise insurers for their delay and encourage the speedy settlement of costs. Solicitors are also incurring costs on the outlay they have made while chasing payment and the effect of the introduction of this provision will be to force solicitors to refer their costs for taxation immediately rather than attempt to negotiate and agree costs. Legal costs belong to the plaintiff and if the plaintiff is entitled to interest on his award from the date of judgment, he should also be entitled to interest on the costs from the same date.

The Law Society has failed to address the concerns of solicitors and their clients adequately in this debate. It failed to make a submission to the original investigation and report and is now stating that it is resigned to the introduction of this bill. There is no doubt that the personal injuries system requires reform, but the emphasis in the bill is to favour the insurance companies at the expense of


Dáil debates focus on unfairness of personal injuries board

Is the Law Society doing enough?: see pages 8 – 11

plaintiff. It fails to address the antiquated PI list, where parties and their legal teams can waste days in the High Court waiting for a judge to become available, even where their case has been specially fixed. This lack of resources adds unnecessary legal costs, which are passed down the line to the policyholder. The practice of insurers using a computer to assess *quantum* and then refusing to budge from that assessment has also wasted valuable time in the Law Library.

Even at this late stage, the Law Society should be emphasising the unfairness in this bill and fighting it tooth-and-nail instead of giving ground to a piece of legislation that has been drafted by and for the benefit of the insurance industry. Serious consideration needs to be given to the taking of a constitutional action before we have a green book for personal injuries foisted upon us by one lobby group.

Ward McEllin, chair of the Law Society's PIAB Task Force, replies:

I have read Mr O'Toole's letter with interest.

Unfortunately, he appears to have mixed up two different pieces of legislation. The *Personal Injuries Assessment Board Act, 2003* was signed into law by the president of Ireland on 28 December last. The contents of the first paragraph of his letter refer to that matter. The Law Society ran a very strong campaign against the very matters highlighted by Mr O'Toole. In that regard, I refer readers to pages eight to 11 of this issue of the *Gazette*.

As regards the general scheme of *Civil Liability and Courts Bill*, the position is that the bill has yet to be debated in both houses of the Oireachtas. I agree broadly with many of the issues raised by Mr O'Toole. He may be assured that the Law Society will again run a strong campaign to change various sections of that bill.

DUMB AND DUMBERER

YOU DON'T BRING ME FLOWERS

From: Frank Lanigan, Carlow

It was 1966. With just a few hours' notice, my father's best client decided to go off on a cruise – right in the middle of a most complicated sale. This proved yet again what he always said: 'The law would be great if only we didn't have to deal with clients'.

My father, Thomas G Lanigan of Kilkenny, decided that the only way to deal with this crisis was to get the new shorthand typist to run up a power of attorney. Anyway, he wasn't sure that her heart was in the job and this would give him an opportunity to see how good she was at shorthand. He brought her up to his office and rattled off a power of attorney, but at a speed that enabled her to keep up. And he was pleased that she had done so well, even more so when she came back less than 20 minutes later with the job done.

Until he started to read 'No old men buy me presents that I ...'

THE DOG ATE MY HOMEWORK

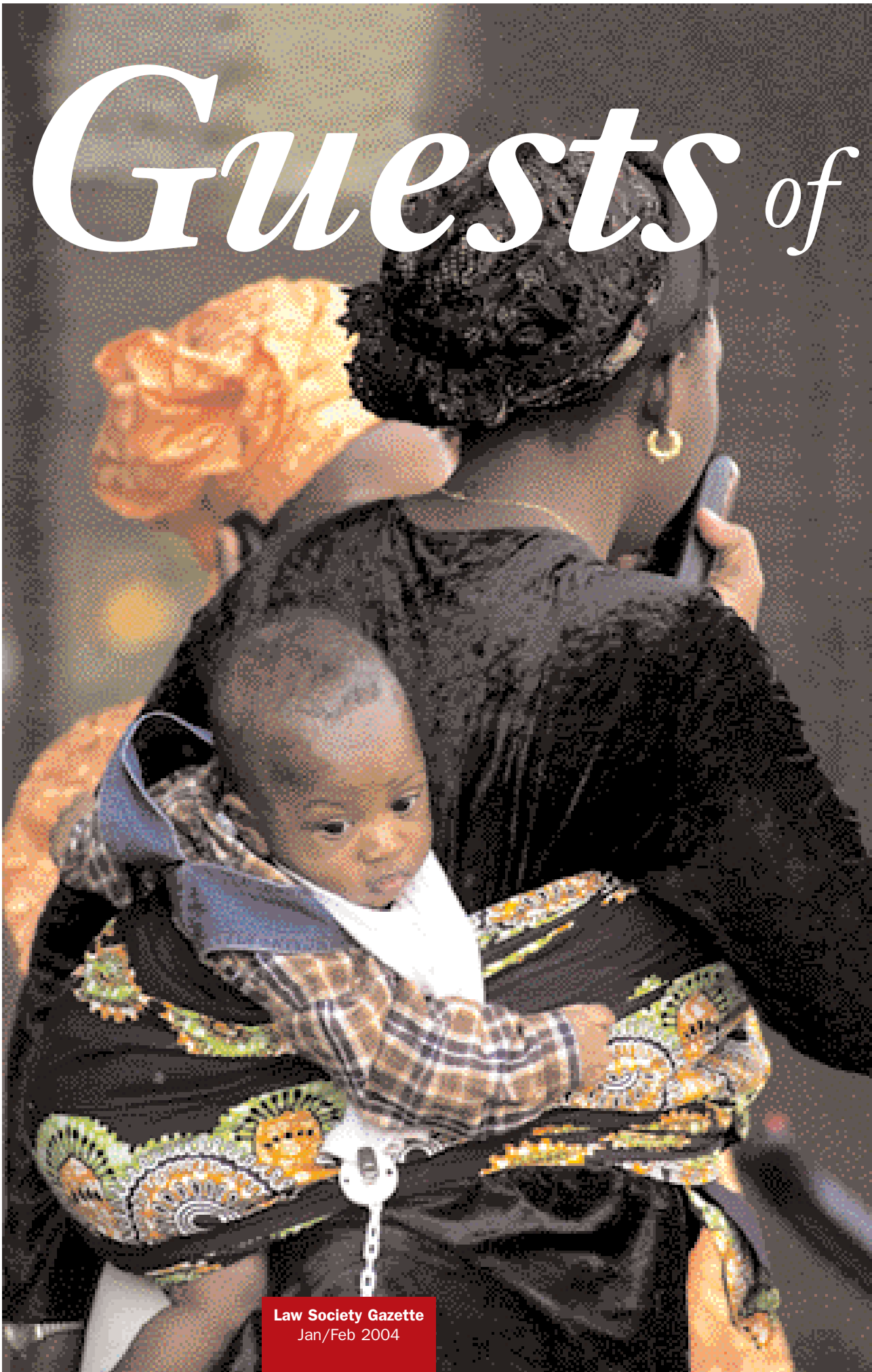
From: Liam Moore, Solicitors, Limerick

Acting for a young plaintiff in an RTA, who currently lives abroad, I received a request from the defendants for him to attend a medical examination, and the plaintiff had agreed that he would come home to do so.

Shortly before the appointment, he sent me an e-mail which, although sent with absolute sincerity by my client, I found more amusing than most communications that come across my desk. This is an extract from the e-mail, which reads as is – spelling and all: '*liam i have some bad news im so sorry this is realy frustrating i cant make that appiontment on monday the 19th of jan at the moment i have been working nites doing dog patrol secuirity with a japenesse akita and a rothwiler 5 weeks ago when i was feeding them they escaped out of the complex true a hole in the fence and attacked and criticaly injured an asian guy and completely tore hes calfs of hes legs i got a letter yeaterday i have to appear up in the magistrates court in romford on monday the 19th as i am the only wittness ive been to barking police station already to write a statment 4 weeks ago ...*'

Liam Moore, Solicitors, wins the bottle of champagne this month.

Guests of



Automatic residency rights for non-national parents of Irish-citizen children have been limited by the Supreme Court. But what about the applications that were outstanding when the ruling was delivered? asks Aisling Ryan

the NATION

MAIN POINTS

- **Residency rights for non-nationals**
- ***L & O v The Minister for Justice, Equality and Law Reform***
- ***Immigration Act, 1999***

More than 10,000 non-nationals are living and working in Ireland today on the basis of their parentage of Irish-citizen children. Article 2 of the constitution entitles a person born on the island of Ireland to Irish citizenship, and this right is also provided for under section 3(1) of the *Irish Nationality and Citizenship Act, 2001*.

The practice of granting permission to reside in Ireland to parents of Irish-citizen children began around 1990, after the Supreme Court judgment in *Fajujonu v Minister for Justice, Equality and Law Reform* ([1990] 2IR 151). In this case, Mr Justice Walsh held that an Irish-born child had the right to the company and society of his or her parents within the family unit and that the reasons for breaking up a mixed family of non-nationals and Irish citizens would have to be 'predominant and overwhelming'.

In *Fajujonu*, the court was concerned with safeguarding the 'inalienable and imprescriptible' rights of the family under article 41 of the constitution. The ruling focused on the child's right to the company and care of his or her parents under the constitution while exercising the right to live in the state as an Irish citizen.

After the *Fajujonu* decision, non-national parents of Irish-born children could apply to the Department of Justice, Equality and Law Reform for permission to reside in the state. Although the minister had complete discretion on whether to grant residency in each case, most applications for residency on this basis were successful unless there were strong grounds for refusal in the interests of national security or public policy. An individual who was granted residency by the minister on the basis of parentage of an Irish-born child was issued with a residency certificate or 'green card', which allowed that person to take up employment in the state, start his or her own business, or study without the need to obtain a separate visa.

Landmark ruling

In January 2003, the number of individuals seeking residency in the state on the basis of their parentage of an Irish child had risen to almost 11,000. At that time, an applicant could expect to wait approximately 16 months for a decision. While the majority of these applicants came to Ireland to seek asylum, a large percentage were living in Ireland on foot of student or work visas and were applying to change their status to a more general right to reside in the state.

On 23 January 2003, in the case of *L & O v The Minister for Justice, Equality and Law Reform* ([2002] IESC 109/02 and 108/02), the Supreme Court delivered a landmark ruling which restricted automatic residency rights for non-national parents of Irish-citizen children. In a five-to-two majority, the court found that – in the interest of the common good, which in this case was held to include the integrity of the asylum process – the minister could deport the non-national parents of an Irish citizen even if this resulted in the *de facto* removal of the Irish citizen from the state. It was held that the right of the child to the society, care and company of parents may be protected by residence outside of the state.

Worst fears confirmed

Following the Supreme Court ruling, the minister temporarily suspended the processing of outstanding applications for residency to consider the decision in the context of 'the policy, legal and constitutional matters surrounding the issue'. The 11,000 people who had lodged an application for residency in advance of the ruling, but who had not yet received a decision, waited six months for the minister to issue an official statement on the processing of their applications. Their fears were confirmed on 18 July 2003, when it was announced that no outstanding applications for residency would be granted solely on the basis that the applicants had an Irish-citizen child.

For outstanding applicants, the implications of this policy are significant for a number of reasons. At first glance, the statement suggests that the minister will examine and decide all outstanding applications for residency individually. However, it is not made clear that applications will only be considered individually in advance of the deportation process

and if further representations are made to the minister in relation to a case. Since applicants can only make further representations if the minister proposes to deport them, applications from those people seeking a change in status, that is, those who have an alternative legal status in Ireland, will not be further considered. This affects almost 25% of outstanding applicants.

Where an applicant has no alternative legal status in the state, the minister will only consider parentage of an Irish-citizen child as part of a so-called 'humanitarian' or 'leave to remain' application. Humanitarian protection is a complimentary form of protection offered by states in recognition of the international human rights concept of *refoulement*, which requires states to ensure that individuals are not returned to countries where their life or liberty would be at risk (article 33 of the 1951 *Refugee convention* and section 5 of the *Refugee Act, 1996*). Humanitarian applications are usually made by asylum seekers who have been refused refugee status and who are at risk of deportation. Under section 3 of the *Immigration Act, 1999*, where the minister proposes to make a deportation order, he is obliged to notify the person concerned in writing of his proposal (**see panel**).

The *Immigration Act*

Although many outstanding applicants for residency are former asylum seekers and, therefore, may fear being returned to their country of origin, the humanitarian approach seems an inappropriate vehicle to pursue an outstanding residency application. The granting of humanitarian status under the *Immigration Act* is discretionary, and there is no appeal against a negative decision. Indeed, an unsuccessful application will result in an automatic deportation order. A person who is deported from the state may also be excluded from returning in the future under section 4 of the *Immigration Act*, which states that 'the minister may, if he considers it necessary in the interest of national security or public policy, by order exclude any non-national specified in the order from the state'. An exclusion order would of course have serious implications for nationals of European Union accession states, who will be permitted to enter and work in Ireland in the future without the need to obtain a work permit.

Another issue for applicants is that they have not been notified of the new criteria for the granting of residency, and so are currently making applications in the absence of any guidelines. This lack of fairness and transparency has caused concern among human rights groups, not least because, in practice, the deportation of non-national parents will result in the *de facto* removal of Irish citizens from the state.

Since the rights of the Irish-citizen child are central to the issue of whether the minister will grant a family permission to remain in the state, further applications to the minister should contain representations under section 3(6) of the *Immigration Act* and a lengthy assertion of the Irish citizen's rights and guarantees under national and international law, and in particular the Irish constitution.

For example, although the minister cannot deport a child citizen, a child's rights cannot be effectively protected by the Irish constitution if *de facto* removed from the state. The right to access the constitution is implicit in its preamble, which states: 'We the people of Éire … do hereby adopt, enact, and *give to ourselves* this constitution' (emphasis added). Article 40.3 guarantees personal rights to citizens, including the right to life and bodily integrity. In the Supreme Court case of *Ryan v The Attorney General* ([1965] IR 294), Mr Justice Kenny cited a Papal encyclical which said: 'Every man has the right to life, to bodily integrity and to the means which are necessary and suitable for the proper development of life: these are primarily food, clothing, shelter, rest, medical care

'A child's rights cannot be effectively protected by the Irish constitution if de facto removed from the state'

NOTIFICATION OF DEPORTATION ORDERS UNDER THE *IMMIGRATION ACT, 1999*

Notification should include three options, namely:

- That the person concerned may make representations to the minister in writing within 15 working days of the sending of the notification
- That the person may leave the state before the minister decides the matter and the person must inform the minister in writing of information concerning arrangements for leaving the state, and
- That the person may consent to the making of a deportation within 15 working days.

If a person opts to make further representations, the minister must consider the following factors under section 3(6) of the *Immigration Act* before deciding whether to make a deportation order in respect of that person:

- The age of the person
- Duration of residence in the state
- The family and domestic circumstances of the person
- The nature of the person's connection to the state, if any
- The employment (including self-employment) record of the person
- The employment (including self-employment) prospects of the person
- The character and conduct of the person both within and (where relevant and ascertainable) outside the state (including any criminal convictions)
- Humanitarian submissions
- Any representations duly made by or on behalf of the person
- The common good, and
- Considerations of national security and public policy.

Moore Street market in Dublin has a mixture of ethnic shops catering for the growing immigrant population

and finally the necessary social services'. In the case of *G v An Bord Uchtála* ([1980] IR 32, 113 ILTR 25), former chief justice O'Higgins considered that the right to bodily integrity included 'the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being'. Furthermore, he proclaimed that 'these rights of the child must be equally protected and vindicated by the state'.

It is difficult to see how the Irish state can guarantee these rights to citizens who are *de facto* removed from the jurisdiction with their deportee parents. Similarly, the *de facto* removal of a citizen to another jurisdiction would make it impossible for the state to monitor certain minimum standards of education guaranteed under article 42 of the constitution. It has been accepted by the courts that 'education' is not purely scholastic education but involves the upbringing of a child (*Ryan v The Attorney General*).

Welfare of the child

It could also be argued that the unequal treatment of citizens by virtue of the nationality of their parents breaches Ireland's obligations under the UN *Convention on the rights of the child*, ratified by Ireland in 1992. Article 2 of the convention declares that states party to it shall 'respect and ensure the rights set out in the convention without discrimination of any kind irrespective of the child's or his or her parents' race, colour … national, ethnic or social origin … birth or other status'.

Of course, where there is a risk that the welfare of the child would suffer if removed from the state, the welfare of the child should be the 'first and paramount consideration' under section 3 of the *Guardianship of Infants Act, 1964*. In *G v An Bord Uchtála*, Mr Justice Walsh said 'the use of the word *paramount* indicates that, where there is a conflict between the welfare of the child and other considerations, the welfare of the child takes precedence over all other matters'. This should include situations where the minister proposes to deport a family to a country where the welfare of the child would be at risk.

It is clear that many arguments can be made by legal representatives on behalf of clients who wish to pursue their residency application. This, of course, assumes that an applicant is in a position to discharge private legal fees, as civil legal aid is not currently available to applicants. This is notable, especially since the minister has offered financial assistance to those who choose to leave the state voluntarily.

Of the 11,000 applicants in the balance, only a portion (approximately 1,100) have received correspondence from the department outlining their options in relation to their applications, and many more wait with uncertainty. It does not appear that any deportation orders have been issued to families with Irish-born children since the Supreme Court ruling. However, with so many families affected, this is likely to be a serious issue for practitioners in the coming year. G

Aisling Ryan is a solicitor with the Dublin law firm Terence Lyons & Co.

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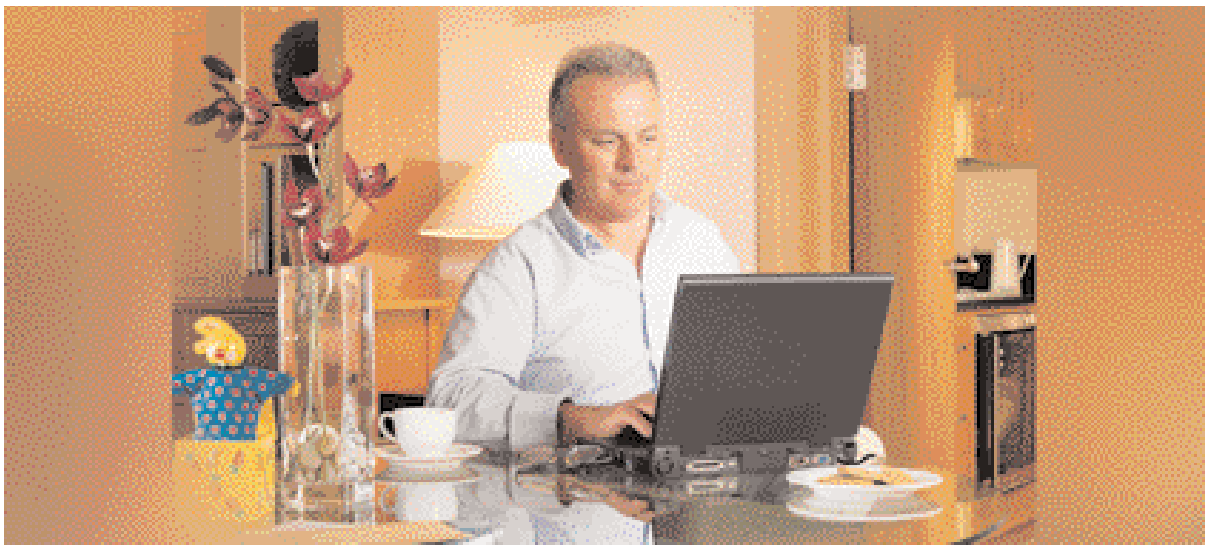

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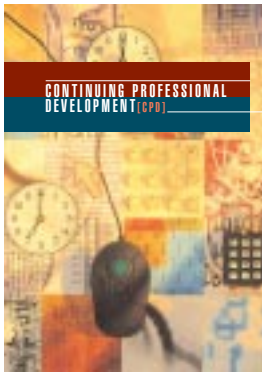
Revenue

CPD a review



Continuing professional development (CPD) was introduced to the profession last year. Alison Egan answers some of the most common queries raised by practitioners

The continuing professional development scheme came into operation on 1 July 2003. We are now at the beginning of year two of the current cycle. We have received over 380 queries to date on the scheme, and this article will address the most frequently-asked questions that arose last year.

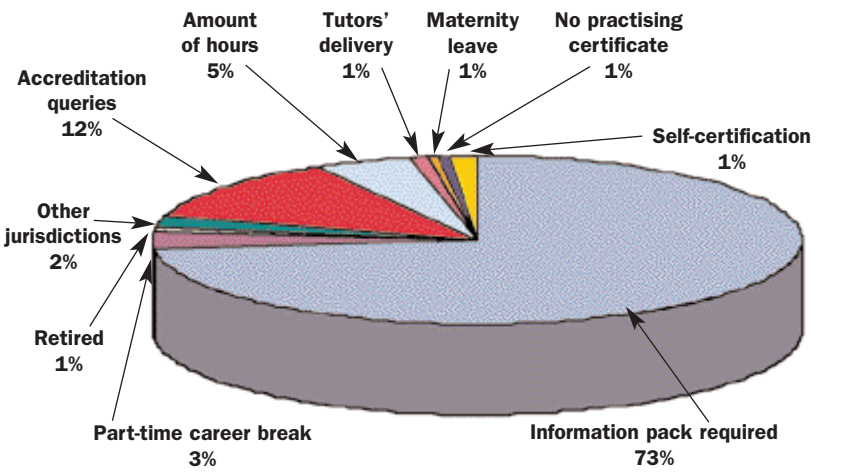
Where can I get a replacement record card?
An A4 version of the record card can be downloaded from the CPD section on the homepage of the Law Society website at *http://www.lawsociety.ie/newsite/Continuing_Legal_Education/CPD_Documents*. Alternatively, if you do not have access to the web, please contact me and I will issue you with a replacement card.

Do courses in other jurisdictions qualify for CPD points?
Yes. The ethos of the scheme is that courses entered into which are for the benefit and development of the practising solicitor fall within the ambit of the scheme. As such, group study may take place within or outside Ireland. Therefore, if you feel a course in the UK, for example, will aid your practice development, you may count the actual course contact hours towards your CPD requirement.

Is the Law Society recommending or providing accreditation to any third-party course providers?
No. The scheme is one of self-certification, and the Law Society does not accredit any particular course providers. Solicitors should exercise their own reasonable judgement on what training is relevant to their particular practice needs. However, since there may be a considerable time lapse between the date of occurrence of the training event and the date on which verification is sought for compliance, we would suggest that solicitors retain proof of their attendance at the training event. An appropriate letter or a certificate from the provider confirming attendance will suffice.

What does 'self-certification' mean?
All solicitors have been issued with a record card and are expected to complete this truthfully. This means that a solicitor should only record the number of contact hours actually attended, rather than those advertised, as referable to a course. This means that although a provider may advertise that a course lasts for four hours, if there is a coffee break of half an hour, only 3.5 hours should be claimed on the record card.

CPD ENQUIRIES 2003



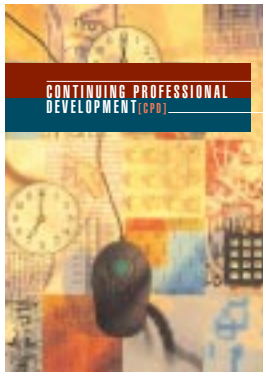
Practitioners should retain their record card and submit it at the end of the current CPD cycle. This cycle began on 1 July 2003 and ends on 31 December 2005. The record card alone will suffice, but the Law Society will check a random sample of record cards and further verification may be sought. This may be an instance where a certificate of attendance, received from a third-party provider, would be required.

Should I have completed my hours by the end of 2003?

No. The current CPD cycle began on 1 July 2003 and runs through to the end of December 2005. Therefore, you have just less than two years to complete the 20-hour requirement of the current cycle.

What does *management and professional development* mean?

At least 25% of the total CPD requirement (five hours) should comprise management and professional development training. This is a broad heading, and can include such topics as professional ethics, communication skills, human resource management, financial management, computer skills and language training. This list is intended as a guide only, and is not exhaustive. Three hours of this type of training should be completed in a 'group-study' environment.



How many hours of 'group study' do I have to do?

Group study can be defined as a group of three or more involved in a training activity which lasts for more than an hour. A minimum of 15 hours per CPD cycle is required and can include, but is not exclusive to:

- Lectures
- Tutorials
- Workshops
- Seminars
- Video-conference lectures and tutorials, and
- Diploma and certificate courses.

A unique element of the scheme is that group study can be run by a variety of organisations and is not confined to courses in Ireland. Individual firms can also run these courses, as can local bar associations and other legal associations such as the Society of Young Solicitors. Equally, universities, other teaching institutions or training organisations can also run these courses. It need not be in groups solely comprised of solicitors. The most important element is that the course is relevant to the practice development of the solicitor. The focus of the scheme is firmly on the training needs that are appropriate to the individual practitioner. G

Alison Egan is the Law Society's CPD executive.

Labouring THE POINT

The long-running *de Rossa* libel case is still in the courts and the ECHR's verdict is likely to be delivered soon. Simon McAleese examines the case's progress

MAIN POINTS

- ***De Rossa v Independent Newspapers (Ireland) Limited***
- ***European convention on human rights***
- **Judicial guidance for juries**

On 13 December 1992, the *Sunday Independent* published an article that led to the case of *de Rossa v Independent Newspapers (Ireland) Limited*. The article by Eamon Dunphy, headlined *Throwing good money at 'jobs' is dishonest*, claimed that a letter addressed to Russia's Central Committee of the Socialist Party and signed in Proinsias de Rossa's name referred to 'special activities' that had previously been used to meet shortfalls in the funding of his political party. It was clear that 'special activities' was a veiled reference to crime. De Rossa, then leader of Democratic Left, denied at all times that the signature was his.

De Rossa issued High Court proceedings in August 1993. After two aborted trials, a third trial was heard before Mr Justice Carney and a jury between 15 July 1997 and 31 July 1997.

On hearing the evidence, the jury determined that the words in the article implied that:

Eoin McCullough SC addresses the European Court of Human Rights in the *de Rossa* case

- De Rossa was involved in, or at least tolerated, serious crime, and
- De Rossa personally supported anti-semitism and violent communist oppression.

Little Bo Peep

Under Irish law, assessment of damages is uniquely within the province of the jury. The judge usually reviews the evidence and gives directions on the appropriate legal principles. The jury must decide whether the words complained of carry the defamatory meanings which are alleged by the plaintiff. If so, they proceed with the measurement of damages.

In accordance with previous legal authority, the trial judge in the *de Rossa* case gave no specific guidance as to the appropriate level of damages. Nor were counsel on behalf of the parties permitted to suggest any guidelines. The jury assessed damages at £300,000 (€380,921.42) and de Rossa was also awarded the costs of the action.

Independent Newspapers appealed to the Supreme Court on the basis that the damages were excessive and also that the trial judge had erred in law in failing to give specific guidance to the jury in relation to the assessment of damages.

The Supreme Court issued its judgment on 30 July 1999, finding that the damages were not excessive and setting out the appropriate test to be applied in determining whether a jury award of libel damages should be set aside: 'Was the award made by the jury so disproportionately high, having regard to the injury suffered, that no jury acting reasonably and applying the law to all the relevant circumstances could reasonably have awarded [it]?' It also stated that a jury libel award would be set aside if it had 'been arrived at capriciously, unconscionably and irrationally'.

The court decided that it would not follow English Court of Appeal judgments that paved the way for English juries to receive specific judicial guidance on the question of damages in libel actions (*Esther Ranzen v Mirror Group Newspapers* ([1993] All ER 975); *Elton John v MGN Limited* ([1997] QB 586); see also section 8 of the *Courts and Legal Services Act 1990*). The Court of Appeal concluded that, without such guidance, libel jurors were like 'sheep on an unfenced common with no shepherd'!

Having exhausted their domestic remedies, Independent Newspapers initiated its suit against Ireland in the European Court of Human Rights (ECHR).

Lost sheep

The ECHR had previously addressed a very similar case, *Tolstoy Miloslavsky v United Kingdom* (application no 18139/1991), which was an English libel case in which a pamphlet written by the applicant contained grievously defamatory statements about a certain Lord Aldington, who was awarded libel damages of €1,500,000 by a High Court jury. Referring to the state of English law as it applied at the time of the *Tolstoy* case, the ECHR stated: '*Having regard to the size of the award in the applicant's case in conjunction with the lack of adequate and effective safeguards at the relevant time against a disproportionately large award, the court finds that there has been a violation of the applicant's rights under article 10 of the convention*'.

'Without guidance, libel jurors are like sheep on an unfenced common without a shepherd'

On 16 October 2003, 11 international judges at the ECHR in Strasbourg, including Ireland's John Hedigan, heard *Independent News and Media plc v Ireland* (application no 55120/00). The two main arguments put forward by Independent's legal team were that:

- The award to de Rossa, although substantially less (approximately five times less) than the jury award in *Tolstoy*, was nevertheless excessive and disproportionate. The highest award previously upheld by the Irish Supreme Court was one of IR£90,000 in the case of *McDonagh v News Group Newspapers Limited* (Supreme Court, 23 November 1993, unreported: the Supreme Court upheld the jury award but noted that it was 'at the top of the permissible range'). For that reason alone, it was submitted that the award was disproportionate and that it breached

Portugese judge, Irenea Cabral Barreto *(left)*, and ECHR president Judge Georg Ress

PAST JURY AWARDS

- *McDonagh v News Group Newspapers Limited* (1993): IR£90,000
- *Proinsias de Rossa v Independent Newspapers (Ireland) Limited* (1997): IR£300,000
- *Denis O'Brien v Mirror Group Newspapers Limited* (1999): IR£250,000. The Supreme Court overturned this High Court jury award, 25 October 2000
- *Beverly Cooper-Flynn v RTÉ & James Howard* (2001): €0. An appeal lodged by Beverly Cooper-Flynn has yet to come before the Supreme Court
- *Sean Sherwin v Independent Newspapers (Ireland) Limited* (2002): IR£250
- *Judge Joseph Mangan v Independent Newspapers (Ireland) Limited* (2002): €25,000
- *John Waters v Times Newspapers Limited* (2002): €84,000.

Eoin McCullough SC responding to questions from Irish Judge John Hedigan and German Judge Georg Ress, president of the European Court of Human Rights. To his left are solicitors Paula Mullooly and Simon McAleese

ARTICLE 10
OF THE *EUROPEAN CONVENTION*

'1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority

2. The exercise of these freedoms ... may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of reputation or rights of others, for preventing the disclosure of information received or for maintaining the authority and impartiality of the judiciary.'

article 10 of the *European convention on human rights*, and

- The absence of any specific guidelines for juries in relation to libel damages was an equal infringement of article 10 of the *European convention on human rights*.

The Irish government submitted that the jury which had heard de Rossa's defamation action had been given greater guidance than the jury in *Tolstoy*. In *de Rossa*, the judge referred the jury to the earlier case of *Barrett v Independent Newspapers Limited* ([1986] IR 13), which concerned an allegation that a politician had pulled a journalist's beard.

The government's legal team also pointed out that the Supreme Court in *de Rossa* had decided that a jury award could be set aside in circumstances where it is disproportionate to the injury suffered. It submitted that 'this emphasis on proportionality represents a significant difference between the law in force in Ireland and that in force in the United Kingdom at the time of the Court of Appeal's judgment in *Tolstoy*'.

It was also argued that the Irish state is entitled to a margin of appreciation which reflects the jurors' acquaintance with the realities of life in their country. The state's lawyers added that the Irish government was entitled to take the view that the ordinary Irish citizen is capable of arriving at a rational and proportionate award relevant to the facts of the case.

Wagging their tails behind them

The European Court of Human Rights will deliberate upon its verdict, which is likely to be delivered early this year. This case has put assessment of damages in Irish libel actions under scrutiny in a European human rights context.

Mr Justice Carney, during a recent murder trial, criticised the tendency to treat jurors like 'simpletons'. However, jurors need some sensible level of guidance when assessing a complicated issue such as damages for injury to reputation. As things stand, Little Bo Peep springs to mind! G

Simon McAleese is managing partner of Dublin law firm McAleese & Co. The firm acts for Independent Newspapers.

SLOW M

MAIN POINTS

- 'Culture of delay'
- *Rules of the Superior Courts*
- Recent case law

The courts are taking a harder line with applications that are late or out of time. Master of the High Court Edmond Honohan discusses the rationale behind the courts' insistence that motions delayed may lead to motions denied

The Supreme Court has recently commented about the 'culture of delay' which appears to afflict most litigation. Where the *Rules of the Superior Courts* prescribe procedural time limits for litigants, failure to meet the deadlines may result in a motion to dismiss. Other applications that can be decided on a similar basis include the application to renew an unserved summons or the application to extend the time for appealing a Circuit Court decision.

The principles to be applied when dealing with some of the more exotic applications to dismiss, such as abuse of process, vexatious litigation, no cause of action disclosed and so on, are well developed (see, for example, *Sun Fat Chan v Osseous Ltd* [1992, 1 IR 425] or *Sean Quinn Group v An Bord Pleanála* [2001, 1 IR 505]).[1] But applications to dismiss for simple delay (or non-compliance with a discovery order) seem to turn on an unspoken application of the court's reluctance to summarily dispose of any case (reflecting the court's pre-eminent role in preserving the citizen's access to the courts) unless justice clearly dictates otherwise.[2] No party should 'win' a case simply on technical grounds.

In *Prior v Independent Television News Ltd* ([1993] ILRM 638), Barron J observed that:

'It seems to me that the essential principle is that where proceedings have not been heard on the merits, it may be unjust that they should be barred by procedural difficulties … The question of prejudice to the defendant is equally as important as prejudice to the plaintiff … The fact that the plaintiff has received damages from other defendants … largely counterbalances the element which would normally exist in favour of the plaintiff that, if relief is refused, he would be deprived of damages'.

Any old excuse

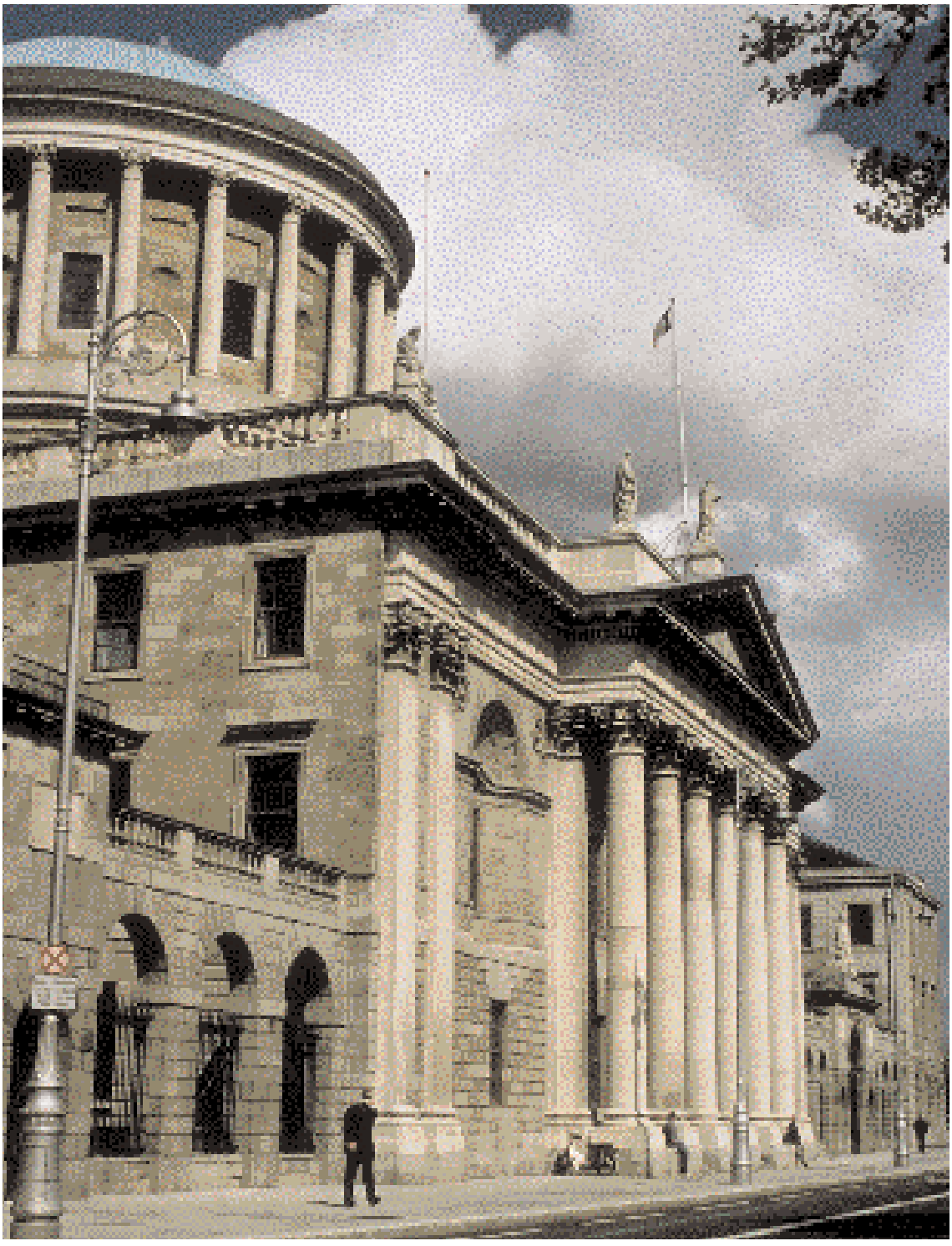
In his 1996 decision in *Primor plc v Stokes Kennedy Crowley* ([1996] 2 IR 459, Hamilton CJ attempted to restate the things that a court should take account of in the exercise of this inherent jurisdiction. The Rainsford/Primor *inordinate and inexcusable* formula has been a useful filtering device, keeping the volume of dismissal applications to a minimum. (Broadly, if the delay had been neither inordinate nor inexcusable, the application to dismiss will fail. Only where the delay merits the description will the court proceed to the analysis of prejudice and injustice.) Unfortunately, over-analysis of the formula has had the effect of comforting delaying parties who feel that any old excuse will do; and even if the excuse will *not* stand up to scrutiny, the other party will probably not be able to point to any particular evidential prejudice if the case is to proceed to trial.

Lately, I have been told that the delay in delivering a statement of claim sometimes arises because of the Supreme Court's insistence (in *Cooke v Cronin* [1999, unreported]) that counsel signing the pleadings be satisfied that there is expert evidence to support the case.[3] If the evidence is not available by the time specified for delivery of the statement of claim, perhaps there is all the more reason for dismissing the claim! But the *inordinate and inexcusable* analysis is not the complete picture. Even where the excuse is a good one, it may not be good enough if other factors combine to sway the court's discretion.

Commenting on the principles established by the *Primor* decision in the course of his judgment in *AIBP Ltd & Anor v Montgomery & Ors* ([2002] 3 IR 510), Fennelly J offered the following synthesis:

'It is always necessary for the defendant applicant to demonstrate, and he bears that burden, that the plaintiff has been guilty of inordinate and inexcusable delay. Subject to that, however, the court should aim at a global appreciation of the interests of justice and should balance all the considerations as they emerge from the conduct of and the interests of all the parties to the litigation. The separate considerations mentioned by Hamilton CJ should not be treated as distinct cumulative tests but as related

OTION

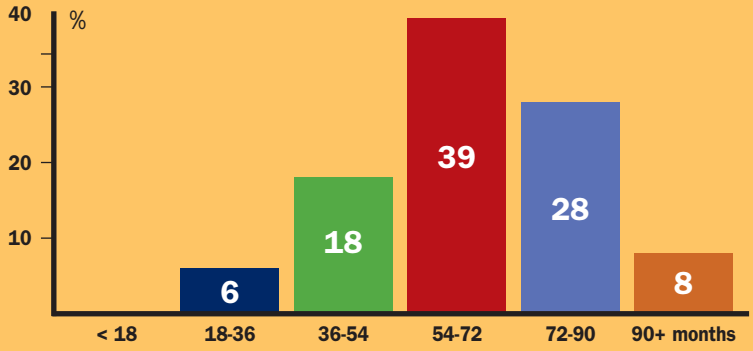


DATA COLLECTED OVER FIVE DAYS IN LATE FEBRUARY 2003

A total number of 725 matters were listed, of which approximately 300 were 'fresh' special and summary summons matters. Of the other 425, approximately 25 were unrepresentative, 50 were tobacco claims dismissed for failure to deliver a statement of claim, and another 50 or so were discarded because data was incomplete or the date of accrual in dispute.

*Of the remaining 300 statistically-valid motions, only four – I repeat, **four** – managed to make it into the list within 18 months of the date of accrual of the cause of action.*

AGE ANALYSIS TABLE:
TIME ELAPSED FROM ACCRUAL TO LISTING OF MOTION



Curiously, notwithstanding the collective average age of these cases, over one-third of the 300 motions were adjourned to later sittings! A small number were even struck out for non-appearance by either party.

As of 8 January 2004, regular (non-urgent motions) were being listed for 17 February (six weeks away) and there were slots available for urgent applications on 3 February (four weeks away).

matters affecting the central decision as to what is just … When the court comes to strike that balance of justice … it will need to find something weighty to cancel out the effects of the (delay). It will attach weight to the character of the claim[4] and the character of the (delaying party)'.

Fatal attraction?

So when is non-compliance with the rules of the court likely to prove fatal? In what circumstances will the High Court shut out a plaintiff from proceeding or a defendant from defending an action – in effect, exercising summary justice?

In *Hogan v Jones* ([1994] 1 IRLM 512, 518), Murphy J stated as follows:

STOP PRESS: CHANGE TO LIMITATIONS PERIOD

The heads of the proposed *Civil Liability and Courts Bill* posted on the website of the Department of Justice late last year include a proposal that the limitations period for personal injury claims be reduced from three years to one. The proposal to require verification of the facts of a personal injury claim as set out in the summons in turn has produced the obvious proposal that the endorsement of claim be fully particularised at the outset (that is, within 12 months of accrual) and that the statement of claim be dispensed with altogether in such claims.

'The draconian penalty of dismissing proceedings as against a particular defendant in circumstances which will wholly defeat the claim of the plaintiff is not an order which is made with a view to punishing a party for his dilatoriness in proceeding with the action or for his failure to meet some artificial regime. The order is made only where it is necessary to protect the legitimate interests of the party sued and, in particular, the constitutional right to a trial in accordance with fair procedures'.

If the administration of justice were wholly statute-based, we would be referring to the 'scheme of the act' and debating which rules were mandatory (where non-compliance is fatal) and which merely directory (where the consequences of non-compliance can be avoided but perhaps at some cost). But given the constitutional overlay, express and implied, and the onus placed on the court to uphold the societal imperative of dispute resolution by an unfettered judiciary, no mere rule of court will ever be elevated to the status of a mandatory requirement. Lawyers have long memories: the pre-*Judicature Acts* procedural farce (as to pleadings, causes of action and court jurisdictional confusion) diminished the status of law as certain and even-handed.

Abuse of privilege

But what it comes down to is this: non-compliance with the rules carries with it the risk that the court may be asked by the other party to assess the circumstances and ask itself the question: 'Should the non-compliant party continue to enjoy access to the court?' If a plaintiff, he was privileged to be able to avail of the good offices of the chief justice when he applied for the issuing of a summons. Perhaps non-compliance with the rules of court is an abuse of that privilege, or at the very least suggests a wanton disregard for the nature (hard won, it must be remembered) of such a privilege. The court will not lightly lend its offices to the imposition of unnecessary burdens or irrecoverable costs.

A successful defendant is rarely ever returned unscathed to his pre-litigation status. A particular instance (excusable only because of difficulties with service) is the failure to serve the summons within the year. If the court is asked to overlook this non-compliance, and the effect of the renewal sought is to avoid the relevant limitations periods, the court should be hesitant. In times past, the court was inclined to accept that where a plaintiff was to be left without a remedy for limitations reasons, unless the summons was renewed, it should be renewed. In these days of comprehensive professional insurance, the plaintiff's option to sue his negligent solicitor is a real option, and will not be politely glossed over by the court.

The court's analysis of the justice of the situation will focus on any assertion or clear evidence of prejudice (in the sense of perhaps insurmountable evidential difficulties) caused to the other party as a result of the default of the rule-infringer. For the purposes of that limited exercise, the court will have

to inform itself as to the issues in the case. It is not unreasonable to assume that, while the court's decision may be expressly based on the prejudice yardstick, frailties or want of *bona fides* in the infringer's case (as set out on paper) will tend to tell against the discretion being exercised in the infringer's favour. Even in the *Primor* case, we find O'Flaherty J going to some lengths to demonstrate just how slim were the plaintiff's chances of success had the case not been dismissed for delay.

But it is not unreasonable to suppose that the very fact of delay (or non-compliance) itself raises questions about the genuineness of the plaintiff's (or defendant's) formal stance. Perhaps the case bears the hallmarks of a case which was always expected to settle, even perhaps without any close analysis of the merits. Judges can spot 'compensationitis' too, and will not knowingly be party to any clear abuse of the privilege of access to the courts. The 'excuse' offered by the delaying party will be read against such a background, and may be viewed as threadbare.

Don't blame the courts

Courts are more sympathetic when non-compliance with the rules may have been caused by less controversial behaviour, such as simple mismanagement, neglect or inadvertence. But please note that the courts will not accept blame for delays which are not of the courts' making. If the solicitor or barrister is at fault, let him not tell his client that the courts system is to blame! One suspects that this particular excuse is in use far too often. Complaints about a seven-week delay in getting a listing for a motion in the Master's Court must be read against the backdrop of delays of not months but years in the prosecution of the case up to the point when the motion comes to be issued.

The statistical age analysis table reproduced here (**see panel, left**) is the analysis of an exercise I undertook over five successive days in court last February. The results are somewhat startling, even for an old hand like myself. Practitioners will themselves be able to draw conclusions as to the causes of the 'culture of delay' so graphically apparent from the figures.

Practitioners may find this analysis of some use when making submissions in court in connection with the implementation of the proposed new rule concerning default in the delivery of the statement of claim (**see panel above**). The principal change is that at the hearing of a *second* motion to dismiss, an order extending time should recite the 'special circumstances which explain and justify the failure'. In effect, the court will not be able to extend time this way unless it has material on affidavit which evidences the circumstances constituting the reasons for the delay. No doubt, the change was partly prompted by the *AIBP v Montgomery* case cited above, in which Fennelly J commented that: *'It looks like mute, not to say insolent, indifference, when a litigant evinces no consciousness of the need to explain its long and egregious periods of silence. The court is entitled to expect something more from parties who crave its indulgence'.*

PROPOSED REVISION OF ORDER 27, RULE 1

The revision of order 27, rule 1 of the *Rules of the Superior Courts* will establish a clear distinction between the first application by a defendant (to dismiss the plaintiff's claim for failure to deliver a statement of claim within the time allowed) and a second or subsequent application.

On the subsequent application, **the action will be dismissed unless:** *'The court is satisfied that special circumstances exist which explain and justify the failure'.*

This comes close to being identical to the concept of an 'acceptable' excuse. Note that a plaintiff would appear to be out of difficulty (of the order 27 variety) once he so satisfies the court. The new rule will provide that the court 'shall' extend time for delivery of a statement of claim and adjourn the motion for the same period. If there is evidence of prejudice, it will have to be specified by the defendant in his notice of motion as a separate and distinct basis for a summary dismissal by the court in the exercise of its inherent jurisdiction.

Footnotes

1 *Rules of the Superior Courts*, order 19, rule 4 (inherent jurisdiction). See generally Desmond Shiels, *Abuse of process* (FirstLaw, 2002) pp20, 21.
2 There is no constitutional right to justice as such. The unenumerated personal right is variously described as a 'right to litigate' or 'right of access to the courts': not quite the same thing, perhaps?
3 None of the judges in that case appear to have expressed their concerns in just such terms and the concerns expressed seem to be only in the context of professional negligence.
4 The chief justice employs the phrase 'the seriousness of the case' in *Murray v Devil's Glen* ([2001] 4 IR 34, 38). G

Edmond Honohan is the Master of the High Court.

BREAK FOR T

The law in relation to the recognition of foreign divorces has always been complex. Now, as a result of some recent conflicting High Court judgments, it is also in a state of confusion. Eugene Davy explains

MAIN POINTS

- Conflicting case law
- *Brussels II regulation*
- Need for legislation

As a consequence of recent developments in our case law, there are now many individuals and couples who, having previously been advised that their foreign divorces were not valid, are now being advised that such divorces are or might be valid. Others who had previously believed that their divorces were valid are now being advised that this may not in fact be the case.

Article 41.3.3 of the constitution reads as follows: *'No person whose marriage has been dissolved under the civil law of any other state but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the government and parliament established by this constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved'.*

Until the enactment of the *Domicile and Recognition of Foreign Divorces Act, 1986*, which came into effect on 2 October 1986, and following the reasoning set out in the judgments of Kingsmill Moore J in *Mayo-Perrott v Mayo-Perrott* ([1968] IR 336), Walsh J in *Gaffney v Gaffney* ([1975] IR 133) and Hederman J in *W v W* ([1993] 2IR 476), it was universally understood and accepted both by practitioners and the courts that divorces obtained in foreign jurisdictions would only be recognised as valid in this jurisdiction if both parties to the proceedings were domiciled in the judgment-rendering jurisdiction at the date the divorce proceedings were instituted. Up until this point, the principles of private international law applied by the courts in Ireland included the rule known as the 'dependent domicile' of a wife. This meant, in effect, that a wife was always considered to be domiciled wherever her husband was domiciled, irrespective of her domicile of origin or a previous domicile of choice and, indeed, irrespective of her own intentions.

It was assumed that the rule of the 'dependent domicile' of a wife continued until it was abolished by section 1(1) of the *Domicile and Recognition of Foreign Divorces Act, 1986*, which says: *'From the commencement of this act, the domicile of a married woman shall be an independent domicile and shall be determined by reference to the same factors as in the case of any other person capable of having an independent domicile and, accordingly, the rule of law whereby upon*

THE BORDER

marriage a woman acquires the domicile of her husband and is during the subsistence of the marriage incapable of having any other domicile is hereby abolished'.

Section 5(1) of the act provides that:

'For the rule of law that a divorce is recognised if granted in the country where both spouses are domiciled, it is hereby substituted a rule that a divorce shall be recognised if granted in the country where either spouse is domiciled'.

In *CM v TM* ([1991] ILRM 268), the High Court (Barr J) held that the rule of the 'dependent domicile' of a wife was inconsistent with the provisions of the constitution and had not survived its enactment. That statement of the law was upheld by the Supreme Court in *W v W*. The Supreme Court in *W v W* went on to hold that the common-law rule to be applied to a foreign divorce granted prior to 2 October 1986 was that such a divorce was to be recognised if it was granted by a court in the country in which either of the parties was domiciled at the time the divorce proceedings were instituted.

As a result of *W v W*, it appeared in hindsight that there was no need for the legislature to abolish the old common rule of a wife's 'dependent domicile', as this rule had not in fact existed since the enactment of the constitution.

The decision in *W v W* still has important implications that may have dramatic consequences for many individuals and couples. Prior to *W v W*, solicitors would have advised clients on the validity (or invalidity) of their foreign divorces with a degree of certainty depending on the circumstances, relying, where appropriate, on the old rule of a wife's 'dependent domicile', which rule was assumed to have subsisted until 2 October 1986. Following the *W v W* decision, many of those clients who were previously advised that their divorces and re-marriages were invalid had to be advised that such divorces and re-marriages were in fact valid, and, of course, vice versa.

In the wake of the *W v W* case, the law in relation to the recognition of foreign divorces seemed to be quite clear, in that the Irish courts would recognise any such divorces if either party to the proceedings was domiciled in the country which granted the divorce at the time proceedings were instituted.

Residency test

The next significant development occurred in the case of *GMcG v DW* ([2000] 1IR 96), which was heard in the High Court by McGuinness J. While it is not necessary for the purposes of this article to set out the details of this case, it is important to note that the facts were particularly unusual and extraordinary. Furthermore, the attorney general was not made a notice party to the proceedings and,

consequently, there was no party to argue that the rules of recognition should not be extended. In this case, the husband had sought and obtained a divorce in England on the basis of his wife's residence in England and in circumstances where neither he nor his wife were domiciled there. The divorce was sought and obtained in 1985 and consequently the rules set out in the *Domicile and Recognition of Foreign Divorces Act, 1986* did not apply.

McGuinness J held that the issue as to the recognition of a foreign divorce was still governed by the common-law rules of private international law. She held that it was open to the Irish courts in the case of foreign divorces to modify, where necessary, the recognition rules. She cited at length from the judgment of Blayney J in *W v W*, in which he concluded that: 1) the common-law rule is judge-made law and is not immutable, and 2) the question of whether or not a foreign divorce should be recognised should be answered by the court in the light of the present policy. McGuinness J was satisfied that, having regard to the relevant provisions of the *Family Law (Divorce) Act, 1996* and the *Family Law Act, 1995*, the courts should adopt a policy of extending recognition to decrees of foreign courts where either of the spouses were ordinarily resident in the foreign jurisdiction for a period of one year prior to the institution of the relevant proceedings.

On the basis of the policy of the comity of courts, and on the basis that the Irish courts have jurisdiction to grant a divorce if one of the parties is ordinarily resident in the jurisdiction for one year prior to the institution of the proceedings, McGuinness J concluded that foreign divorces should be recognised where either of the spouses was ordinarily resident in the foreign jurisdiction for a period of one year prior to the institution of the relevant proceedings.

Some months after the case of *GMcG v DW*, the same issue (relating to the recognition of a foreign divorce based on ordinary residence) arose again in the case of *MEC v JAC* ([2001] 2IR3 39), which came before Kinlen J. In this case, the attorney general was joined as a notice party and it was argued on his behalf that the rules regarding the recognition of foreign divorces should not be extended by the judiciary. Kinlen J found that neither party was domiciled in the foreign jurisdiction (England) at the relevant date. He went on to consider the issue of residence as a ground of recognition of the divorce, which in this case had been granted before the coming into force of the 1986 act. He concluded that the rules regarding the recognition of foreign divorces should be developed by the legislature rather than by the judiciary. He found that if the grounds of recognition were retrospectively extended to include the residence of either party, it would have serious implications for the way in which the state and many of its citizens had ordered their affairs. He expressly rejected the idea that a foreign divorce could be recognised on the basis that one of the parties was ordinarily resident in the foreign jurisdiction.

'The recognition of foreign divorces should be developed by the legislature rather than by the judiciary'

Position after 2 October 1986

The question of foreign divorces based on residence next arose in the case of *DT v FL* ([2002] 2ILRM 152) (see *FirstLaw update*, p64 this issue). This case was heard in the High Court by Morris P, and the attorney general was joined as a notice party. In this case, the respondent husband, an Irishman, had obtained a divorce in Holland in 1994, having instituted divorce proceedings some months before at a time when he had been ordinarily resident in that country for some years. Morris P concluded that the husband was not domiciled in Holland at the relevant time and he went on to consider whether the divorce was capable of recognition by virtue of the husband's residence in Holland. He held that, unlike the facts which had arisen in *GMcG v DW*, the recognition rules in respect of foreign divorces after 2 October 1986 (the date on which the *Recognition of Foreign Divorces Act* came into force) were governed entirely by the *Domicile and Recognition of Foreign Divorces Act, 1986*, and that there was no room for the development of the common law in this area, as it had been supplanted entirely by the 1986 act.

In his judgment, Morris P said:

'I am of the view that with the enactment of section 5 of the 1986 act, the rules relating to recognition of foreign divorces passed from the common law and thereafter were regulated by statute. Thereupon, the court's right to alter the rules ceased'.

Quoting with approval the judgments of Blayney J and Egan J in the case of *W v W*, the president

CONSEQUENCES OF THE *W v W* JUDGMENT

The following example will help illustrate the problems that have arisen for many individuals and couples following the decision in *W v W*.

Mary was born in England and brought up in England by English parents. Quite clearly, her domicile of origin was England. In 1976, she married John, an Irishman who was clearly domiciled in Ireland. At the time of her marriage, Mary came to Ireland and lived with John. The marriage broke up after a couple of months, and Mary returned to England. Shortly after returning to England, Mary instituted divorce proceedings against John in the English courts and obtained a decree of divorce. If John had sought legal advice any time prior to the case of *W v W*, he would have been advised that, on the basis of the old common-law rule of a wife's 'dependent domicile', the divorce would not be recognised in this jurisdiction.

If John had wanted to remarry, he would have been advised that any such re-marriage would not be considered valid in this jurisdiction. If, however, John consulted his solicitor in Ireland after the *W v W* case, he should have been advised that his divorce was in fact valid all along and that any subsequent re-marriage by him would also be quite valid.

PRESENT POSITION SUMMARISED

Foreign divorces obtained before 2 October 1986

If a foreign divorce was obtained prior to this date in circumstances where either party to the proceedings was domiciled in the country which granted the divorce at the date proceedings were begun, quite clearly any such divorce would be recognised in this jurisdiction. There is, however, uncertainty and confusion in relation to the recognition of foreign divorces that have been obtained on the basis of ordinary residence.

If the judgments of McGuinness J and Morris P in the cases of *GMcG v DW* and *DT v FL* are to be followed, such divorces obtained prior to 2 October 1986 on the basis of residence will be recognised. On the other hand, if the judgment of Kinlen J in the case of *MEC v JAC* is to be followed, such divorces will not be recognised.

Foreign divorces obtained after 2 October 1986

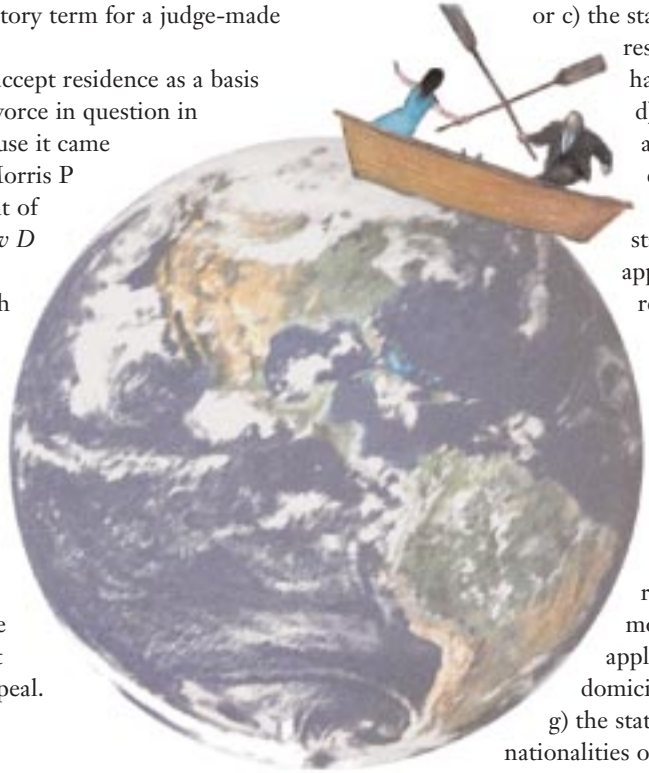
If the judgments of Morris P and Kinlen J in the cases of *DT v FL* and *MEC v JAC* are to be followed, divorces obtained after this date will only be recognised in circumstances where one of the parties was domiciled in the country which granted the divorce at the date proceedings were instituted. It should be noted that McGuinness J in *GMcG v DW* did not distinguish between pre-1986 divorces and post-1986 divorces and consequently her judgment can still be relied on in support of recognising foreign divorces on the basis of residence, irrespective of whether such divorce was obtained either before or after 2 October 1986.

Foreign divorces obtained after 1 March 2001 in an EU state

As already noted above, such divorces are now governed by specific rules set out in the *Brussels II regulation* (EC no 1347/2000).

concluded that the said judgments contemplated that on the passing of the 1986 act, the matter became regulated by statute. He further concluded that section 5(1) of the 1986 act by its very wording clearly intends to substitute 'a rule', that is to say a statutory rule, for what the act describes as a 'rule of law', this being a statutory term for a judge-made law.

Although refusing to accept residence as a basis for recognition of the divorce in question in this particular case (because it came after 2 October 1986), Morris P approved of the judgment of McGuinness J in *GMcG v D W* in so far as that case related to a divorce which was granted before 2 October 1986. The husband in *DT v FL*, who was attempting to rely on the foreign divorce, subsequently appealed the decision of Morris P to the Supreme Court. However, at the Supreme Court hearing he did not pursue this ground of appeal.



Brussels II regulation

The most recent development in this area of law is the *Brussels II regulation* (EC no 1347/2000), which came into force in this jurisdiction on 1 March 2001 and applies in all EU member states except Denmark. *Brussels II* provides a set of uniform rules for the automatic recognition of divorces (and separations and nullities) granted in the courts of other EU member states. The rules contained in the *Domicile and Recognition of Foreign Divorces Act, 1986* have no application to divorces granted after 1 March 2001 in other EU states. As a consequence of *Brussels II*, foreign divorces obtained in other EU member states (except Denmark) will now be automatically recognised in this jurisdiction, provided the divorce sought and obtained in the other member state was obtained in any of the following circumstances: a) the state of the habitual residence of both parties at the time of the application; or b) the former habitual residence of both spouses, when one spouse still resides there; or c) the state where the respondent is habitually resident; or d) in a joint application, where either is habitually resident; or e) the state where the applicant is habitually resident, once he or she has resided there for a year before the application; or f) the state where the applicant is habitually resident, once he or she resided there for six months before the application and is domiciled in that state; or g) the state of either of the nationalities of both parties, or, in the case of Ireland and the UK, domiciled there.

As a consequence of the cases referred to above and the introduction of *Brussels II* into our domestic law, there are now several categories of foreign divorces with separate recognition rules applying to each category (**see panel above**).

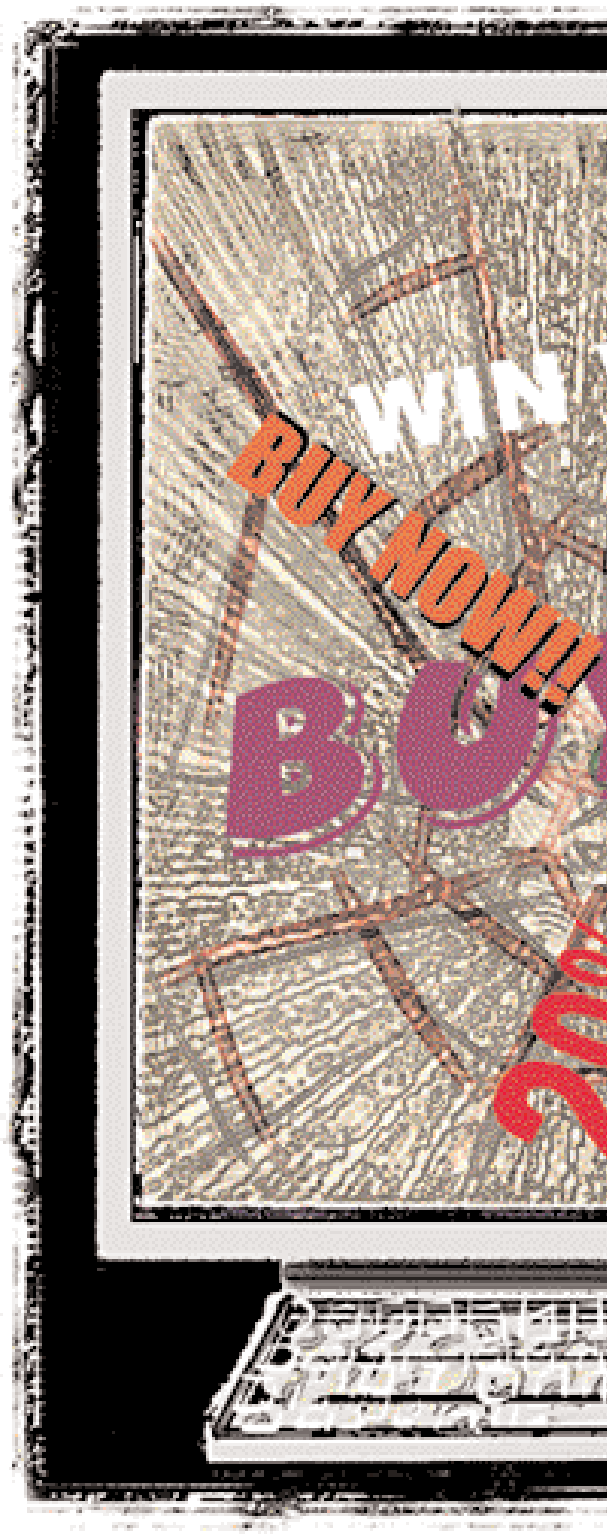
Quite clearly, an act of the Oireachtas is urgently required to bring about certainty in this area of the law and to clarify the marital status of thousands of individuals and couples living in this jurisdiction. G

Eugene Davy is principal of the Dublin law firm Eugene Davy, Solicitors.

As internet use continues to grow at an extraordinary rate, so too does advertising on the web. So who polices the net, and what redress is there for consumers who have been misled by on-line advertising? Sinead Morgan reports

MAIN POINTS

- Domestic and EU legislation
- Advertising standards codes
- Legislation versus self-regulation



CAUGHT i

New buzzwords seem to infiltrate our vocabulary almost on a daily basis. 'Webvertising', or advertising on the internet is one of the newest of these terms. As the volume of advertising on the internet, increases – by 20% this year alone, according to recent figures – there are many options available to those wishing to advertise on-line. These range from banner advertising, to hyperlinks that target perceived customer needs, to portals and search engines (such as Yahoo and Google), to direct e-mails. This area has been highlighted recently by the fact that a large number of complaints have been registered against internet service providers (ISPs) because of the way they advertise their products. For example, the Advertising Standards Authority of Ireland (ASAI) recently found that Esat BT's banner adverts were misleading and the company later admitted that these adverts were incorrect. Despite the need to address this area, there is no legislation that specifically deals with webvertising at present.

As a result, one must pull together all general advertising legislation, namely, the *Consumer Information Act, 1978*, the *EC directive on misleading advertising 1988*, the *EC directive on comparative advertising 1997*, together with the *EC directive on distance marketing of financial services* (which is due to be implemented in Ireland by 9 October 2004). There are also specific sectoral regulations in the fields of medical and financial services and products. Finally, the *E-commerce directive* potentially affects webvertising if you choose to carry out direct marketing on the net. It should also be noted that all criminal statutes apply directly to the internet. This was brought to the public's attention when escort services in Ireland were advertised on the web recently. However, the relevant parties could not be prosecuted as the sites were hosted in the UK, where

n the web

our *Criminal Justice (Public Order) Act* obviously does not apply.

Alternatively, you can look to the ASAI codes if you want to follow a less rigid, more cost-effective dispute-resolution formula. It should be noted that these codes have been applied directly to webvertising since 1 April 2002.

So what are the main provisions that a business needs to be aware of when choosing whether to advertise on-line, and what format should this advertising take?

The *Consumer Information Act, 1978* makes it an offence to publish an advertisement that is false (to a material degree) or misleading and likely to cause loss, damage or injury to the public. However, it does not generally confer rights on a consumer who has suffered loss as a result of a false description. Under the act, the director of consumer affairs has the power to prosecute such offences and it allows him to require the withdrawal or amendment of adverts and to compel compliance by court order.

Misleading advertising

The *EC (Misleading Advertising) Regulations 1988* also deal with misleading advertising, which is defined as 'any advertisement which in any way, including its presentation, *deceives or is likely to deceive* the persons to whom it is addressed or whom it reaches and which by reason of its deceptive nature is likely to affect their economic behaviour or which for those reasons *injures or is likely to injure a competitor*'. It should be noted that this is an incredibly wide definition, and does not actually require proof that anyone was misled. Further powers are conferred on the director of consumer affairs, allowing him to pursue complaints on his own initiative as well as requesting the discontinuation of misleading advertising or applying to the High Court to prohibit publication. It also leaves it open to the consumer to pursue similar action.

Comparative advertising is any advertising that explicitly or by implication identifies any competitor or goods or services offered by a competitor. It is only permitted under the *EC (comparative advertising) directive 1997* if it is not misleading and does not cause confusion, discredit or take advantage of a

competitor's trademark, trade name or products. It may only compare goods or services meeting the same needs and cannot present goods or services as imitations. In essence, this means that advertisements can only compare the objectively 'verifiable' features of the goods and services in question. But it is uncertain what effect it will have in practice. For example, slogans such as '*probably the best lager in the world*' could conceivably fall foul of this legislation. Many of the provisions of the 1997 directive had already been implemented by the *Consumer Information Act, 1978*, so the enforcement powers of the director of consumer affairs are outlined in that legislation rather than the 1988 regulations.

Direct marketing

The *E-commerce directive* applies only in so far as you advertise using direct marketing or unsolicited commercial communications (also known as 'spam'). Under the directive, all spam must be clearly identified as such on its face, as must all promotions and the conditions attached. The consumer may receive unsolicited commercial communications (UCCs) but must be given the choice of opting out of receiving them. Accordingly, the internet service provider must include an option on every page of the website clearly indicating how the consumer can do this. This condition, which was included in the Irish legislation, was not part of the original directive and imposes a more onerous obligation on the ISP. However, as other EU states have chosen the 'opt-in' system, our legislation provides far less protection to the consumer. Finally, the ISP must confirm to the consumer that he will receive no more spam messages. In order to do this, ISPs must maintain an opt-out register which they can consult regularly. The difficulty with this legislation is that most spam originates from outside the EU and would automatically be outside the directive's remit. The introduction of the country-of-origin principle means that an ISP need only comply with the laws of the country in which it is established.

Under the legislation, the director of consumer affairs is given a variety of enforcement powers up to and including withdrawal or amendment of an advertisement by court order. The consumer is also conferred with similar rights to apply to the courts under the 1988 regulations.

So which is preferable: legislation or self-regulation? The ASAI system (**see panel opposite**) seems to work, probably due to the fact that 80% of advertisers are members. This was demonstrated by Esat BT's recent withdrawal of some of its advertisements after an unfavourable ASAI decision. Advertisers would prefer to self-regulate, if possible, since it is quicker, more cost effective and better for their public image. But the question will always remain of whether an organisation funded by advertisers can truly be expected to put the consumer's rights above those of its own membership.

Jurisdiction

The main issue raised by on-line advertising is jurisdiction. The question of how and where a complaint will be prosecuted has partly been answered by the introduction of the country-of-origin principle in the *E-commerce directive*. However, case law suggests that you can prosecute companies if they 'direct' advertising towards a particular group or country. For example, in 1998 Zippo Dot Com was found to be subject to the laws of Pennsylvania and could be prosecuted in that state because it had entered into contracts with a number of internet providers which allowed it to contact subscribers in that jurisdiction and distribute Zippo products to them.

This stance is supported by the *Brussels regulation*, which states that where a contract has been concluded with a person who pursues commercial or professional activities in the member state of the consumer's domicile or *by any means directs such*

ADVERTISING CODES

The Advertising Standards Authority of Ireland (ASAI) is an independent self-regulating body, financed by the advertising industry, that claims to promote higher standards in advertising and promotion in the public interest. The codes published by the ASAI provide another remedy to the consumer (advertisers can also obtain free legal advice from the ASAI on a confidential basis to determine if their advertisements comply with the codes).

To comply with these codes, adverts must be 'legal, decent, honest and truthful', be prepared with a sense of responsibility to consumers and society, and respect the principles of fair competition. The codes set out special rules dealing with health and beauty products, protection of children, advertising alcoholic drinks, financial services, distance selling, and employment and business opportunities.

The codes cover only paid-for advertising and sales promotions in the Irish media, so editorial or self-advertising are not affected. Comparative advertising is permitted either explicitly or implicitly if it is held to be in the interest of public information and competition. This system is subordinate to legislation, meaning that a decision by the ASAI does not deprive a consumer of taking a further action under the law.

As the ASAI is intended to protect the consumer, it will not involve itself in intra-industry complaints unless consumer interests are involved. Furthermore, complaints will not be pursued if the matter is already the subject of a simultaneous legal action or if such an action is contemplated.

It should be noted that the International Chamber of Commerce established these codes and that the ASAI is a member of the European Advertising Standards Alliance (EASA). This association provides a European dispute-resolution procedure to consumers whereby complaints against a European advertiser are passed on to the European equivalent of the ASAI to be resolved.

The ASAI can impose fines or suspension for failure to comply with a decision. The ASAI or its equivalent European counterpart will make and enforce decisions under the codes depending on the jurisdiction in which the complaint arises. However, it should be noted that despite the fact that there is a similar system of self-regulation present in Europe through the EASA, the definition of 'honest and decent' may well vary between different cultures, and this could affect consumer rights in certain cases.

activities to that member state, the consumer may bring proceedings in his domicile or the domicile of the supplier. However, proceedings may only be brought against the consumer in his own domicile. 'Directing' has not been defined, but any direct approach to a consumer, even via an intermediary, will amount to *directing*, according to the *OLG Bremen* case (17 February 2000, Higher Regional Court, Bremen, Germany). Commentators suggest that mere access to a website is not sufficient to bring you within the definition, but allowing choices of languages, currencies, delivery times or costs to countries may attract liability. However, there is no case law to support these assertions.

It has emerged from American case law, specifically the leading *Zippo* case (992F Supp 44, DC [1988]) that 'directing' does not 'catch' websites that are by their nature passive, for example, those that only allow users to access information. However, more interactive websites that allow the purchase of goods and exchange of information will attract liability.

But the recent *Yahoo* case (COO-21275-JF-RS), where a French court found that Yahoo Inc, based in the United States, was liable for advertising Nazi memorabilia on its US website (although access was banned on its French website) casts doubts over all the current thinking in a European framework.

It has been suggested that clarity could be achieved by placing warnings on a website that if a 'surfer' is from a particular jurisdiction he should go no further. You can also block customers from certain jurisdictions by including only certain countries in drop-down boxes for compulsory information, such as addresses. A jurisdiction clause may afford protection in business-to-business transactions but not in consumer transactions under the present legislation.

Liability is the overriding concern when discussing webvertising. We appear to be complying with EU legislation regarding consumer protection in this area, but it must always be borne in mind that this legislation covers only the European Union and that activities carried on outside this region cannot be controlled at present. Adopting the country-of-origin principle leaves it open to us to position ourselves competitively by adopting the least restrictive version of directives, as enforcement and other issues are dealt with on a national level. We have already done this in relation to the 'opt-out' provision in the *E-commerce directive*. However, the *Brussels regulation* directly contradicts that directive by trying to apply our laws to other jurisdictions and vice versa.

Many countries are trying to move towards self-regulation because of the difficulties of policing the internet through legislation. But these initiatives need to be instigated by consumer groups who are protecting their own rights rather than business associations who have an obvious conflict of interest. G

Sinead Morgan is a solicitor working with Dell Computers.

LONG AR

It has not always been easy for the Revenue Commissioners to keep track of foreign interest payments made to Irish residents, but this is set to change. Two new directives adopted last year will make it easier for the Revenue to find out about cross-border bank accounts, writes Max Barrett

MAIN POINTS

- ***Savings directive***
- **Interest paid on off-shore savings**
- **Possible loophole**

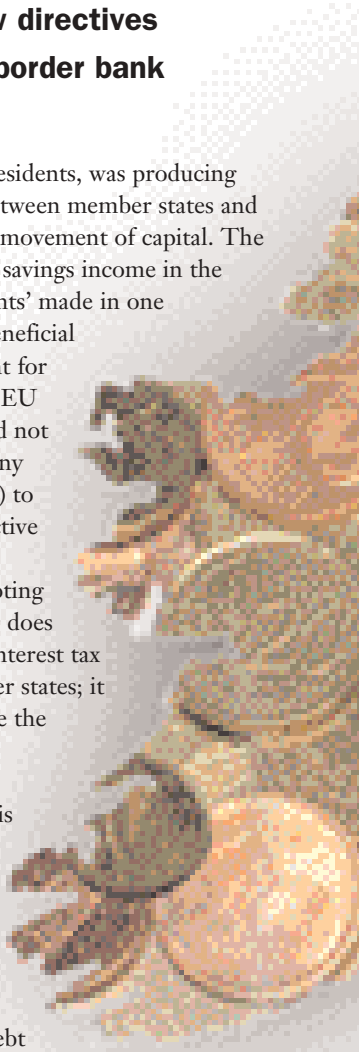
On 3 June last, the EU Council of Ministers adopted two directives aimed at tackling tax competition that is harmful to EU member states. The *Savings directive* (2003/48/EC) deals with taxation of savings income in the form of interest payments. The *Interest and royalties directive* (2003/49/EC) concerns a common system of taxation applicable to interest and royalty payments made between associated companies of different member states. These directives, together with an earlier related code of conduct, form a trio of EU measures that seek to:

- Facilitate the taxation of interest paid on cross-border savings
- Eliminate withholding taxes on interest and royalty payments made between associated companies of different EU member states, and
- Establish a code of conduct for the taxation of businesses by EU member states.

These measures have been adopted by the EU in a bid to stabilise EU member-state tax revenues, to remove tax as a barrier to the creation of a single market, and to reduce the relative over-taxation of labour.

Nowhere to hide

Of the three measures, the *Savings directive* has perhaps excited the most attention. Its adoption was prompted by a concern that variations between EU member-state tax regimes, as well as the generally preferential treatment traditionally afforded by member states to non-residents, was producing economic distortions between member states and was inimical to the free movement of capital. The *Savings directive* enables savings income in the form of 'interest payments' made in one EU member state to 'beneficial owners' who are resident for tax purposes in another EU member state (they need not be nationals of that or any other EU member state) to be made subject to effective taxation in the state of residence. It is worth noting that the *Savings directive* does not seek to harmonise interest tax rates among EU member states; it seeks merely to conserve the capital tax base in those countries.



The *Savings directive* is intended to increase the tax haul of EU member states on interest payments. Broadly speaking, these include:

- Interest relating to debt claims of any kind that is paid or credited to an account
- Interest accrued at the sale, refund or redemption of such debt claims
- Income distributed by undertakings for collective

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investment in transferable securities (UCITS), entities that have opted to be treated as UCITS, and undertakings for collective investment established outside the EU.

Slipping through the net

The *Savings directive* is targeted at the 'beneficial owners' of interest payments. This term embraces any individual who receives an interest payment for his personal benefit. Therefore, interest payments made for the benefit of companies or other legal persons do not come within the directive's scope. The rationale for this distinction is that the evasion of interest tax is a problem associated primarily with ordinary individuals and not with legal entities (which generally prefer aggressive tax avoidance to actual tax evasion).

There may be a potential loophole in the definition of beneficial owner. Excluded from the definition are persons who, when they receive interest, are acting on behalf of:

- A legal person
- An entity which is taxed on its profits under general business taxation
- Certain UCITS, or
- (Subject to certain conditions) any entity established in a member state to which interest is paid or for which interest is secured for the benefit of a beneficial owner.

'Evasion of interest tax is a problem associated primarily with individuals and not with legal entities'

So it is entirely open for a natural person to claim that a particular interest payment has been received by him in a representative capacity for a legal entity to which the *Savings directive* does not apply and that, accordingly, he is not subject to the directive. This potential loophole has been raised by the media and has typically met with the response that the *Savings directive* was never intended to apply wholesale to legal entities. This is entirely true.

However, the *Savings directive* is intended to apply to natural individuals in receipt of interest and, for the moment, there appears to be an opening for such individuals to construct their affairs in such a manner as to appear to be receiving interest in a representative capacity for exempted legal entities, thus placing themselves outside the directive's scope. The extent to which individuals do so will depend on the exact terms in which implementing legislation is drafted and on the rigour with which revenue authorities scrutinise such claims.

Home alone

A beneficial owner must be resident in an EU member state for the *Savings directive* to apply. Residency is determined by where a beneficial owner has his permanent address. The *Savings directive* prescribes a range of documentation by reference to which a person's 'permanent address' may be determined. It remains to be seen whether the notion of permanent address as a key determinant of one's place of residence will be open to abuse.

As mentioned above, where a beneficial owner resident in one member state receives interest payments in another, the *Savings directive* requires the paying agent (in effect, the person who pays interest to, or secures the payment of interest for, the beneficial owner of that interest) to report certain details of that payment to the competent revenue authority. In general, a competent authority must then transfer that information to the competent authority in the beneficial owner's state of residence. However, separate arrangements apply in the case of Austria, Belgium, and Luxembourg – the 'banking secrecy' states. For a transitional period, those member states will each receive information regarding cross-border interest payments made to their residents in other EU member states. However, they will generally not provide similar information to other member states. Instead, they will impose a prescribed withholding tax on interest payments made to residents of other EU member states, which will be split 25/75 between the withholding member state and the member state in which the relevant interest recipient is resident.

This withholding tax will not, however, be imposed if the relevant beneficial party:

- Authorises the paying agent to report the interest payment to the competent authority in its state of establishment, and/or
- (Depending on the member state) furnishes a prescribed tax certificate from the competent authority in his state of residence (in effect, indicating that interest tax will be paid in that state).

To protect the particular interests and protect against a flight of capital and/or paying agents from Austria, Belgium and Luxembourg, the transitional period is set to continue until:

- The EU has concluded an agreement with Andorra, Liechtenstein, Monaco, San Marino and Switzerland concerning the exchange of information regarding (and the imposition of withholding tax on) interest payments made by paying agents in those states to beneficial owners resident in an EU member state, and
- The Council of Ministers (or the European Council) has unanimously agreed that the United States is committed to exchanging information on request with respect to interest payments made by paying agents established in the United States to beneficial owners resident in the EU.

Flight of capital

Under the *Savings directive*, the linchpin in the revenue collection process is the paying agent. The paying agent must notify the competent authority in its state of establishment that an interest payment has been made. If overseas paying agents were not

subject to the same reporting requirements as their EU counterparts, then there might be a flight of capital from the EU, with paying agents perhaps choosing to relocate outside the EU. As a result, the *Savings directive* would be rendered something of a toothless wonder.

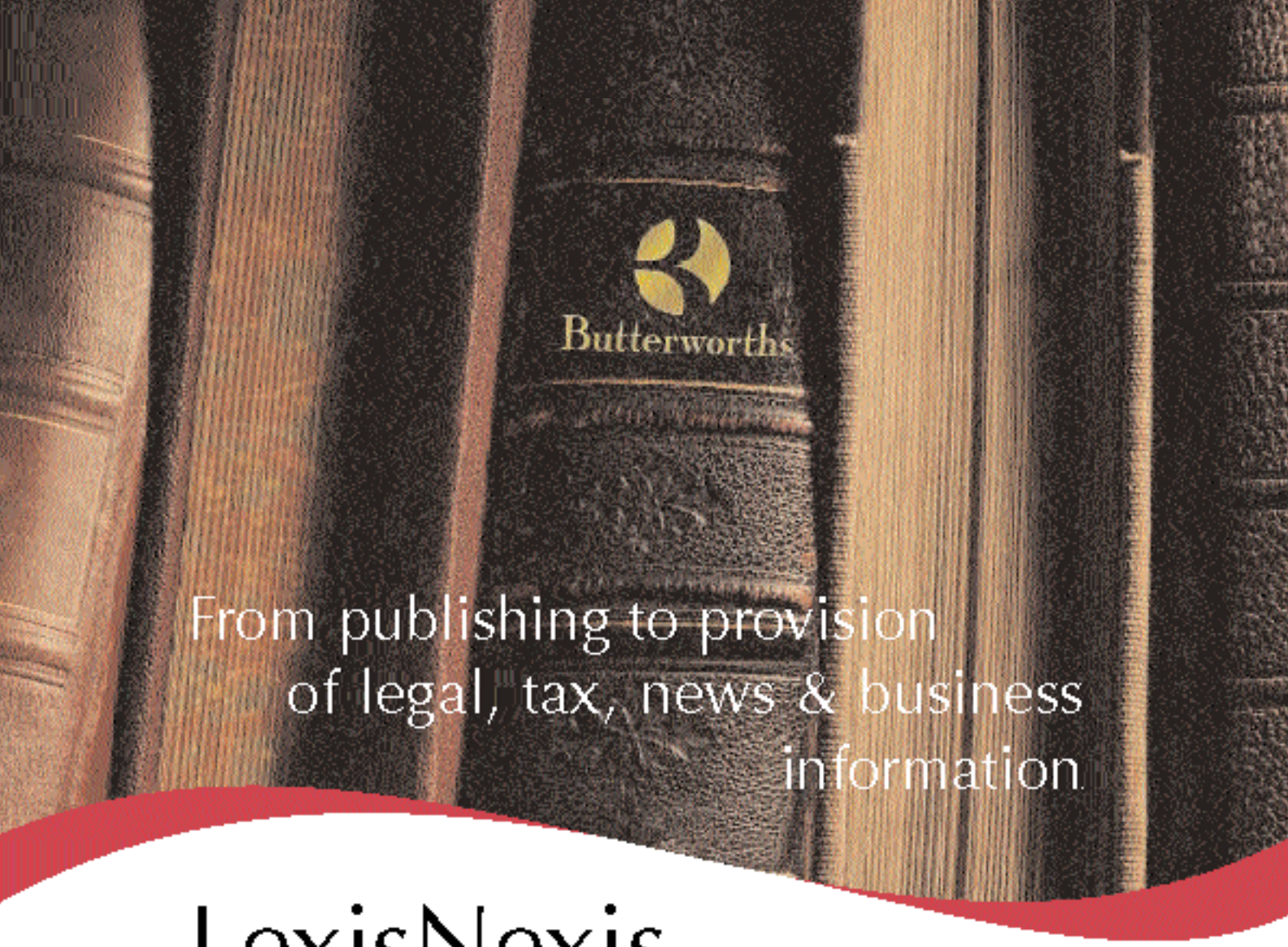
Because of this, at the same time as the *Savings directive* was working its way through the EU legislative process, parallel discussions were initiated with the United States and certain tax-friendly jurisdictions, including Jersey, encouraging those jurisdictions to adopt similar measures to those being put in place within the EU. This initiative has been broadly successful, though the tendency to date has been for off-shore jurisdictions to agree to a withholding tax arrangement (not an exchange of information) in respect of interest payments made to EU residents. The rationale for this trend is that the jurisdictions concerned do not wish to place themselves in an uncompetitive situation in relation to the three EU member states to which the special withholding-tax provisions apply.

EU member states are required to implement the *Savings directive* by 1 January 2004. It is intended that the implementing measures should be effective from 1 January 2005. However, whether the measures do in fact come into force from that date is conditional on:

- Andorra, Liechtenstein, Monaco, San Marino and Switzerland applying from the same date measures that are equivalent to those contained in the *Savings directive*, and
- All agreements and other arrangements being in place which ensure that the Channel Islands, the Isle of Man and the dependent and associated Caribbean territories of EU member states apply an automatic exchange of information process with EU member states (or, during the transitional period that applies to Austria, Belgium and Luxembourg, apply a withholding tax procedure similar to that applicable to those member states).

The Council of Ministers is to decide by mid-2004 whether the target date of 1 January 2005 will be met. If not, the council will set a new date for commencement. After this point, Irish residents in receipt of interest earnings in other EU member states and numerous other overseas jurisdictions can expect that the Revenue Commissioners will learn of these payments. G

Dr Max Barrett is an Irish solicitor working with the Jersey law firm Bailhache Labesse.



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Book review

Personal injury compensation in Europe

Pan-European Organisation of Personal Injury Lawyers. Kluwer (2003), PO Box 23, 7400 GA Deventer, the Netherlands. ISBN 90-13-00484-9. Price: €95.

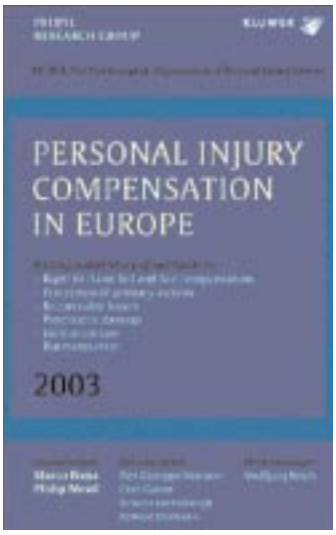
The payment of just compensation to a person injured as a result of the negligence of another is a hallmark of civilised society. As long ago as 1703, Chief Justice Holt in *Ashby v White* ([1703] Ld Raym 955) held that 'every injury imports a damage' and if a man is 'hindered of his right', he shall have a cause of action. The chief justice was referring in that context to the concept of personal injury and its due compensation when caused by another.

Article 40.3.2 of the Constitution of Ireland proclaims that the state shall, in particular by its laws, protect as best it may from unjust attack and, in the case of injustice done, vindicate the life and property rights of every citizen. There is the thesis that the concept of 'the life' of every citizen encompasses the physical well-being of the living citizen. Accordingly, it may be argued that it would be unconstitutional for the state to restrict a citizen from recovering just compensation from another caused by the negligence of that other person.

This book is a comparative study and guide to the right to claim full and fair compensation in the context of primary victims; the book deals in particular with recoverable losses, psychiatric damage, limitation laws and the 'Europeanisation' of personal injury compensation in the context of the approximation of laws in Europe.

There are, in effect, three families of jurisdictions considered in the book: the civil law jurisdictions, comprising Austria, Belgium, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain and Switzerland; the common-law jurisdictions of England, Wales, Scotland and Ireland; and the Scandinavian countries, Denmark, Finland, Norway and Sweden.

The book contains 18 national reports, providing a country-by-country practitioner guide to damage for personal injury. Each national report includes issues such as the sources of personal injury law, a consideration of the right to claim full and fair compensation, recoverable losses, including psychiatric damage, quantification of damages, the role of medical experts, limitation periods, issue and service of proceedings, and procedures for uninsured and untraced drivers. The book also contains a consideration of European law and case law governing personal injury, including consideration of the fourth *Motor insurance directive* and a description of the harmonisation of laws within



Europe. The general editors are Marco Bona and Philip Mead, and the publication of the book was supported by the European Commission under the GROTIUS civil programme.

John Schütte, a Dublin solicitor with a particular interest in personal injury litigation, is the author of the chapter dealing with personal injury compensation in Ireland. He comprehensively deals with the issue of the law governing personal injury. Among other matters considered is the issue of payment of lawyers' fees. Schütte notes that where only a portion of the successful party's fees is recovered, clients must always remember that they may be responsible for some shortfall. He states that usually the money recovered from the other side is referred to as party-and-party costs, while the contribution paid by the client is known as the solicitor-and-client charge. He states that under existing legislation, Irish solicitors are prohibited from agreeing a percentage fee with their client in personal injury litigation. The matter is ultimately one of negotiation, subject to the overriding principle that the matter can be decided by the taxing master.

In addition to John Schütte's contribution, the chapter written by Professor Marco Bona, a personal injury practitioner and a lecturer in comparative law at Milan University, describes how road traffic accidents and other injuries have been the subject of specific legislative provisions at European level. The law relating to recovery of damages has (to some extent) been affected by European legislative provisions as well as decisions of the European Court of Justice and by the European Court of Human Rights.

This book is an engaging and informative read for those interested in the law regulating the recovery of damages for personal injury. It contains a valuable description of the law, on a national and international basis, on a topic of considerable importance to lawyers. G

Dr Eamonn Hall is the company solicitor of Eircom plc.

BOOKS PUBLISHED

The *Succession Act, 1965* and related legislation: a commentary
Brian Sperrin with Paula Fallon
Lexis Nexis (2003)
26 Ormond Quay Upper, Dublin 7
ISBN: 1-85475-2944
Price: €140

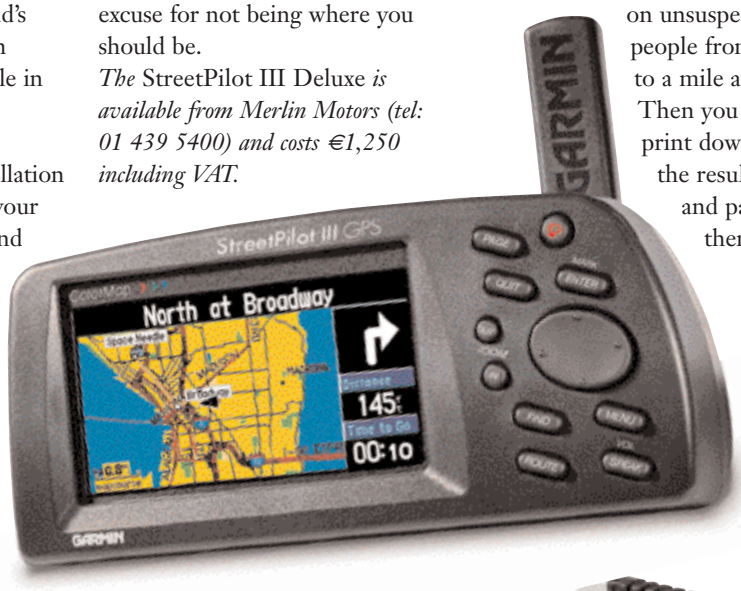
Intangible property rights in Ireland
Albert Power
Lexis Nexis (2003)
26 Ormond Quay Upper, Dublin 7
ISBN: 1-85475-3711
Price: €130.01

Tech trends

Lost in space?

Given the state of the traffic congestion in this country, drivers often find themselves going nowhere fast. And on those rare occasions when you might be able to cut loose in your car, you probably won't be able to find where you're going anyway, thanks to the woeful signposting. But if you do drive for a living, you might find the *StreetPilot III Deluxe* invaluable. The StreetPilot is the world's leading GPS car navigation system and it's now available in Ireland for the first time, through Merlin Motors. It requires no expensive installation since you just plug it into your vehicle's cigarette lighter and sit it on your dashboard. Using a satellite global positioning system (GPS), the electronic map plots your exact location and calculates the route to your destination. The colour screen gives you the name of approaching roads, the direction you're travelling and even the speed you are doing. The StreetPilot is supplied with *Mapsource City Navigator Europe V5*, which gives the best mapping available for Western Europe, including thousands of points of interest such as hotels, restaurants, theatres, historical and cultural sites, sports grounds and hospitals. Now you have no excuse for not being where you should be.

The StreetPilot III Deluxe *is available from Merlin Motors (tel: 01 439 5400) and costs €1,250 including VAT.*



I know what you did last summer

What's the biggest problem with being a Peeping Tom? It's being caught, right? Well, now you can get away with it by buying a Binocular Digital Camera over the internet. Forget legal niceties such as the right to privacy: this ludicrous yet entirely lawful invention allows you to intrude on unsuspecting people from up to a mile away. Then you can print down the results and paste them up on your big living room wall, admiring your handiwork as you sit on the floor of your unfurnished flat. You psycho. The Binocular Digital Camera's memory card can handle 24 super high res pictures or 128 low res pix, and you can download them on to your computer and print them out. It comes with leather case, neck strap, USB cable and software package compatible with Windows 98, 2000, ME and XP.

The Binocular Digital Camera is available over the internet at www.youcansave.com/binoculars *and costs $159.95 for the version with 8x magnification.*

The great outdoors

Panasonic has launched a new range of notebook computers 'specifically designed to meet the mission-critical computing needs of mobile workers facing the most demanding of environments'. In plain terms, this means that you can drop the new Toughbook line from a height, rattle it, spill liquid on it, and otherwise generally abuse it, and the little beggar will keep on ticking. The range includes a variety of models and processing powers, but they all do what you'd expect a top-notch notebook to do, and weigh between one and two kilograms. For example, the T2 weighs just 1.09kg, uses a 900mhz Intel Centrino chip and boasts 256MB of RAM and a 40GB hard drive. It has a 12-inch LCD screen and six hours of battery life. The bad news is that Panasonic, like so many other manufacturers, continues to bastardise the English language: the Toughbook, apparently, is 'a fully ruggedised notebook'. Still, if you're a professional who works outdoors a lot, this could be the one for you.

For more information and prices on the Toughbook range, visit www.panasonic.co.uk.

Rear window

After his ill-fated intervention at the battle of Waterloo, the Duke of Wellington's flagrantly gay younger brother, Edmund, opted for a career in the Royal Navy, where he quickly earned the sobriquet 'Rear Admiral'. If he'd heard what his salty shipmates were saying about him, he might not have had made the tragic mistake that cost Nelson an eye at Trafalgar. But Edmund wasn't to know that he could have bought the *Orbitor Electronic Eavesdropping Device* for a mere $59.95 on-line. Again, the dubious legality of this piece of equipment could add a frisson of excitement to your otherwise pointless existence. Apparently, you can snoop on conversations 300 feet away and record up to 12 seconds of talk on a digital chip. The device includes a 10x prism 'monocular' so you can look, listen and learn simultaneously. 'Hear what two suspicious men are planning down the street from your house', boasts the advertising copy for the Orbitor. Well, we can help you out there, mate: they're planning to come and take you away.

The Orbitor Electronic Eavesdropping Device is available at www.youcansave.com/gadgets *and costs $59.95.*

Sites to see

The truth is out there (*foia.fbi.gov/foiaindex.htm*). Ever wonder why the FBI kept tabs on Lucille 'I love Lucy' Ball? Well, now you can find out, thanks to the US government's freedom of information legislation. This site is an archive of files on figures as diverse as Baby Face Nelson, Ted Bundy, Albert Einstein, Winston Churchill and John Wayne.

Make friends and influence salads (*www.lunch.ie*). It's so crazy it might catch on. This site allows you to arrange to meet complete strangers for lunch and share the bill. It is aimed primarily at business people who may have similar business interests or whose advice could be helpful to each other. Who says there's no such thing as a free lunch?

Alternative news (*www.whatreallyhappened.com*). Never again will you be forced to accept what you see on Sky as news. Culled from countless – and some reputable – media sources, *whatreallyhappened.com* brings together mainstream and conspiracy-oriented news in one place. Just don't go there when you're working: you'll lose the day.

On-line games (*www.itsyourturn.com*). And if you've got any hours in your working day left after those sites, waste some more time by challenging a colleague to an e-mail correspondence game of chess, backgammon or even battleships. Sign up, send your challenge, and wait to be notified by e-mail of when it's your turn to move again.

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Name(s) of accompanying person(s): _____

Firm: _____

Tel: _____ Fax: _____ E-mail: _____

Flight preference (PLEASE TICK): Charter: ☐ Scheduled: ☐

BY CHEQUE: I enclose a cheque in the sum of €_____ (€400 per person travelling) representing booking fee (non refundable after 20th February 2004).

OR

BY CREDIT CARD: Name of cardholder

Expiry date: ____/____/____ Amount: _____

Type of card & credit card number: _____

Signed: _____ Date: _____

Please return the above completed form and payment to: Sarah Ellins, Law Society of Ireland, Blackhall Place, Dublin 7. DX79.
Tel: 01 672 4823, fax: 01 672 4833, e-mail: s.ellins@lawsociety.ie

Report of Law Society Council meeting held on 10 October 2003

Implementation of the *Second money-laundering directive*

James MacGuill reported that a seminar on the new regulations and guidance notes, organised by the DSBA, had been held on the previous Monday. Approximately 200 solicitors were present and there was a consensus that the society had reacted speedily and pro-actively in relation to the introduction of the new requirements. A number of important issues had been raised, including the implications for the giving of undertakings and for professional indemnity insurance. These issues would now be examined by the task force.

PIAB and proposed reforms to the litigation system

The Council considered the society's response to the general scheme of the *Civil Liability and Courts Bill*, together with the society's response to the draft scheme of the *Personal Injuries Assessment Board Bill, 2003*, both of which were circulated.

Ward McEllin briefed the Council on a series of initiatives being undertaken by the society to bring the inequities in the legislation to the attention of the public and public representatives. These initiatives involved contacts by the society and the local bar associations with TDs and senators throughout the country, press releases highlighting the areas of concern in both proposed bills and meetings of representatives of the local bar associations with their local political representatives.

The director general noted that the society's primary focus was to secure a statutory right of

representation before the PIAB and a right to payment for that representation. In addition, efforts would be made to prevent the proposed reduction in the limitation period from three years to one year.

Reviews of the legal profession: Ireland, England and Europe

The director general briefed the Council in relation to the review of legal services regulation recently announced in relation to the legal profession in England and Wales by Lord Falconer, the secretary of state for constitutional affairs. Lord Falconer had indicated that 'nothing would be out of bounds for the review, from complaints to price controls'.

At European level, he reported that a conference on competition and regulation in the professions would be held in Brussels on 28 October, which would be addressed by the European Commissioner for Competition, Mario Monti, and also by John Fingleton, chairman of the Irish Competition Authority. The announcement of a review by the EU Commission of competition in the liberal professions in the EU was expected.

The director general noted that the Law Society of Ireland was at a well-advanced stage in relation to a study by the Irish Competition Authority into the professions.

Education

John Costello noted that there were more than 440 students attending the current professional practice course, although the lecture hall was designed for a maximum of 400 students, and the overflow was being facilitated by video-link to another room within the building. Donald Binchy explained that, due to the high number of applicants, the Education Committee had been faced with numbers in excess of the capacity within the lecture theatre. The possibility of a video-link to another room on the premises had been given as an option to all of those who had exceeded the cut-off point and who, otherwise, would have had to wait for a year before they could commence their course. All those currently receiving their lectures by video-link had accepted this option in the full knowledge of what was involved.

The director general paid tribute to TP Kennedy and the staff in the Law School, who had taken on an additional 70 students and were making the system work just as efficiently as for the smaller number. He noted that, in their 1998 report, Deloitte & Touche had predicted an intake in 2003 of 300 when, in fact, the Law School had a current intake of 443. G

In briefing this month...

Report of Law Society Council meeting held on 7 November 2003

New Council members

The Council welcomed its new Council members James Cahill, James Long, Jarlath McInerney, Michele O'Boyle and Jerome O'Sullivan, and wished them well for their term of office.

Taking of office of presidents and vice-presidents

The outgoing president, Geraldine Clarke, thanked the Council members, the director general and the society's staff for their help and support during her year of office, a year that she regarded as the most interesting and challenging of her life. She wished the incoming president, Gerard Griffin, every success in the coming year. Mr Griffin was then formally appointed as president of the society. He thanked the Council for giving him the opportunity to serve as their representative, an appointment he assumed with a deep sense of the honour and trust placed in him. He paid tribute to the stamina, hard work, enthusiasm, energy and determination of Geraldine Clarke during her year of office. He also acknowledged the support and encouragement of her husband, Eric, and her daughters, Kate and Kamala.

The senior vice-president, Owen Binchy, and the junior vice-president, John D Shaw, then took office and pledged their commitment to the Council and the president during the coming year.

PIAB and proposed changes to the litigation system

Stuart Gilhooly reported that the *Personal Injuries Assessment Board Bill* was due to be published within the next two weeks. The society was engaged in a campaign, both at national level and through the bar associations, to seek to secure changes to the proposal, particularly the right of claimants to have legal representation. In relation to the one-year limitation period for the bringing of claims, it appeared that the minister for justice, equality and law reform was not prepared to make any concession on this point. The society was also seeking an amendment to place a time limit on the PIAB for the making of assessments.

The director general said that the society would press home its arguments in relation to the right of representation for claimants at its forthcoming meeting with the cabinet sub-committee. He understood that the tánaiste intended to process the legislation through the Oireachtas within a week, which was an extraordinary proposal reminiscent of emergency legislation relating to the security of the state. He noted also that the Alliance for Insurance Reform was engaged in an advertising campaign making objectionable suggestions about the legal profession, which was a measure of the hostility being faced by the society.

Studies on competition in the professions

The director general reported on a conference in Brussels on 28 October which had been attended by one representative from each of the major professions in each European member state. The conference was organised by the European Commission and had been addressed by commissioner Mario Monti, as well as John Fingleton, chairman of the Irish Competition Authority. At the conference, commissioner Monti had announced a major study on competition in the professions, with the report to issue by mid-2004. Both state and self-regulation of professional services would be examined.

Multiple complaints

John O'Connor reported that the new powers conferred on the Registrar's Committee by the *Solicitors (Amendment) Act, 2002* to take action in respect of solicitors who gave rise to multiple complaints from clients were now being exercised. The new powers had arisen from recommendations made by the independent adjudicator and the lay members of the Registrar's Committee.

Ireland Aid

The Council congratulated Michael Irvine on his successful efforts in securing funding from Ireland Aid to promote co-operation between the Irish legal profession and the legal profession in South Africa. G

Report of Law Society Council meeting held on 5 December 2003

PIAB and proposed changes to the litigation system

The president thanked all those Council members who had made contact with public representatives during recent weeks. The *PIAB Bill* would be considered by the joint Oireachtas committee on the following Wednesday and he urged any Council members who had not yet made contact with their local representatives to do so in advance of that date.

Ward McEllin said that, despite the profession's intensive lobbying campaign, it was having little success within the government, even though a significant number of members of the Fianna Fáil parliamentary party and the Opposition agreed with the society's concerns.

The director general noted that, only a few months previously, the PIAB proposal had enjoyed all-party uncritical support. However, because of the efforts of the bar association PROs, the Law Society and its Council members, this was no longer the case. He referred the Council to statements made in both the Seanad and the Dáil in relation to the issues of concern to the society (for further detail, see pages 8-11 of this *Gazette*).

The president noted that the *Courts and Civil Liability Bill* would probably be introduced in early 2004 and the society would have to engage in a similar exercise in relation to that bill. A recent meeting with the minister for justice, equality and law reform had confirmed that he was not open to amendments, particularly in relation to the reduction in the statutory period for bringing personal injury claims. John Dillon-Leetch said that the reduction in the statutory period to 12 months was totally unfair to the victims of accidents and, in his view, those who had proposed the amend-

ment should be required to justify it. It seemed to him that, in many instances, if a solicitor agreed to act for a claimant where a number of months had already elapsed, the solicitor could be exposed to an action in negligence.

Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights

The president briefed the Council in relation to a submission made by the society to the Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights in relation to its review of the criminal justice system. The society had been represented by the president, together with Patrick McGonagle, Dara Robinson and Colette Carey.

Law Clerks Joint Labour Committee

Kevin O'Higgins briefed the Council on a proposal being considered by the Law Clerks Joint Labour Committee to reclassify categories of workers employed in solicitors' offices. The intention was to remove outdated and outmoded classifications, such as 'clerk' and 'paperkeeper'.

The thrust of the proposal was one that rewarded education and provided a career path for individuals who were prepared to advance their skills by undertaking training courses. The Council indicated its support for the concept of re-classification, subject to a further examination of the specific education and training targets being considered.

Company Law Review Group

The Council approved the appointment of Paul Egan, the society's current nominee on the Company Law Review Group, for a further term of four years.

Approval of practising certificate form and fee for 2004

The Council approved the practising certificate form for 2004, together with the practising certificate fees recommended by the Finance Committee. The fees were set at €1,821 for solicitors more than three years' qualified and €1,490 for solicitors less than three years' qualified. The membership subscription was set at €85 for solicitors more than three years' qualified and €55 for solicitors less than three years' qualified. G

Committee reports

BUSINESS LAW

General scheme of the new *Companies Bill*

The Company Law Review Group established by the tánaiste and minister for enterprise, trade and employment has reached an advanced stage in determining the shape of the *Companies Consolidation Bill*. It recently published the general scheme of the proposed new *Companies Bill* on its website *clrg.org*. The new bill consists of two main groupings: group A – private company limited by shares, which will in future be known as the company limited by shares (CLS); and group B – companies and bodies corporate other than CLS. Group B companies include public limited companies, guarantee companies, unlimited companies and overseas companies.

Group A, which deals with by far the most common type of company incorporated in Ireland – the private company limited by shares – is sub-divided into 13 parts:

- Part 1 – preliminary and definitions
- Part 2 – incorporation and consequential matters
- Part 3 – share capital
- Part 4 – corporate governance
- Part 5 – duties of directors and other officers
- Part 6 – accounts, audit and annual return
- Part 7 – debentures and charges
- Part 8 – receivers
- Part 9 – reconstructions
- Part 10 – examinerships
- Part 11 – winding up
- Part 12 – dissolution and reinstatements, and
- Part 13 – compliance, investigation and enforcement.

The Company Law Review Group has published the full text of parts 2, 3 and 4 on its website and is seeking the views of practitioners and members of the public in respect of these and the remaining parts of the proposed new bill, which will be made available on its website over the coming weeks.

Business Law Committee

PROBATE, ADMINISTRATION AND TAXATION

Changes to VAT invoicing from 1 January 2004

Practitioners should note that the *VAT (Invoicing and Other Documents) (Amendment) Regulations 2003* came into force on 1 January 2004. The regulations impose new obligations on practitioners in respect of the invoices that they issue.

The main changes are as follows:

- A new requirement to sequentially number invoices in one or more series which will uniquely identify the invoice
- In the case of payments made on account, the date of receipt of the payment must be shown on the invoice if different from the invoice date
- For supplies of goods/services to another member state, the supplier must show the customer's VAT number in that other member state
- Where a reverse charge applies, the VAT number of the recipient must be shown on the invoice
- A VAT invoice for a zero-rated or reverse charge supply to a customer in another member state must indicate that the supply is an intra-community supply or reverse charge supply.

The Revenue will issue a detailed statement of practice in due course.

In the interim, practitioners may wish to refer to a document entitled *VAT invoicing information note*, which appears on the Revenue Commissioners' website. (Note: the reference in the Revenue note to the requirement to specify the 'unit price' on an invoice – for example, an hourly rate – will not apply to professional services where the supply is classified as a supply for a unit of time: for example, 'for services rendered from 1 July to 30 November'.) G

Probate, Administration and Taxation Committee

Practice notes

Data protection

The *Data Protection (Amendment) Act, 2003*, part of which came into force on 1 July 2003, amends the existing *Data Protection Act, 1988* (collectively the 'acts'). The acts have a considerable impact on how employers can gather, retain, process and distribute personal data about employees and potential employees.

The acts require that all personal data recorded, collected and stored by an employer must: i) be obtained and processed fairly; ii) be accurate and complete; iii) be kept up-to-date; iv) be kept only for one or more specified, explicit and legitimate purpose and not be processed in a manner incompatible with that purpose; v) be adequate, relevant and not excessive in relation to the purpose for which it was collected; vi) not be kept longer than is necessary; and vii) have appropriate security measures taken against unauthorised access or disclosure of the data. The above obligations apply to relevant electronic records (irrespective of when created) and also to data in a manual filing system (as defined in the acts) created after 1 July 2003. For the avoidance of doubt, the above provisions do not come into effect until October 2007 in relation to manual data created prior to 1 July 2003.

Pursuant to the acts, an employee is entitled to request access to data held by his employer in relation to him. This applies to relevant electronic and manual data regardless of when created. The employer must comply with the employee's written request for information within 40 days. The employee may, on receipt of the personal data relating to him, request to have the data rectified or erased. Employees and potential employees may also complain to the data protection commissioner and penalties may be imposed on the employer.

Practitioners should note the requirements of the act, both in respect of the obligations imposed on clients and those pertaining to data maintained within their own offices.

Employment Law Committee

Administration of estates: Department of Social Welfare enquiries

The Department of Social Welfare has advised that, *in every case where a will or schedule of assets arises*, the personal representatives of deceased social welfare assistance recipients are obliged by law to notify the minister, in writing, of the death of the social welfare recipient. Further, the personal representative must provide the minister with a copy of the Inland Revenue affidavit of the deceased, on request. This document is checked against the information held by the department. In order to determine the existence or extent of a claim against the estate, the inspector may require transcripts of all bank/building society accounts held solely or jointly by the deceased during the period that the assistance or pension was paid.

As failure to notify the minister can lead to personal liability on the part of the personal representative, it is essential in every case that either the required notification is made or that confirmation is obtained from the personal representative, having been fully advised of the implications, that the deceased was not at any time in receipt of social welfare assistance.

The committee is aware that the number and extent of these enquiries is creating an additional burden for solicitors. The solicitor's involvement in the information-gathering process may be significantly reduced if clients are encouraged to carry out the enquiries themselves, preferably at the time of filing of the Inland Revenue affidavit. Clients should be advised that if the solicitor is required to provide this service, an additional cost will be incurred.

The categories of social welfare assistance are as follows:

- Unemployment assistance
- Pre-retirement allowance
- Old age (non-contributory) pension
- Blind person's pension
- Widow's and orphan's (non-contributory) pension
- Deserted wife's allowance
- Prisoner's wife's allowance
- Lone parent's allowance
- Carer's allowance
- Supplementary welfare allowance
- Disability allowance.

Probate, Administration and Taxation Committee

Advertising regulations

The *Advertising regulations* specifically allow for the inclusion in an advertisement of a list of the services that are provided by the solicitor. The words 'personal injuries' may be included in such a list, provided the advertisement refers to the prohibition on percentage charging in contentious business.

It has come to the attention of the committee that there are an increasing number of advertisements which include in the list of services provided different categories of personal injuries, such as:

- *Personal injuries*
- *Accidents at work*
- *Traffic accidents*
- *Medical negligence*
- *Public liability accidents.*

The committee takes the view that the purpose of such advertisements is to solicit personal injury claims and consequently advertisements in this format will be regarded as a *prima facie* breach of the *Solicitors' advertising regulations*. Solicitors are reminded that advertisements may be submitted in draft form to the society for approval.

X & Company, Solicitors

Registrar's Committee

Certificates of title in commercial lending

Some lending institutions require certificates of title in commercial lending cases from borrowers' solicitors. The solicitor's packages supplied in most of such cases contain the lenders' own forms of undertaking, certificate of title and guidelines. It has been brought to the notice of the Conveyancing Committee that some of these documents contain a paragraph concerning the definition of 'good marketable title', which refers to the standards of good conveyancing practice prevailing in this jurisdiction as entailing the use of the standard Law Society contract for sale, building agreement and requisitions on title as appropriate **and/or** a paragraph providing for the referral of disputes as to the quality of any title for a ruling by the Conveyancing Committee of the Law Society.

It appears to the committee that the use of the name of the Law Society and/or the Conveyancing Committee in these documents gives the misleading impression to some practitioners that the society or the committee has approved the use of these certificate of title documents or has approved the content of the documents.

For the avoidance of doubt, the Conveyancing Committee wishes to bring the following to the notice of practitioners:

a) There is no certificate of title system for commercial lending agreed between the lenders and the Conveyancing Committee of the Law Society
b) The committee has not approved the use of or the content of any commercial certificate of title documentation with any lender
c) Use of the name of the committee or the Law Society in the body of such documentation does not mean the documents have been approved by the committee or the society
d) If individual solicitors agree to give certificates of title in commercial cases, they should be aware that:
   - the documents used will usually be significantly different to those agreed under the certificate of title system for residential mortgage lending
   - the documents agreed under the certificate of title system for residential mortgage lending will usually not be appropriate for use in relation to a commercial loan transaction
   - the basis on which they give a certificate of title to a lender, in terms of legal liability, may not be the same as that which has been agreed between the lenders and the society in residential mortgage lending certificate of title cases.

In addition, the committee would encourage practitioners to carefully review the terms of any non-residential mortgage certificate of title documentation presented to them for completion and, in particular, would encourage practitioners to negotiate the terms of same with the lender. The solicitor will not be in a position in every case to certify every item listed in the documentation and some documentation includes matters that are more properly for members of other disciplines, such as engineers or architects, to certify.

Conveyancing Committee

Note: The committee has recently established a working group to explore the possibility of drafting a standard certificate of title for use in commercial conveyancing. The discussions are at an early stage and are expected to take some time. The committee will advise the profession of the outcome of the discussions in due course.

CAT thresholds

Practitioners should note that the revised thresholds for capital acquisitions tax for the tax year 1 January 2004 to 31 December 2004 are:

Group	Threshold amount
I	€456,438
II	€45,644
III	€22,822

Indexation factor: 1.198

Probate, Administration and Taxation Committee

Appeals to Circuit Court

Practitioners should note the provisions of SI 484 of 2003, *District Court (Appeals to the Circuit Court) Rules 2003*, which came into operation on 17 November 2003.

The statutory instrument amends order 101 of the *District Court Rules 1997* (SI 93 of 1997) in order to clarify the position regarding the fixing of recognisances in situations where there are appeals to the Circuit Court.

Members are urged to familiarise themselves with the amend-ments to the rules, which are op-erative from 17 November 2003.

Criminal Law Committee

Garda station (legal advice) scheme: increase in fees payable

The Department of Justice has advised that fees for consultations under the scheme will be increased as follows:

Visit between 9am and 7pm, Monday to Friday

- €107.87 plus VAT with effect from 1 January 2004
- €110.03 plus VAT with effect from 1 July 2004
- €112.23 plus VAT with effect from 1 December 2004.

Visit between 7pm and 9am, Monday to Friday and on weekends and bank holidays

- €146.69 plus VAT with effect from 1 January 2004
- €149.62 plus VAT with effect from 1 July 2004
- €152.61 plus VAT with effect from 1 December 2004.

Telephone consultation

- €43.91 plus VAT with effect from 1 January 2004
- €44.79 plus VAT with effect from 1 July 2004
- €45.69 plus VAT with effect from 1 December 2004.

Travelling expenses paid at €0.76 per mile

Travelling expenses are paid by reference to the distance from the solicitor's office to the garda station or the place where the solicitor commences the journey to the garda station, whichever is the lesser distance. One set of travelling expenses only is paid for each visit to a garda station, irrespective of the number of persons advised.

A fee is payable to a solicitor in respect of each person who is detained in a garda station who is advised by the solicitor.

Criminal Law Committee

LEGISLATION UPDATE: 19 NOVEMBER 2003 – 19 JANUARY 2004

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

ACTS PASSED

Appropriation Act, 2003
Number: 42/2003
Contents note: Appropriates to the proper supply services and purposes sums granted by the *Central Fund (Permanent Provisions) Act, 1965* and makes certain provisions in relation to the financial resolutions passed by Dáil Éireann on 3/12/2003
Date enacted: 19/12/2003
Commencement date: 19/12/2003

Broadcasting (Funding) Act, 2003
Number: 43/2003
Contents note: Establishes a broadcasting funding scheme for television and radio programmes, to be funded by 5% of the net television licence fee receipts and to be administered by the Broadcasting Commission of Ireland (BCI); outlines the general objectives and framework of the scheme which is to be prepared by the BCI and agreed with the minister for communications, marine and natural resources
Date enacted: 23/12/2003
Commencement date: 23/12/2003

Companies (Auditing and Accounting) Act, 2003
Number: 44/2003
Contents note: Provides for the establishment of the Irish Auditing and Accounting Supervisory Authority; gives powers to the supervisory authority to supervise the regulatory functions of the recognised accountancy bodies and other prescribed accountancy bodies; amends company law to transfer to the supervisory authority existing functions relating to the recognition of accountancy bodies, and otherwise amends company law in relation to auditing, accounting and other matters
Date enacted: 23/12/2003
Commencement date: Commencement orders to be made (per s2 of the act)

Containment of Nuclear Weapons Act, 2003
Number: 35/2003
Contents note: Implements the state's obligations under the protocol additional to the agreement between the non-nuclear weapons states of the European Atomic Energy Community, and the International Atomic Energy Agency, in implementation of art III(1) and (4) of the *Treaty on non-proliferation of nuclear weapons*; designates the Radiological Protection Institute of Ireland as the national authority for the implementation of the new protocol, and provides for related matters
Date enacted: 17/11/2003
Commencement date: 3/12/2003 (per SI 657/2003)

Courts and Court Officers (Amendment) Act, 2003
Number: 36/2003
Contents note: Amends section 9 of the *Courts and Court Officers Act, 1995* (as last amended by the *Courts and Court Officers Act, 2002*) to increase the maximum number of ordinary judges of the High Court from 26 to 28
Date enacted: 17/11/2003
Commencement date: 17/11/2003

European Arrest Warrant Act, 2003
Number: 45/2003
Contents note: Gives effect to the council framework decision of 13/6/2002 on the European arrest warrant and the surrender procedures between member states; amends the *Extradition Act, 1965* and certain other enactments and provides for related matters (text of the council framework decision is included as a schedule to the act)
Date enacted: 28/12/2003
Commencement date: 1/1/2004 (per s 1(2) of the act)

European Communities (Amendment) Act, 2003
Number: 38/2003
Contents note: Amends the *European Communities Act, 1972* in order to provide that certain parts of the *Athens treaty* of 16/4/2003 concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union shall form part of the domestic law of the state once Ireland has ratified the treaty
Date enacted: 3/12/2003
Commencement date: Commencement order to be made (per s2(3) of the act)

Independent Monitoring Commission Act, 2003
Number: 40/2003
Contents note: Provides for the Independent Monitoring Commission established by an agreement between the government of Ireland and the government of the United Kingdom of Great Britain and Northern Ireland done at Dublin on 25/11/2003. The objective of the commission is to carry out the functions in relation to paramilitary activity and demilitarisation as described in arts 4, 5, 6 and 7 of the agreement with a view to promoting the transition to a peaceful society and stable and inclusive devolved government in Northern Ireland
Date enacted: 19/12/2003
Commencement date: Commencement order to be made (per s12(2) of the act)

Minister for Community, Rural and Gaeltacht Affairs (Powers and Functions) Act, 2003
Number: 39/2003
Contents note: Consolidates the existing legislative powers of the minister for community, rural and gaeltacht affairs in relation to the provision of transport to the inhabited islands of the state and provides for new powers in relation to the provision of airstrips on the islands and of connecting bus passenger services as part of certain ferry/air contracts
Date enacted: 16/12/3003
Commencement date: 16/12/2003

Personal Injuries Assessment Board Act, 2003
Number: 46/2003
Contents note: Establishes the Personal Injuries Assessment Board (PIAB) to make assessments of compensation for personal injuries without legal proceedings being brought
Date enacted: 28/12/2003
Commencement date: Commencement orders to be made (per s2 of the act)

Road Traffic Act, 2003
Number: 37/2003
Contents note: Substitutes a new section 12 in the *Road Traffic Act, 1994* to extend the grounds on which a garda may require a driver to provide a preliminary breath test (breathalyser); amends section 13(1) of the *Road Traffic Act, 1994* and repeals section 10 of the *Road Traffic Act, 2002*
Date enacted: 27/11/2003
Commencement date: 1/12/2003 (per SI 647/2003)

Social Welfare Act, 2003
Number: 41/2003
Contents note: Amends and extends the *Social Welfare Acts*, the *Health Contributions Act, 1979* and the *National Training Fund Act, 2000*. Provides for increases in the rates of social insurance and social assistance payments, improvements in the family income supplement scheme, and an increase in the

widowed parent grant; provides for an increase in the annual earnings/income ceiling above which PRSI contributions are not payable by employed or optional contributors, as announced in the budget; provides for a number of changes to social welfare legislation, including amendments to claim-linking, duration of entitlement to unemployment benefit, amendments to qualified child increases and to the supplementary welfare allowance scheme as it relates to rent and mortgage supplements; also contains a number of minor technical amendments to the legislation governing the application of PRSI, health contributions and the national training fund levy to benefits-in-kind
Date enacted: 19/12/2003
Commencement date: Various – see act

SELECTED STATUTORY INSTRUMENTS

Containment of Nuclear Weapons Act, 2003 *(Commencement) Order 2003*
Number: SI 657/2003
Contents note: Appoints 3/12/2003 as the commencement date for all sections of the act

Criminal Justice Act, 1994 *(Section 32) (Prescribed Activities) Regulations 2004*
Number: SI 3/2004
Leg-implemented: Dir 2001/97
Contents note: Prescribe activities for the purposes of sub-section (2) of section 32 (measures to be taken to prevent money laundering) of the *Criminal Justice Act, 1994* which apply to the designated bodies, including solicitors, referred to in the Criminal Justice Act, 1994 *(Section 32) Regulations 2003* (SI 242/2003) as amended by the Criminal Justice Act, 1994 *(Section 32) (Amendment) Regulations 2003* (SI 416/2003). Gives further effect to directive 2001/97/EC
Commencement date: 1/2/2004

Criminal Justice (Legal Aid) (Amendment) Regulations 2003
Number: SI 713/2003
Contents note: Provide for increases in the fees payable under the criminal legal aid scheme to solicitors for attendance in the District Court and for appeals to the Circuit Court, and to solicitors and counsel in respect of essential visits to prisons and other custodial centres (other than garda stations) and for certain bail applications, as follows: 3% with effect from 1/1/2004; 2% with effect from 1/7/2004; 2% with effect from 1/12/2004
Commencement date: 1/1/2004

Employment Regulation Order (Law Clerks Joint Labour Committee) (No 2) 2003
Number: SI 543/2003
Contents note: Made by the Labour Court on the recommendation of the Law Clerks Joint Labour Committee; fixes statutory minimum rates of pay and regulates statutory conditions of employment for certain workers employed in solicitors' offices
Commencement date: 21/11/2003

European Communities (Abolition of Withholding Tax on Certain Interest and Royalties) Regulations 2003
Number: SI 721/2003
Leg-implemented: Dir 2003/49
Contents note: Insert a new chapter 6 into part 8 (annual payments, charges and interest) of the *Taxes Consolidation Act, 1997* to implement council directive 2003/49 on a common system of taxation applicable to interest and royalty payments made between associated companies of different member states
Commencement date: 1/1/2004

European Communities (Electronic Communications Networks and Services) (Data Protection and Privacy) Regulations 2003
Number: SI 535/2003
Leg-implemented: Dir 2002/58 on the processing of personal data and the protection of privacy in the electronic sector
Commencement date: 6/11/2003

Circuit Court Rules (No 4) (Restoration of Companies to the Register pursuant to Section 12 of the* Companies Act, 1982 *as inserted by Section 46 of the* Companies (Amendment) (No 2) Act, 1999*) 2003
Number: SI 615/2003
Contents note: Amend order 53, rule 2 of the *Circuit Court Rules 2001* (SI 510/2001) by the addition of provisions and a form in respect of applications for restoration of companies to the register
Commencement date: 11/12/2003

District Court (Maintenance) Rules 2003
Number: SI 614/2003
Contents note: Substitute new forms 54.5, 54.6, 54.7 and 54.8 in schedule C of the *District Court Rules 1997* (SI 93/1997)
Commencement date: 11/12/2003

Rules of the Superior Courts (Commercial Proceedings) 2004
Number: SI 2/2004
Contents note: Insert a new order 63A and a new appendix X in the *Rules of the Superior Courts* in order to prescribe regulations for the operations of the commercial list in the High Court
Commencement date: 5/1/2004

Rules of the Superior Courts (Fees Payable to Commissioners for Oaths) 2003
Number: SI 616/2003
Contents note: Substitute a new part VI of appendix W of the *Rules of the Superior Courts* to provide for increases in the fees chargeable by commissioners for oaths
Commencement date: 11/12/2003

European Communities (Fourth Motor Insurance Directive) Regulations 2003
Number: SI 651/2003
Leg-implemented: Dir 2000/26 amending dir 73/239 and dir 88/357
Contents note: Implement directive 2000/26/EEC relating to insurance against civil liability in respect of the use of motor vehicles and amending directives 73/239/EEC and 88/357/EEC (*Fourth motor insurance directive*). Provide for the processing of certain claims for compensation for injury or damage arising as a result of accidents occurring in an EU member state other than the member state of residence of the injured party
Commencement date: 27/11/2003

European Communities (Lawyers' Establishment) Regulations 2003
Number: SI 732/2003
Leg-implemented: Dir 98/5
Contents note: Give effect to directive 98/5/EC to facilitate practice of the profession of a lawyer on a permanent basis in an EU member state other than that in which the lawyer's professional qualification was obtained. Provide for the registration of such lawyers, their professional activities, conduct and discipline and, subject to certain conditions, their admission into the professions of barrister and solicitor
Commencement date: 29/12/2003

European Communities (Mutual Assistance in the field of Direct Taxation, certain Excise Duties and Taxation of Insurance Premiums) Regulations 2003
Number: SI 711/2003
Leg-implemented: Dir 77/799 as amended by dir 79/1070, dir 92/12 and dir 2003/93 on mutual assistance (exchange of information) by the competent authorities of EU member states
Commencement date: 31/12/2003

European Communities (Taxation of Savings Income in the form of Interest Payments) Regulations
Number: SI 717/2003
Leg-implemented: Dir 2003/48
Contents note: Insert a new chapter 3A (sections 898B to 898O) into part 38 (returns of income and gains, other obligations and returns, and revenue powers) of the *Taxes Consolidation Act, 1997* to give effect to council directive 2003/48/EC on taxation of savings income in the form of interest payments. Chapter 3A requires paying agents established in Ireland to report to the Revenue Commissioners information about savings income paid to, or secured for, a beneficial owner resident in an EU member state other than the state. The Revenue Commissioners are authorised to pass this information on to the competent authorities of the member state in which a beneficial owner is resident. Similar reporting requirements are made in respect of certain entities known as 'residual entities'. Provision is also made for credit for, or refund of, tax deducted where savings income beneficially owned by an Irish resident and arising in Austria, Belgium or Luxembourg is subject to the withholding tax which these countries are authorised to impose under the directive in place of exchange of information
Commencement date: 1/1/2004 for the sections of chapter 3A other than ss898H, 898I, 898J, 898L and 898M for which a commencement order will be made to bring them into operation on a day not earlier than 1/1/2005 (per s8980(1))

European Communities (Undertakings for Collective Investment in Transferable Securities) (Amendment) (No 3) Regulations 2003
Number: SI 623/2003
Leg implemented: Dir 85/611 as amended by dir 88/220, dir 95/26, dir 2001/108 and dir 2001/107
Contents note: Implement directive 2001/107/EC (*Management directive*) which amends directive 85/611/EEC as amended by directive 88/220/EEC, directive 95/ 26/EC, and directive 2001/108/ EC on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS). Amend SI 497/2003 (*Management regulations*) by defining the transitional arrangements applicable to self-managed investment companies and simplified prospectuses
Commencement date: 21/11/2003

Extradition Act, 1965 *(Application of Part II) (Amendment) (No 2) Order 2003*
Number: SI 649/2003
Contents note: Gives effect to an international agreement between Ireland and Spain in relation to the extradition of own nationals whereby each state shall not refuse a request for extradition on the basis that the person whose extradition is being sought is a national of the requested state
Commencement date: 19/11/2003

Freedom of Information Act, 1997 *(Prescribed Bodies) Regulations 2003*
Number: SI 642/2003
Contents note: Prescribe each of the performance verification groups listed in the schedule to the regulations as a public body for the purposes of the *Freedom of Information Act, 1997* by their inclusion in paragraph 1(5) of the first schedule to the act
Commencement date: 19/11/2003

Health (In-Patient Charges) (Amendment) Regulations 2003
Number: SI 654/2003
Contents note: Increase the daily charge for in-patient services to €45 and the maximum amount payable in any period of 12 consecutive months to €450
Commencement date: 1/1/2004

Health (Out-Patient Charges) (Amendment) Regulations 2003
Number: SI 653/2003
Contents note: Increase to €45 the charge in respect of attendance at accident and emergency or casualty departments, where the person concerned has not been referred by a medical practitioner. The charge shall not apply where such attendance results in hospital admission. Exemptions for medical card holders and hardship provision continue to apply
Commencement date: 1/1/2004

Income Tax (Employments) Regulations 2003
Number: SI 613/2003
Contents note: Amend the *Income Tax (Employments) (Consolidated) Regulations 2001* (SI 559/2001), which prescribe the manner in which the tax is to be deducted from salaries and wages and accounted for to the Revenue Commissioners under the PAYE system
Commencement date: 1/1/2004

Road Traffic Act, 2003 *(Commencement) Order 2003*
Number: SI 647/2003
Contents: Appoints 1/12/2003 as the commencement date for all sections of the act

Social Welfare (Miscellaneous Provisions) Act, 2002 *(Section 11 & 16) (Commencement) Order 2003*
Number: SI 643/2003
Contents note: Appoints 25/11/2003 as the commencement date for: a) s11 of the *Social Welfare (Miscellaneous Provisions) Act, 2002*, which provides for regulations to permit the return, subject to certain conditions, of PRSI contributions paid in respect of payments to personal retirement savings accounts (PRSAs) and other personal pensions made in a personal capacity outside the payroll system; b) s16 of the *Social Welfare (Miscellaneous Provisions) Act, 2002* insofar as it relates to part 3 of the schedule to the said act. Part 3 of the schedule provides that contributions made by employees or proprietary directors to PRSAs or other personal pensions will be exempt from payment of a health contribution in line with the arrangements that will apply in respect of PRSI. Regulations may be made to enable the return, subject to certain conditions, of health contributions made outside the payroll system in respect of payments to such pensions by employees or proprietary directors

Stamp Duty (Particulars to be Delivered) (Amendment) Regulations 2003
Number: SI 542/2003
Contents note: Amend the *Stamp Duty (Particulars to be Delivered) Regulations 1995* (SI 144/1995) and provide that particulars to be delivered are to be presented at any one of three revenue offices which have a stamping service for impressing the 'particulars delivered' stamp or at any other office of the Revenue Commissioners as directed by the Revenue Commissioners or by any officer acting on their behalf. Minor changes have been made to the particulars delivered form ST.21 and all references to 'revenue social insurance (RSI) number' in the 1995 regulations have been replaced by 'personal public service (PPS) number'
Commencement date: 5/12/2003

Value-Added Tax (Invoices and other Documents) (Amendment) Regulations 2003
Number: SI 723/2003
Leg-implemented: Dir 2001/115
Contents note: Specify the form and particulars to be contained in VAT invoices, credit notes and other documents which are required to be issued by taxable persons in accordance with s17 of the *Value-Added Tax Act, 1972*, and implement the outstanding parts of council directive 2001/115/EC
Commencement date: 1/1/2004 G

Prepared by the Law Society Library

SOLICITORS DISCIPLINARY TRIBUNAL

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 William B Glynn, solicitor, carrying on practice under the style and title of William B Glynn Solicitors at Aengus House, Long Walk, Galway, and in the matter of the *Solicitors Acts, 1954 to 1994* [2219/DT365]
Law Society of Ireland (applicant)
William B Glynn (respondent solicitor)

On 24 July 2003, the Solicitors Disciplinary Tribunal found that the respondent solicitor was guilty of misconduct in his practice as a solicitor in that he had:

a) Failed to comply with an undertaking of 18 September 1995 in a timely manner or at all
b) Failed to reply to multiple correspondence from the complainant solicitor in a timely manner or at all
c) Failed to reply to the society's correspondence in a timely manner or at all, in particular, the society's letters of 20 February 2001, 11 April 2001, 30 May 2001, 8 February 2002, 22 February 2002, 8 March 2002, 19 March 2002 and 3 May 2002
d) Failed to reply to the society's requirement as set out in the letter of 3 May 2002 to furnish a progress report indicating by return the reasons for the delay in dealing with the matter and how it was proposed to resolve it
e) Failed to attend the Registrar's Committee meeting on 11 June 2002.

The tribunal ordered that the respondent solicitor:

a) Do stand censured
b) Pay the sum of €1,500 to the compensation fund
c) Pay the whole of the costs of the Law Society as taxed by the taxing master of the High Court in default of agreement.

In the matter of Ambrose Steen, solicitor, carrying on practice under the style and title of Ambrose Steen Solicitors at Tara House, Trimgate Street, Navan, Co Meath, and in the matter of the *Solicitors Acts, 1954 to 2002* [2851/DT346]
Law Society of Ireland (applicant)
Ambrose Steen (respondent solicitor)

On 10 April 2003, the Solicitors Disciplinary Tribunal found that the respondent solicitor was guilty of misconduct in his practice as a solicitor in that he had:

a) Allowed a deficit of client funds to arise in his practice totalling £112,796 as of 11 December 2001, which deficit totalled £82,796 as of 21 January 2002, by drawing cheques in the client account payable to the office account thus creating the deficit
b) Failed to file an accountant's report for the year ended 30 June 2001 in a timely manner or at all
c) Failed to file a cessation report or a closing accountant's report in a timely manner or at all.

The tribunal ordered that the respondent solicitor:

a) Do stand censured
b) Pay a sum of €5,000 to the compensation fund within three months from the date of the order
c) Pay the whole of the costs of the Law Society of Ireland of this tribunal inquiry, to be taxed in default of agreement.

In the matter of Christopher B Walsh, solicitor, carrying on practice under the style and title of Christopher B Walsh Solicitor at 90 Park Drive Avenue, Castleknock, Dublin 15, and who also has a branch office at Main Street, Tinnahinch, Graignamanagh, Co Kilkenny, and in the matter of the *Solicitors Acts, 1954 to 2002* [4949/DT338]
Law Society of Ireland (applicant)
Christopher B Walsh (respondent solicitor)

On 24 April 2003, the Solicitors Disciplinary Tribunal found that the respondent solicitor was guilty of misconduct in his practice as a solicitor in that he had:

a) Failed to file his accountant's report for the year ended 28 February 2001 in a timely manner or at all in accordance with the provisions of section 21(1) of the *Solicitors' accounts regulations* of 1984.

The tribunal ordered that the respondent solicitor:

a) Do stand censured
b) Pay the sum of €1,250 to the compensation fund
c) Pay the whole of the costs of the Law Society of Ireland or any person appearing before them as taxed by the taxing master of the High Court in default of agreement.

In the matter of Francis J Lowney, solicitor, carrying on practice in the firm of Doyle Lowney & Company Solicitors at Westgate, Wexford, and in the matter of the *Solicitors Acts, 1954 to 1994* [2969/DT344]
Law Society of Ireland (applicant)
Francis J Lowney (respondent solicitor)

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

a) Failed to transmit his file to the society in accordance with the society's recommendations and his agreement to do so in a timely manner or at all
b) Failed to respond to the society's correspondence in the investigation of this complaint in a timely manner or at all, and in particular failed to reply to the following letters dated 4 December 2000, 18 December 2000, 9 February 2001, 20 March 2001, 20 April 2001, 9 May 2001, 22 May 2001, 29 June 2001, 21 August 2001, 5 September 2001, 18 September 2001, 11 October 2001, 9 November 2001, 23 November 2001, 6 December 2001, 10 January 2002, 23 January 2002, 7 February 2002, 22 March 2002
c) Failed to appear at the Registrar's Committee meeting on 19 March 2002 despite being requested to do so.

The tribunal ordered that the respondent solicitor:

a) Do pay the sum of €500 in respect of each finding of misconduct
b) Pay the whole of the costs of the Law Society of Ireland to be taxed by the taxing master of the High Court in default of agreement. G

Personal injury judgment

Traffic accident – minor injuries of a soft-tissue nature – video evidence – proceedings instituted in the High Court – issue of whether gross exaggeration of injuries amounted to an abuse of process warranting dismissal of the case – role of an appellate court in the context of review of evidence – whether a plaintiff who instituted proceedings in the High Court rather than in the Circuit Court should be liable to pay costs to the defendant

CASE

***Conor O'Connor v Bus Átha Cliath/Dublin Bus*, High Court, O'Donovan J, judgment of 28 March 2003; Supreme Court, Denham, Murray and Hardiman JJ; judgment of the Supreme Court delivered by all three members of the court on 18 December 2003.**

THE FACTS

On 18 November 1996, Conor O'Connor was driving a four-wheel drive jeep, which he used for towing. He was stationary in a line of traffic on the Malahide Road in Dublin when his car was struck in the rear by a bus.

Born on 15 June 1968, Mr O'Connor was a self-employed motor engineer at the time of the accident, with garage premises on the North Circular Road, Dublin 7. He had been in business there since 1990 and was mainly engaged in the servicing of light commercial vehicles.

Liability for the accident was not denied by Dublin Bus. High Court proceedings were instituted on 26 April 1999. Mr O'Connor went to Mr McNamee, an orthopaedic surgeon, who saw him in March 1997, and Mr McNamee gave evidence of Mr O'Connor's complaints. He saw Mr O'Connor again on 30 November 1999. Mr O'Connor had claimed injuries in respect of his neck and back, with resulting pain, stiffness and restriction of movement. This was said to affect his work. In evidence, Mr O'Connor said he was still getting headaches, his neck was stiff and he felt that he had decreased power in his arms. He said his lower back locked up when he was working and when he was standing at the sink. The surgeon stated that Mr O'Connor complained of a dull ache in his back, which could be associated with some feeling of nausea. Mr O'Connor had difficulty in carrying out a lot of activities while he was still having physiotherapy. In relation to the clinical findings, the surgeon stated that Mr O'Connor had some decrease in neck movements. The surgeon stated that he found it difficult to quantify such decrease in neck movements but estimated they were certainly greater than 25% reduced. The surgeon indicated that Mr O'Connor otherwise had a normal range of movements.

JUDGMENT OF THE HIGH COURT

The case proceeded in the High Court on 26 and 27 March 2003 before O'Donovan J, the trial judge. O'Donovan J reserved judgment overnight and delivered judgment on 28 March 2003.

Dublin Bus argued in the High Court that Mr O'Connor had deliberately and grossly exaggerated his injuries, to the point that his claim was an abuse of process. O'Donovan J stated that he had no doubt that Mr O'Connor grossly exaggerated the symptoms that he alleged he experienced as a result of the injuries he suffered. However, he was not convinced that Mr O'Connor told deliberate lies. The judge stated that he did not believe Mr O'Connor was anything like as bad as he purported to have been since the accident. The judge was convinced that Mr O'Connor believed everything that he had told the judge. The judge considered that Mr O'Connor was misguided and that a lot of his problems, particularly his alleged on-going problems, were 'a figment of his imagination'. Nevertheless, the judge considered that Mr O'Connor was basically an honest person.

Dublin Bus was in possession of a video dating back to March 2001 showing Mr O'Connor engaging in building work in Raheny and various ancillary activities. On 10 March 2001, Mr O'Connor was seen taking a trailer to a Land Rover vehicle and attaching the trailer. Two weeks later he was seen in a white vehicle with a load of timber. He was seen leaving premises in that vehicle and coming back with the vehicle loaded with sand. He was shown unloading the bags of sand from the back of the vehicle. Subsequent to this, he left in the same vehicle and came back with cement in the back of the vehicle. On Sunday 31 March 2001, Mr O'Connor was seen moving a cement mixer from a garage and beginning to mix concrete or cement. He was seen lifting bags and filling the mixer on a number of occasions throughout the afternoon. He was also seen lifting a bag of cement and unloading 'mix' into a wheelbarrow.

O'Donovan J concluded that certain soft-tissue injuries were probable consequences of the accident that Mr O'Connor had with the bus, but it was equally probable 'that those injuries were of a very moderate nature'. The judge noted that Mr O'Connor claimed to have on-going problems and held that these complaints were inconsistent with the evidence of the surgeon.

By notice for particulars dated 5 October 1999, Mr O'Connor was asked, among other things, to say how much the sum claimed in respect of loss of earnings and future loss of earnings was computed and made up. Subsequently, an accountant's report was furnished. It dealt with the earnings for the years 1997, 1998 and 1999 under the headings 'actual sales, actual net earnings, budgeted sales and budgeted net earnings'. It also stated that Mr O'Connor's business had ceased to trade from 30 August 2000 'due to financial difficulties and was presently being wound up'.

In his direct evidence in the witness box, Mr O'Connor stated that, in relation to the year 1999, his actual earnings were about £10,000 less than his budgeted or projected earnings. He explained that this was so because he was

not able to work as hard or effectively as he might have due to his injury. At the end of the direct evidence, O'Donovan J had asked Mr O'Connor what was being claimed for loss of earnings. O'Donovan J was told that there was no specific sum being claimed for loss of earnings; it was part of the general damages as such. However, counsel for Mr O'Connor stated that the loss of earnings was not alleged to be on an on-going loss.

O'Donovan J considered that basically Mr O'Connor was an honest person. He came to this conclusion because Mr O'Connor had never stopped working since his accident, he never denied engaging in any of the activities that the video showed him doing, he conceded not only improvement over the years but also that he had remissions which lasted for months and, finally, the surgeon thought he was a genuine person. The trial judge stated that if Mr O'Connor was deliberately trying to pull the wool over the court's eyes or endeavouring to attract compensation to which he was not entitled, he would not have continued to work and would not have made the concessions which he made in evidence.

The trial judge, and subsequently the judges in the Supreme Court, referred to the case of *Shelly-Morris v Bus Átha Cliath* ([2003] 1 IR 232), where the Supreme Court considered that the telling of deliberate falsehoods in respect of one aspect of a claim might have implications for the plaintiff's credibility in general and might mean the plaintiff failed to discharge the required burden of proof generally or with regard to an aspect of the claim. The Supreme Court in *Shelly-Morris* held that where the credibility of the plaintiff had been so undermined that the burden of proof was not discharged, the case might be dismissed.

THE HIGH COURT AWARD

O'Donovan J awarded Mr O'Connor general damages to the date of trial in the amount of €15,000. The judge considered that Mr O'Connor was not suffering any on-going consequence to his accident and, accordingly, he did not award any general damages for the future.

The trial judge awarded Mr O'Connor a sum of €4,790, which he had paid to repair his car, €595 in respect of physiotherapy and €46 that he paid to his general practitioner.

Total award: €20,431.

Mr O'Connor was awarded costs only on the Circuit Court scale, with a certificate for senior counsel.

JUDGMENT OF THE HIGH COURT

Dublin Bus appealed the decision of the High Court. The case was heard before Denham, Murray and Hardiman JJ, with each judge delivering a separate judgment on 18 December 2003.

Dublin Bus argued that the findings of the High Court to the effect that Mr O'Connor was an honest though misguided witness was contrary to the evidence; that the High Court judge failed to give any or sufficient weight to the contradictions, exaggerations and falsehoods perpetrated by Mr O'Connor both in his pleadings and in his evidence; that the High Court had erred in law and fact in failing to hold that Mr O'Connor so abused the process of the court as to warrant dismissal of his claim; and finally that the High Court erred in law and in fact in not exercising discretion in favour of Dublin Bus in relation to certain matters pertaining to costs as provided for in section 17 of the *Courts Act, 1981* as substituted by section 14 of the *Courts Act, 1991*.

The judges in the Supreme Court referred to the case of *Hay v O'Grady* ([1992] IR 210), where the Supreme Court heard an appeal by the plaintiff from the dismissal by the High Court of an action for negligence. The question raised in that court related in part to the function of an appellate court. Having considered the constitution, case law and the rules of the superior courts, McCarthy J in that case considered the role of an appellate court:

'1) An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence but also observes the manner in which it is given and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial

2) If the findings of fact made by the trial judge are supported by credible evidence, this court is bound by those findings, however voluminous and apparently weighty the testimony against them. The truth is not the monopoly of any majority

3) Inferences of fact are drawn in most trials; it is said that an appellate court is in as good a position as the trial judge to draw inferences of fact. (See the judgment of Holmes LJ in 'Gairloch', *The SS Aberdeen Glenline Steamship Co v Macken*, [1899] 2 IR 1, cited by O'Higgins CJ in *The People (Director of Public Prosecutions) v Madden*, [1977] IR 336 at p339.) I do not accept that this is always necessarily so. It may be that the demeanour of a witness in giving evidence will, itself, lead to an appropriate inference which an appellate court would not draw. In my judgement, an appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence or recollection of fact and a different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge

4) A further issue arises as to the conclusion of law to be drawn from the combination of primary fact and proper inference – in a case of this kind, was there negligence? I leave aside the question of any special circumstance applying as a test of negligence in the particular case. If, on the facts found and either on the inferences drawn by the trial judge or on the inferences drawn by the appellate court in accordance with the principles set out above, it is established to the satisfaction of the appellate court that the conclusion of the trial judge as to whether or not there was negligence on the part of the individual charged was erroneous, the order will be varied accordingly

5) These views emphasise the importance of a clear statement, as was made in this case, by the trial judge of his findings of primary fact, the inferences to be drawn and the conclusion that follows'.

The other judges of the Supreme Court agreed with the judgment of McCarthy J.

Hardiman J stated that Mr O'Connor was a cautious and wary witness, 'prone to repeat questions instead of answering them, to offer irrelevant evidence and to attempt to probe what they knew already before making concessions'. But the trial judge who saw and heard him felt that he was honest but misguided in his exaggerated account of the injury. Hardiman J considered that this was not a finding which in the absence of something coercive the Supreme Court could disregard. The work Mr O'Connor was shown to be capable of by the videotape was

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SOCIETY OF YOUNG SOLICITORS IRELAND
IN ASSOCIATION WITH THE BAR COUNCIL OF IRELAND

SPRING CONFERENCE 2004

27, 28 and 29 February 2004 at Dromoland Castle Hotel, County Clare

Friday 27 February

20.00 - 21.30	Registration
21.00 - late	Welcome drinks – cocktail bar

Saturday 28 February

10.30 - 13.30: lectures*	1. Chairperson's introduction 2. *An introduction to the operation of the Commercial Court in Ireland* – **Grahame Walsh, solicitor, McCann FitzGerald** 3. *Your career move: how and where to find the best positions* **Brian Carroll, director, Brightwater Selection** 4. To be confirmed
14:00	Activities: horse riding, clay pigeon shooting, health centre, swimming, beauty treatments, walking etc
19.30 - 20.00	Pre-dinner drinks reception
20.00 - late	Gala dinner, band and DJ (black tie)

Sunday 29 February

12.00	Check out

* **Time spent attending the above lectures may be counted when assessing the completion of your CPD requirements**

Notes:

1. Persons wishing to attend must apply through SYS.
2. Accommodation is limited and will be allocated on a first-come first-served basis, in accordance with the procedure set out below.
3. The conference fee is €300 pps and includes Friday and Saturday night accommodation, two breakfasts, reception, subsidised activities, banquet and conference materials.
4. One application form must be submitted per room per envelope together with cheque(s) for the appropriate conference fee and a self-addressed envelope. All applications must be sent by ordinary prepaid post, and only applications exhibiting a postmark dated 12 February 2004 or after will be considered. Rejected applications will be returned in due course. Successful applications will be confirmed by e-mail only.
5. Names of delegates to whom the cheque(s) apply **must** be written on the back of the cheque(s).
6. Cancellations must be notified to nora.lillis@mccannfitzgerald.ie on or before 20 February 2004. Cancellations after that date will not qualify for a refund.

APPLICATION FORM

PLEASE USE BLOCK CAPITALS. ONE FORM PER ROOM PER ENVELOPE.

Name 1 _____ Name 2 _____

Firm 1 _____ Firm 2 _____

E-mail _____ E-mail _____

One contact address _____

_____

Phone (O) _____ (M) _____ (H) _____

I enclose cheque(s) payable to SYS in the sum of €600 and I enclose self-addressed envelope.
Application to the chairman, SYS, PO Box 7255, Dublin 4.

indeed inconsistent with Mr O'Connor's account of continuing disability, according to the judge. But he said that the High Court judge's assessment of Mr O'Connor's state of mind in giving the vital evidence about continuing disability must therefore subsist.

Denham J considered, based again on *Hay v O'Grady*, that on the current jurisprudence of the court, she was satisfied that she could not interfere with the decision of the High Court on the issue of the credibility of Mr O'Connor.

In the view of Murray J, the trial judge was entitled to make the findings which he did. In regard to the principles in *Hay v O'Grady* set out above, it was not open to the Supreme Court to set them aside. Accordingly, he considered in the circumstances that the question of an alleged abuse of process did not arise.

The issue of costs

The Supreme Court then considered the issue of costs. The High Court had awarded costs to Mr O'Connor on the Circuit Court scale, having regard to the level of damages awarded. Dublin Bus submitted that the High Court judge erred in failing to accede to its submission that costs should be awarded on the basis of section 17(5) of the *Courts Act, 1981* as amended by the *Courts Act, 1991*. Essentially, the effect of the legislative provision is, in the words of Hardiman J, to provide a disincentive to the taking of an action in a higher court than is necessary. It provides that, where a plaintiff obtains an award of damages which could have been made by a lower court, the trial judge has discretion to order the plaintiff to pay a sum of money to the defendant. This sum is to represent the additional costs incurred by the defendant in defending the action in a higher court, when the case might have been taken in a lower court.

Denham J considered that, given Mr O'Connor's 'honest belief' as found in the High Court, it could not be said that Mr O'Connor acted unreasonably or irresponsibly in bringing the action in the High Court. Accordingly, Denham J was satisfied that the High Court judge exercised his discretion reasonably in the circumstances, and she would not intervene in his determination. Murray and Hardiman JJ disagreed and, as they were in a majority, they decided the case on this point.

Murray J stated that, even though Mr O'Connor may be considered genuine and honest in his approach, the fact that the claim was brought to the High Court on the basis of his gross exaggeration and imagined ongoing problems must have the consequence in his view that he must bear the extra costs incurred by Dublin Bus in defending the proceedings in the High Court rather than in the Circuit Court. Accordingly, Murray J was of the view that there should be an order varying that of the High Court for the payment to Dublin Bus in relation to the additional costs.

Hardiman J was of the same view, considering that Mr O'Connor's claim was never one appropriate to the High Court jurisdiction; the claim for future loss of earnings was one that should never have been made and, once made, should have been withdrawn years before the full hearing at which it was in fact withdrawn; the case could have been more quickly and more cheaply resolved in the Circuit Court. The fact that this did not happen was due either to total inattention on the part of Mr O'Connor to the value of his claim or, alternatively, to the pursuit by him of some perceived tactical advantage in taking his case in the High Court. Hardiman J stated that litigation that is unduly elaborate and expensive imposes a cost on others – most directly on the defendant, but also on wider groups and on society as a whole in the form of social cost. Accordingly, in all the circumstances, it seemed to him appropriate to make an order under section 17 of the *Courts Act, 1981*, and he would accordingly order that Mr O'Connor pay Dublin Bus an amount as set out in section 17 of the 1981 act in respect of the additional costs. G

This judgment was summarised by solicitor Dr Eamonn Hall.

THE SUPREME COURT AWARD

The Supreme Court (Denham, Murray and Hardiman JJ delivering separate judgments) agreed that the general damages to date of the trial of €15,000 should stand and that the special damages of €5,431, coming to a total of €20,431, should also stand.

The Supreme Court (Murray and Hardiman JJ, with Denham J dissenting) held in relation to the costs that Mr O'Connor should pay to Dublin Bus a certain amount in the context of costs as set out in section 17 of the *Courts Act, 1981* because the case should have been heard in the Circuit Court rather than the High Court.

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Compiled by Karen Holmes for FirstLaw

CONTRACT

Building and construction

Terms and conditions – implied term – building contract – interpretation – bystander test – sub-contractor – debt – whether contract gives rise to recoverable debt – application for summary judgment – whether term that main contractor entitled to sue for return of overpayments to sub-contractors should be implied to give business efficacy to contract – architect's certificate of completion

The defendants were engaged as sub-contractors by the plaintiff main contractors on the instructions of the employer's architect to do glazing and cladding work on an office. The architect had certified that the cladding work was satisfactory and authorised payment for it in May 2000. In February 2001, the architect became concerned about the cladding and withheld payment for that work from the plaintiff, despite the fact that the plaintiff had already paid that sum to the defendant for those works on foot of the certification in May 2000. The defects liability period ended on 19 May 2001, but it was not until 5 September 2001 that a certificate outlining the defects and withholding payment from the plaintiff was issued, despite the fact that the defects in the cladding became apparent during the defects liability period. The plaintiff sought summary judgment in the sum of £629,601.30 for the overpayment. The plaintiff alleged that in a situation where there was an overpayment to a sub-contractor, there was an obligation on the sub-contractor to repay the amount of the overpayment to the main contractor. It was conceded by the plaintiff that there was no express provision in the contracts which dealt with and created this obligation but submitted that such an obligation was to be implied to satisfy the 'bystander test' and was also necessary to give business efficacy to the sub-contract so as to facilitate the arbitration provisions in the contract. The defendant contended that the certificate issued after the defects liability period could not give rise to an obligation to repay the monies, being too vague, and that the overpayment on foot of certification could not be recovered as a debt as it was money paid under a valid contract.

O'Neill J refused the plaintiff's application, holding that:

1) The documents which constituted certification complied with the legal requirement for sufficient clarity so as to enable the parties to know exactly where they stood in relation to each other
2) Clause 35(b) of the main contract could create a situation where a downward adjustment to the amount certified for payment on an interim basis would result in an overpayment to a contractor or sub-contractor. The architect was entitled under clause 35(b) to exclude work from certification for payment which, in his opinion at the time, was defective and hence not 'duly executed'
3) The nature and purpose of interim certificates was to provide instalment payments of the final lump-sum price during the currency of the works on the basis set out in the contract. After the date of practical completion, the contract intended a different scheme to prevail. The use of an interim certificate after the expiry of the defects liability period to make an adjustment in respect of alleged defects was not permitted by the main contract or the sub-contract and did not give the plaintiffs a basis in contract to recover the alleged overpayment
4) Payment of money on foot of an interim certificate, even where an overpayment was made, was the discharge of a genuine legal obligation and therefore did not give rise to a debt capable of recovery by way of summary judgment
5) There could not, applying the bystander test, be implied into the sub-contract an obligation on the part of the defendant to repay any such overpayment
6) The implication of such was unnecessary to give business efficacy to the sub-contract.

***Robcon Ltd v SIAC Architectural Ltd*, High Court, Mr Justice O'Neill, 10/10/2003** [FL8221]

CRIMINAL

Appeal, delay

Charge to jury – defects – corroboration warning – whether adequate – delay – whether warning in relation to delay in prosecution of offence adequate – whether applicant afforded trial in due course of law

The applicant had been convicted by a jury of rape in the Central Criminal Court. The complainant did not make complaint to the gardaí until 25 years after the alleged offences. The applicant appealed his conviction on the following grounds: the prejudicial nature of the closing speech of the prosecution counsel and the failure of the trial judge to correct this prejudice in his charge to the jury; a number of alleged defects in the judge's charge to the jury, including a failure to give a full corroboration warning and a failure to deal properly with the issue of delay in the case; the failure of the prosecution to seek out and disclose the available report of a child psychiatrist, which was subsequently produced at the sentencing hearing.

The Court of Criminal Appeal quashed the applicant's conviction and ordered a retrial, holding that:

1) Once a trial judge has elected to give a warning, that warning should be clear and unmistakable. In giving the warning, the judge should also explain the meaning of corroboration, which is independent evidence of material circumstances tending to implicate the accused in the commission of the crime with which he was charged. The wording used by the trial judge in the instant case was not calculated to convey any clear message to the jury, nor was it explained in detail how a lack of corroboration may affect the jury's view of the evidence
2) Trial judges were obliged to issue appropriate directions and rulings to avoid the possible prejudicial effect of delay in sexual abuse cases. The trial judge should deal reasonably and fully with the various aspects of the problems caused by delay in the making of a complaint of this nature
3) The issues of corroboration and delay were distinct and separate and had to be clearly separated and distinguished in a judge's charge to a jury
4) The warnings given by the trial judge in relation to corroboration and delay were insufficient.

Obiter dictum: The role of prosecuting counsel was that they ought to regard themselves as

ministers of justice and not to struggle for a conviction.

***DPP v PJ*, Court of Criminal Appeal, Judge McGuinness, 31/7/2003** [FL8155]

Burden of proof, evidence

Manslaughter – prior inconsistent statement – credibility of witnesses – self-defence – burden of proof – whether statements improperly admitted – whether conviction sound

The applicant was convicted of manslaughter and sought leave to appeal against his conviction. It was contended that the trial judge had incorrectly charged the jury with regard to witnesses' statements. In addition, it was submitted that the trial judge had not fully explained the burden of proof to the jury and furthermore the case should have been withdrawn from the jury due to the failure by the prosecution to call certain witnesses. As a result, the prosecution could cross-examine certain witnesses, an advantage, it was claimed, it should not have had.

The Court of Criminal Appeal refused the application. The jury was entitled to assess the credibility or lack thereof of a witness's evidence in the light of inconsistent statements made. The inconsistencies that existed between statements made by witnesses and their subsequent evidence in court only went to the issue of whether the deceased had been carrying a weapon. On the basis of the rest of the evidence adduced, the jury would still have been entitled to conclude that the applicant had delivered a number of blows to the deceased. A full and careful charge as to the burden of proof had been given by the trial judge to the jury.

***DPP v McArdle*, Court of Criminal Appeal, 13/10/2003** [FL8349]

Delay, judicial review

Prohibition of prosecution – delay – sexual offences – expert evidence – right to expeditious trial – whether lapse of time between date of alleged offences and prosecution gave rise to presumption of prejudice – whether delay hindered applicant's defence – whether delay in reporting incident to gardaí reasonable and explicable – whether failure to assess credibility of complainant by expert witness

The applicant brought an application to seek leave to bring judicial review proceedings in respect of a decision by the director of public prosecutions (DPP) to prosecute the applicant on a number of alleged sexual and indecent assault offences. The applicant contended that the delay between the lapse of time between the date of the alleged offences and the present prosecution had given rise to an incurable presumption of prejudice and, in addition, that the delay had hindered the applicant's defence. The applicant admitted that there had been a sexual relationship between himself and the complainant but said that it had been of a consensual nature. In the High Court, the application was dismissed and the applicant appealed to the Supreme Court. It was submitted that the High Court judge had erred in law and in fact in finding that the delay was reasonable. In addition, issue was taken with expert evidence given on behalf of the complainant by a clinical psychologist, which, it was contended, was fatally flawed.

The Supreme Court (McGuinness J delivering judgment, Denham J agreeing, Hardiman J delivering judgment) dismissed the appeal. McGuinness J held that although the evidence given by the expert evidence had certain weaknesses, the conclusion by the expert evidence that the complainant's delay in reporting the incident was reasonable was correct. The various periods of delay by the prosecution that had occurred were not unduly long and had been explained. Although the lapse of time would create difficulties for the applicant, there was contemporaneous evidence available to the applicant. The degree of prejudice was not such as to create a real and serious risk of an unfair trial. Hardiman J held that there was a real risk of an unfair trial on the indecent assault charges and the prosecution of these offences should be restrained. Apart from that, the appeal should be dismissed.

***W(D) v DPP*, Supreme Court, 31/10/2003** [FL8364]

EMPLOYMENT

Negligence, termination of employment

Termination – damages – negligent misstatement – breach of warranty – injury to reputation

The plaintiff was a journalist who left her employment with *Ireland on Sunday* and entered into employment with the *Evening Herald*. The plaintiff had recently had a child and contended that she had only taken the job with the *Evening Herald* because of assurances she had been given in relation to her working hours. Shortly after she had commenced employment, it became clear that the *Evening Herald* wanted her to work different hours and her employment came to an end. She claimed damages for breach of contract and/or wrongful dismissal and general damages for negligent misstatement.

Gilligan J awarded the plaintiff €52,266 damages, holding that she was entitled to succeed in her claim. The defendants were guilty of negligent misstatement and breach of warranty. The plaintiff was entitled to six months' notice of termination of her employment with the *Evening Herald* and two years' net loss of earnings from the plaintiff's position with *Ireland on Sunday*, less remuneration derived from other sources.

***Carey v Independent Newspaper (Ireland) Ltd*, High Court, Mr Justice Gilligan, 7/8/2003** [FL8229]

FAMILY

Foreign divorce, domicile, law

Recognition – domicile – international law – marriage – residence – whether divorce granted in Netherlands valid having regard to domicile of the respondent – whether respondent had abandoned domicile of origin – Domicile and Recognition of Foreign Divorces Act, 1986 – Family Law (Divorce) Act, 1996 – Family Law Act, 1995

The applicant and the respondent are Irish citizens who were married in Ireland. Eight years after they married, the respondent accepted an 'open-ended' position with a Dutch subsidiary of a major Irish company. Consequently, the applicant and respondent emigrated to the Netherlands, where they lived with their three children until 1992. It was around that time that difficulties arose in the marriage and, as a result, the applicant returned to Ireland with the children that same year. In March 1994, the respondent instituted divorce proceedings in the Netherlands and in September, some four months after the respondent had returned to Ireland to pursue a new job, a decree of divorce was granted by the Dutch court. On 6 July 2000, the applicant instituted proceedings in the High Court, claiming a decree of judicial separation and certain ancillary reliefs. An order was made by consent to try as a preliminary issue the question of whether or not the divorce obtained by the respondent pursuant to the civil law of the Netherlands was entitled to recognition in this state pursuant to section 29(l)(d) and/or (e) of the *Family Law Act, 1995*. The respondent based his case on two main arguments. First, it was submitted that, at the time the divorce proceedings were instituted in the Dutch courts, the respondent had acquired a domicile of choice in the Netherlands. Accordingly, pursuant to the rule contained in section 5(1) of the *Domicile and Recognition of Foreign Divorces Act, 1986*, which states that a divorce shall be recognised if granted in the country where either spouse is domiciled, he argued that the divorce granted by the Dutch court was entitled to recognition in this jurisdiction.

Second, the respondent submitted that, if he had not acquired a domicile of choice in the Netherlands, the court should apply the modified rule of private international law adopted by the High Court in the case of *CMcG v DW* ([2000] 1IR 96). In this regard, the respondent argued that since it was accepted he had been ordinarily resident in the Netherlands for a period in excess of one year at the time the proceedings were instituted, the decree granted by the Dutch court was entitled to recognition in this jurisdiction. Morris P in the High Court rejected both aspects of the respondent's case. The respondent appealed this decision, claiming that the trial judge erred in law and fact. However, the respondent limited his appeal to the issue of domicile only.

The Supreme Court (Keane CJ, Denham, Murray, Hardiman, Geoghegan JJ) refused the respondent's appeal, holding that:

1) In determining whether one's domicile of origin has been replaced by a domicile of choice, it is necessary to infer from all the circumstances that one has formed the settled purpose of residing indefinitely in the alleged domicile of choice; that is to say, one has decided to set up his permanent home in that country. This involves an intention to abandon one's former domicile: *In Re Sillar*; *Hurley v Winbush* ([1956] IR 344) followed
2) The respondent's decision to leave his country of origin and take up employment in the Netherlands for a period of seven years was not sufficient to discharge the onus of establishing that he had abandoned his domicile of origin and acquired a domicile of choice: *F v F* ([1983] IR 29) followed
3) The fact that the respondent, at the date of instituting divorce proceedings, had no immediate intention of returning to Ireland was not sufficient to prove that he had formed the settled purpose of residing indefinitely in the Netherlands. The continued residence of the parties in the Netherlands was inextricably linked to their then personal circumstances and there was no evidence to show that the respondent would not have returned to Ireland permanently if these circumstances changed: *CM v TM* ([1991] ILRM 268) followed
4) The relevant date for determining the respondent's state of mind was the date of the initiation of the divorce proceedings
5) Although a declaration as to domicile is a factor for consideration, little weight should be attached to the respondent's written notification to his lawyer that he intended to change his domicile to the Netherlands in light of the other evidence. The context and form of the declaration is important and in this case the notification was written by the respondent in the context of the divorce proceedings
6) *Obiter*: When considering all the surrounding circumstances, it would be unthinkable to disregard the significant factor that at the time the respondent initiated the divorce proceedings he had been offered the position in Ireland, which he subsequently accepted, and accordingly he had abandoned any intention to permanently remain in the Netherlands at that time.

***DT v FL and Attorney General*, Supreme Court, 26/11/2003** [FL8350]

PLANNING AND DEVELOPMENT

Delay, judicial review

Certiorari – *planning and environmental law – practice and procedure – leave to seek judicial review – time limits – whether grounds adduced by applicant substantial* – Environmental Protection Agency Act, 1992 – Planning and Development Act, 2000

The applicant brought an application seeking leave to bring judicial review proceedings in respect of a decision issued by An Bord Pleanála granting planning permission for construction of an odour-abatement plant. A number of issues were raised by the applicant, who had not been formally involved in an appeal before the board nor had he been an objector at the planning authority stage. The applicant contended that relevant environmental issues had not been dealt with by the planning authority. It was argued that the plant would create atmospheric toxic emissions and that the board had avoided its statutory obligation to consider the issue of pollution in granting permission. Issue was taken by the respondent as to the date of the issuing of the applicant's proceedings which were, it was claimed, out of time as set out in section 50 of the *Planning and Development Act, 2000*.

Murphy J refused leave to seek judicial review, holding that the proceedings had been issued out of time. The appropriate time to have raised the objection regarding the lack of an environmental impact statement was when the matter was before the board. The reasons given by the applicant for his non-involvement and delay were not sufficient for the court to extend the relevant time limit.

***Casey v An Bord Pleanála*, High Court, Mr Justice Murphy, 14/10/2003** [FL8189]

TORT

Appeal, liability

Negligence – liability – appeal – findings of fact made by trial judge – whether High Court judgment unsatisfactory

This was an appeal from the judgment and order of the High Court in which the court found the third defendants liable in respect of an accident that occurred in a shopping centre in Monaghan. The third defendants contended that the trial judge failed to make a crucial finding of primary fact which was essential to the imposition of liability.

The Supreme Court (Keane CJ, Denham and Murray JJ) dismissed the appeal and affirmed the order of the High Court, holding that it was not the function of an appellate court to interfere with findings by trial judges that were based on the credibility of witnesses. The court could not set aside findings of fact made by a trial judge which were based on credible evidence.

***Scott v Victoria House*, Supreme Court, 3/11/2003** [FL8309] 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

Data protection and the ECJ

The European Court of Justice's decision in joined cases C-465/00, C-138/01 and C-139/01 *Rechnungshof*, 20 May 2003, and the more recent case C-101/01 *Lindqvist*, 6 November 2003, provide lucid guidance as to the scope and object of directive 95/46 on the protection of individuals with regard to the processing of personal data and the free movement of such data.

The central issue in *Rechnungshof* concerned whether Austrian law, which provides that certain bodies are obliged to transmit in an annual report to the Court of Audit (*Rechnungshof*) the salaries and pensions exceeding a certain threshold paid to their employees and pensioners, was compatible with community law. The disclosure of the names of the people concerned is not expressly mentioned in the Austrian legislation but such was the interpretation adopted by the *Rechnungshof*. Two employees of ÖRF, one of the bodies affected, appealed to the *Oberster Gerichtshof* (Supreme Court) against the dismissal of their application to prevent ÖRF from acceding to the *Rechnungshof*'s request to communicate data.

Applicability of directive 95/46

The *Rechnungshof* and the Austrian and Italian governments, and to a certain extent the commission, submitted that directive 95/46 was not applicable to the proceedings.

According to the *Rechnungshof* and the Austrian and Italian governments, the control activity referred to in the national legislation that pursues objectives in the public interest in the field of public accounts did not fall within the scope of community law. After observing that the directive, which was adopted on the basis of article 100(a) of the treaty, has the objective of establishing the internal market, an aspect of which is the protection of the right to privacy, the *Rechnungshof* and the Austrian and Italian governments submitted that the control in question was not such as to obstruct the freedom of movement of workers, since it did not in any way prevent the employees of the bodies concerned from going to work in another member state or those of other member states from working for those bodies. In any event, the link between the control activity and the freedom of movement of workers, even supposing that workers do seek to avoid working for a body subject to control by the *Rechnungshof* because of the publicity attaching to the salaries received, was too uncertain and indirect to constitute an infringement of freedom of movement and thereby to allow a link to be made to community law.

The commission adopted a similar position but submitted also that the collection of data served not only the function of auditing, but also primarily the payment of remuneration that constituted an activity covered by community law.

The court noted that the intention of the directive was to ensure the free movement of personal data between member states through the harmonisation of national provisions on the protection of individuals with regard to the processing of such data. Since any personal data can move between member states, the directive requires *in principle* compliance with the rules for protection of such data with respect to any processing of data as defined by article 3.

Further, it added that recourse to article 100(a) of the treaty as a legal basis did not presuppose the existence of an actual link with free movement between member states in every situation referred to by the measure founded on that basis. Referring to previous decisions (case C-376/98 *Germany v Parliament and Council* ([2000] ECR I-8419) and case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* ([2002] ECR I-000), it stated that to justify recourse to article 100(a) as the legal basis, what matters is that the measure adopted on that basis must be intended to improve the conditions for the establishment and functioning of the internal market.

Accordingly, the applicability of directive 95/46 could not depend on whether the specific situations at issue have a sufficient link with the exercise of the fundamental freedoms guaranteed by the treaty. A contrary interpretation could make the limits of the field of application of the directive particularly unsure and uncertain, which would be contrary to its essential objective of approximating the laws, regulations and administrative provisions of the member states in order to eliminate obstacles to the functioning of the internal market deriving precisely from disparities between national legislation.

Furthermore, that article 3(1) of the directive, which defines its scope in very broad terms, does not make the application of the rules on protection depend on whether the processing as an actual connection with freedom of movement between member states is confirmation that its applicability is not dependent on same. This is also confirmed by the wording of the exceptions in article 3(2), which would not be so worded were the directive applicable exclusively to situations where there is a sufficient link with the exercise of freedoms of movement.

European convention on human rights

The court stated that the provisions of directive 95/46, in so far as they govern the processing of personal data liable to infringe fundamental freedoms, in particular the right to privacy, must necessarily be interpreted in the light of fundamental rights, which, according to settled case law, formed an integral part of the general principles of law whose observance the court ensures.[1] Those principles, it added, have been expressly restated in article 6(2), which states that the union shall respect fundamental rights, as guaranteed by the convention, and as they result from the constitutional traditions common to the member states, as general principles of community law.

The court noted that the directive itself, while having as its principal object to ensure the free movement of personal data, provides that member states must observe the protection of the fundamental rights and freedoms of individuals, in particular their right to private life with respect to the processing of personal data. The inclusion of the data concerning the salaries paid and their recipients in an annual report constituted the 'processing of personal data' within the meaning of article 2(b) of the directive. In the context of community law, fundamental rights include, among others, the rights guaranteed by the *European convention on human rights*. While the convention lays down the principle that public authorities must not interfere with the exercise of the right to private life, the court accepted that such an interference is possible under certain conditions (article 8 of the convention).

The ECJ stated that the communication by an employer to a third party of data relating to the remuneration received by an employee or pensioner is an interference with private life within the meaning of article 8 of the convention, which may be justified if it is in accordance with the law, pursues a legitimate aim mentioned in that article, and is necessary in a democratic society to achieve that aim.

In the case under consideration, the ECJ held that the interference was in accordance with Austrian law. However, it stated that the question arose as to whether the Austrian legislation was formulated with sufficient precision to enable the citizen to adjust his conduct accordingly and so comply with the requirement of foreseeability laid down in the case law of the European Court of Human Rights in *Rekvényi v Hungary* ([GC] no 25390/94, 34, ECHR 1999-III).

Having stated that it was for the national courts to ascertain whether the interpretation of the legislation to the effect that it requires disclosure of the names of the people concerned complies with the requirement of foreseeability, the court stated that that question need not arise until it had been determined whether such an interpretation was consistent with article 8 of the convention as regards its required proportionality to the aims pursued.

Austria: the hills are alive with the sound of data processing

The court noted the Austrian government's observation that the interference provided for by the legislation was intended to guarantee the thrifty and appropriate use of public funds by the administration. Such an objective constituted a legitimate aim within the meaning of article 8(2) of the convention, which mentions the economic well-being of the country, and article 6(1) of the directive, which refers to specified, explicit, and legitimate purposes.

It then fell to be considered whether the interference in question was necessary in a democratic society to achieve the legitimate aim pursued. According to the European Court of Human Rights, the adjective *necessary* in article 8(2) of the convention implies that a pressing social need is involved and that the measure employed is proportionate to the legitimate aim pursued. The national authorities also enjoy a margin of appreciation, the scope of which would depend not only on the nature of the legitimate aim pursued but also on the particular nature of the interference involved.[2] The interest of the Republic of Austria in ensuring the best use of public funds, and in particular keeping salaries within reasonable limits, must be balanced against the seriousness of the interference with the right of the people concerned to respect for their private life.

The court noted that the interpretation adopted by the Austrian courts required that disclosure of the names of the people concerned be not only communicated to the *Rechnungshof* but also that such information be made widely available to the public.

The question, therefore, arose as to whether stating the names of the people concerned in relation to the income received was proportionate to the legitimate aim pursued. The court stated that it was for the national courts to ascertain whether such publicity is both necessary and proportionate to the aim of keeping salaries within reasonable limits, and in particular to examine whether such an objective could not have been attained equally effectively by transmitting the information as to the monitoring bodies alone. Similarly, the question arose as to whether it would not have been sufficient to inform the general public only of the remuneration and other financial benefits to which people employed by the public bodies concerned had a contractual or statutory right, but not of the sums which each of them actually received during the year in question, which may depend to a varying extent on their personal and family situation.

Regarding the seriousness of the interference with the right to respect to private life of the people concerned, the court stated that it was not impossible that they might suffer harm as a result of the negative effects of the publicity attached to their income from employment, in particular on their prospects of being given employment by other undertakings, whether in Austria or elsewhere, which were not subject to control by the *Rechnungshof*.

The ECJ therefore concluded that the interference may be justified under article 8(2) of the convention only in so far as the wide disclosure not merely of the amounts of the annual income above a certain threshold of people employed by the bodies subject to control by the *Rechnungshof* but also of the names of the recipients of that income was both necessary for and appropriate to the aim of keeping salaries within reasonable limits, that being a matter for the national courts to examine.

Correlation between directive 95/46 and the convention

The court stated that, were the national (Austrian) courts to conclude that the national legislation at issue was incompatible with article 8 of the convention, that legislation would also be incapable of satisfying the principle of proportionality in articles 6(1)(c) and 7(c) or (e) of directive 95/46. Nor could it be covered by any of the exceptions referred to in article 13 of the directive, which likewise requires compliance with the requirement of proportionality with respect to the public interest objective being pursued. In any event, that provision could not be interpreted as conferring

legitimacy on an interference with the right to respect for private life contrary to article 8 of the convention.

On the other hand, were the national courts to regard the national legislation as both necessary for and appropriate to the public interest objective being pursued, they would still have to ascertain whether, by not expressly providing for disclosure of the names of the people concerned in relation to the income received, the national legislation complies with the requirement of foreseeability.

The court stated that, in light of such considerations, it was to be noted that the national court must also interpret any provision of national law, as far as possible, in the light of the wording and the purpose of the applicable directive, in order to achieve the result pursued by the latter and thereby comply with the third paragraph of article 249 EC.

Direct applicability

The court ruled that the provisions of article 6(1)(c) and article 7(c) or (e) are sufficiently precise to be relied on by individuals and applied by the national courts and are directly applicable.

In *Lindqvist*, the court provided guidance as to the legality of processing within the EU, the meaning of 'transfer to a third country' as contained in article 25 of the directive, and how the possibly inconsistent objectives of the free flow of personal data between member states and the safeguarding of the fundamental rights of individuals are to be achieved. Mrs Lindqvist worked as a catechist in a Swedish parish and set up internet pages at home on her personal computer to allow parishioners preparing for their confirmation to obtain information they might need. At her request, the administrator of the Swedish church's website set up a link between those pages and that site. The pages contained personal information about Mrs Lindqvist and other colleagues in the parish.

Article 3 of the directive provides:

'*1) This directive shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data, which form part of a filing system or are intended to form part of a filing system*

2) This directive shall not apply to the processing of personal data:

- *in the course of an activity which falls outside the scope of community law, such as those provided for by titles V and VI of the* Treaty on European Union *and in any case to processing operations concerning public security, defence, state security (including the economic well-being of the state when the processing operation relates to state security matters) and the activities of the state in areas of criminal law*
- *by a natural person in the course of a purely personal or household activity.*'

The court ruled that the operation of loading personal data on an internet page constituted the processing of information wholly or partly by automatic means within the meaning of article 3(1).

Mrs Lindqvist submitted that the activity was covered by an exception in article 3(2). She submitted that private individuals who make use of their freedom of expression to create internet pages in the course of a non-profit-making or leisure activity are not carrying out an economic activity and are thus not subject to community law. If the court were to hold otherwise, the question of the validity of directive 95/46 would arise, as, in adopting it, the community legislature would have exceeded the powers conferred on it by article 95 of the *EC treaty*.

The commission submitted that an internet page such as that at issue could not be considered to fall outside the scope of the directive by virtue of article 3(2) thereof, but constituted, given the purpose of the internet page at issue, an artistic and literary creation within the meaning of article 9 of the directive. It took the view that the first indent of article 3(2) lent itself to two different interpretations. The first consisted in limiting the scope of the provision to the areas cited as examples; in other words, to activities that essentially fall within what are called the second and third pillars. The other interpretation consisted in excluding from the scope of the directive the exercise of any activity that is not covered by community law.

The court, referring to *Rechnungshof*, reiterated that recourse to article 100(a) as a legal basis 'does not presuppose the existence of an actual link with free movement between member states in every situation referred to by the measure founded on that basis'. Accordingly, it would not be appropriate to interpret the expression 'activity which falls outside the scope of community law' as having a scope that would require it to be determined in each individual case whether the specific activity at issue directly affected freedom of movement between member states.

It followed that the activities mentioned by way of example in the first indent of article 3(2) were intended to define the scope of the exception provided for there, to the effect that that exception applies only to the activities that are expressly listed there or which could be classified in the same category.

As regards the exception provided for in the second indent of article 3(2), the court stated that the 12th recital in the preamble to the directive which concerns that exception cited, as examples of the processing of data carried out by a natural person in the exercise of activities which are exclusively personal or domestic, correspondence and the holding of records of addresses. The exception was to be interpreted, therefore, as relating only to activities that are carried out in the course of private or family life of individuals, which clearly did not apply to the activity at issue, where the data is made accessible to an indefinite number of people on the internet.

Transfer to a third country

In relation to whether Mrs Lindqvist's actions gave rise to a transfer of data to a third country within the meaning of the directive, the court noted that article 25(4) of the directive

provides that, where the commission found that a third country does not ensure an adequate level of protection for such data, member states are to take the measures necessary to prevent any transfer to the third country in question.

Were article 25 of the directive to be interpreted to mean that there was a transfer of data to a third country every time that personal data is loaded onto an internet page, 'that transfer would necessarily be a transfer to all the third countries where there were the technical means needed to access the internet. The regime adopted for by chapter IV of the directive would necessarily become a regime of general application, as regards general applications on the internet'. Accordingly, if the commission found, pursuant to article 25(4), that even one third country did not ensure adequate protection, the member states would be obliged to 'prevent any personal data being placed on the internet'. It therefore had to be concluded that the operations carried out by Mrs Lindqvist did not, as such, constitute a transfer of data to a third country.

Freedom of expression

Mrs Lindqvist submitted that the directive's requirements of prior consent and prior notification of a supervisory authority, and its principle of prohibiting processing of personal data of a sensitive nature, were contrary to the general principle of freedom of expression as enshrined in community law. She further submitted that the mere mentioning of a person by name, revealing their telephone details and working conditions, and giving information about their state of health and hobbies did not constitute a significant breach of the right to respect for private life.

The court held that the provisions of directive 95/46 did not, in themselves, bring about a restriction that conflicts with the general principles of freedom of expression or other freedoms and rights that are applicable within the European Union and are enshrined in article 10 of the *European convention for the protection of human rights and fundamental freedoms*, signed at Rome on 4 November 1950. It was for the national authorities and courts responsible for applying the national legislation implementing directive 95/46 to ensure a fair balance between the rights and interests in question, including the fundamental rights protected by the community legal order.

Both *Rechnungshof* and *Lindqvist* show that the applicability of the data protection directive is not dependent on whether the specific situations at issue have a sufficient link with the exercise of the fundamental freedoms guaranteed by the treaty. While there is a margin for manoeuvre for the member states in implementing the directive, the regime it provides does not lack predictability, nor are its provisions contrary to the general principles of community law and the fundamental rights guaranteed by the community legal order. In particular, its provisions to the effect that personal data must be adequate, relevant and not excessive in relation to the purposes for which it was collected or processed are directly applicable and may be relied upon by individuals before the national courts. It is at the stage of the application at national level of the legislation implementing the directive in individual cases that a balance must be found between the rights and interests involved.

Footnotes

1 Case C – 274/99 *P Connolly v Commission* ([2001] ECR I – 1611), paragraph 37, as cited.
2 *Leander v Sweden*, (judgment of 26 March 1987, Series A no 116, 59). G

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Recent developments in European law

COMPETITION

Case T-65/98 *Van den Bergh Foods Ltd v Commission of the European Communities*, 23 October 2003. The applicant (formerly HB Ice Cream Ltd) is the principal manufacturer of ice-cream products in Ireland. It provided retailers with freezer cabinets for stocking impulse ice creams (ice cream for immediate consumption). The cabinets were then to be used exclusively for HB ice cream. HB retained ownership in the cabinets and maintained them. The contract could be ended by either party giving two months' notice. In 1989, many retailers began to stock Mars ice creams in these cabinets. HB demanded that retailers respect the exclusivity clause. Mars started proceedings before the Irish courts and lodged a complaint with the European Commission. The commission found the exclusivity clause to be incompatible with EC law. HB had a dominant position in the impulse ice cream market in Ireland. The freezer agreements restricted the ability of retailers to sell products of its competitors. Some 40% of all Irish retailers had only HB freezer cabinets, and 17% of Irish retailers had freezer cabinets that were not subject to an exclusivity clause. It was very difficult for new competitors to enter the market and the commission found that HB had abused its dominant position. It refused to grant an individual exemption to HB. HB brought an action before the Court of First Instance (CFI) seeking to have that decision annulled. The CFI upheld the decision of the commission. Taking into account the specific conditions of the market, the popularity of HB ice creams, the strength of HB on the market, and the specific features of the products, the effect of the agreements was to restrict competition on the market. The effect of the exclusivity clause was to distort competition. Retailers were prepared to stock other ice creams provided that they could do so in the same freezer. The CFI could not find grounds for the grant of an individual exemption. The exclusivity clause did not confer objective advantages of such a character as to compensate for the disadvantages they caused in the field of competition. HB had accepted that it was dominant in the relevant market. The CFI held that, through the exclusivity clause, HB had abused its dominance. The decision of the commission did not deprive HB of its ownership of the freezer cabinets or its right to exploit the cabinets by renting them out on commercial terms. It merely forbade it from making them available on the basis of an exclusivity clause so long as it held a dominant position on the market.

FREE MOVEMENT OF WORKERS

Case C-232/01 *Criminal proceedings against Hans Van Lent*, 2 October 2003. Mr Van Lent is a Belgian national who lives in Belgium but drives a car with a Luxembourg registration plate. He works in Luxembourg and his car is one provided to him by his employer that leases it from another Luxembourg company. He is free to use it for private purposes to go home and at weekends. Belgian law requires cars of residents to be registered in Belgium in the name of their owners. Following a random traffic check in 1999, criminal proceedings were commenced against Mr Van Lent. Mr Van Lent was unable to register the car in Belgium, as it was owned by a Luxembourg company. The matter was referred to the ECJ by the Belgian courts. The ECJ held that, in the absence of harmonisation, member states are free to prescribe the conditions for registration of vehicles in their territory. Member states must, however, comply with the treaty rules on free movement of workers. Difficulties caused by the Belgian rules may discourage employers in other member states from engaging Belgian workers. These rules may also deter Belgian workers from exercising their rights of free movement. The ECJ could not find a justification for the rules.

INTELLECTUAL PROPERTY

Case C-104/01 *Libertel Groep BV v Benelux Merkenbureau*, 6 May 2003. Libertel is a Dutch mobile telecommunications company. The respondent is the trademark office for the Benelux states. In 1996, the applicant filed an orange colour as a trademark in respect of certain telecommunications goods and services. The trademark office refused registration of the sign. It ruled that the proposed trademark was devoid of any distinctive characteristic. The matter was appealed to the Dutch courts, which made a reference to the ECJ. The ECJ considered the application of the *Trademark directive* (89/104/EEC). It considered whether a colour was capable of constituting a trademark. The court held that to constitute a trademark the colour must satisfy three conditions. It must be a sign, it must be capable of graphic representation, and it must be capable of distinguishing the goods or services of one undertaking from those of others. The court found that a sample of a colour, combined with a description in words of that colour, may constitute a graphic representation. A colour can distinguish goods or services of one undertaking from another where the colour is capable of conveying specific information (in particular, as to the origin of a product or service). However, the court held that there is a public interest in not unduly restricting the availability of other colours for the other operators who offer for sale goods or services of the same type as those in respect of which registration is sought. This must be taken into account in assessing the potential distinctiveness of a given colour as a trademark.

LITIGATION

Case C-111/01 *Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV*, 8 May 2003. Gantner manufactures and markets carrier pigeon clocks. Basch sold its goods in the Netherlands. Gantner terminated relations with Basch, as it took the view that Basch had not paid for goods delivered and invoiced up to June 1999. On 7 September, Basch started legal proceedings before the Dutch courts, arguing that it was entitled to damages and to a longer notice period. On 22 September, Gantner started proceedings in Austria, seeking payment for goods delivered to Basch. In these proceedings, Basch asked for the proceedings to be stayed under article 21 of the *Brussels convention* or on the basis that the proceedings constituted related actions within the meaning of article 22. Basch's defence to the Austrian proceedings was that the applicant's claim was set off by its own claim for damages in the Netherlands. The case was referred to the ECJ. The ECJ was asked whether, in determining whether two claims brought by the same parties before courts of two different states have the same subject matter, account must be taken not only of the claims of the respective applicants but also of the grounds of defence raised by the defendants. The ECJ held that the purpose of article 21 would be frustrated if the content and nature of claims could be modified by arguments submitted at a later stage by the defendant. In order to determine whether article 21 applied, account could not be taken of the defence submissions, whatever their nature. G

Justice Media Awards ceremony

Pictured with Law Society director general Ken Murphy and immediate past-president Geraldine Clarke at the *Justice Media Awards* ceremony in Blackhall place in December 2003: RTÉ reporter Ken O'Shea and producer Michael Kealy, who won the overall award as well as the television category for their *PrimeTime* report on fraudulent personal injury claims; Vincent Power of Cork's *Evening Echo*, who won the award in the daily newspaper category for the second year in a row; John Burns of the *Sunday Times*, who won the non-daily newspapers category; *Magill*'s Mairead Carey, who won the magazines category; Damien McHugh, winner of the books category; and Emma O'Kelly, winner of the radio category.
(See also *News*, page 2.)

Ken O'Shea and Michael Kealy


Vincent Power


John Burns


Mairead Carey

Damien McHugh

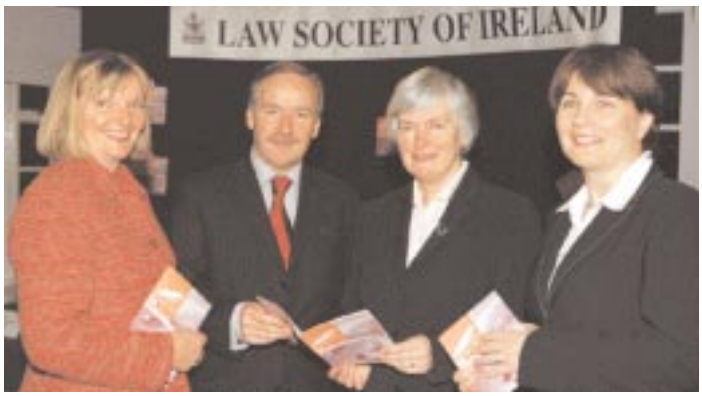
Emma O'Kelly

The third way
Pictured at the recent CPD seminar *Third parties: problems and procedures* are *(from left)* Law Society CPD co-ordinator Barbara Joyce; Ivan Durcan of Good & Murray Smith & Co; Mr Justice Michael Peart; and Patrick Groarke of Groarke & Partners Solicitors

Outgoing President's Dinner

Presidential airs
Pictured at the recent outgoing president's dinner at Blackhall Place were *(from left)* former president Elma Lynch, president Gerard Griffin, immediate past-president Geraldine Clarke, and John Fish, junior vice-president 2002/2003

Blast from the past
The solicitors' apprentices' soccer team in the grounds of the Royal College of Surgeons in Clonskeagh, Dublin, in 1955/56. Pictured are *(back row, from left)* Derry Devine, Athlone; Mick Horgan, Cork; the late Fergus Taaffe; Donald Stuart, Dublin; Brian Rigney, Dublin; Padraic Gearty, Longford; *(front row, from left)* Gerry Murphy, Dundalk and Cork; John Egan, Dublin; Aidan O'Carroll, Athlone; John Goff, Waterford; Tom Tighe, Sligo; and John McKnight, Armagh and Dublin



Let no man put asunder?
Pictured at the launch of the booklet *Survival plan for parents in the separation/divorce process* are *(from left)* Mary Lloyd, member of the Law Society's Family Law and Civil Legal Aid Committee and service co-ordinator of the Family Mediation Service; Law Society president Gerard Griffin; Joan O'Mahony, chair of the Family Law Committee; and committee member Rosemary Horgan. The booklet is available on application to the society

LOST LAND CERTIFICATES

Registration of Title Act, 1964
An application has been received from the registered owners mentioned in the schedule hereto for the issue of a land certificate as stated to have been lost or inadvertently destroyed. A new certificate will be issued unless notification is received in the registry within 28 days from the date of publication of this notice that the original certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the certificate is being held.
(Register of Titles), Central Office, Land Registry, Chancery Street, Dublin
(Published 6 February 2004)

Regd owner: William Nolan; folio: 9917F, Co Carlow; lands: Carlow and barony of Carlow; **Co Carlow**

Regd owner: James Lynch, Lurganboy, Virginia, Co Cavan; folio: 13131; lands: Lurganboy; area: 5.1546 hectares; **Co Cavan**

Regd owner: the county council of the county of Clare; folio: 1707; lands: townland of Ballyminoge and barony of Tulla Upper; **Co Clare**

Regd owner: Martin Ryan; folio: 25260; lands: townland of (1) and (2) Castlepark and barony of (1) and (2) Clonderalaw; area: (1) 1.0926 hectares, (2) 15.9446 hectares; **Co Clare**

Regd owner: the county council of Co Clare; folio: 13387; lands: townland of Cappaghlodge and barony of Bunratty Lower; area: 2.2940 hectares; **Co Clare**

Regd owner: Peter Cassidy and Lynda Underwood; folio: 4410; **Co Cork**

Regd owner: Mary T Cronin; folio: 68961F; lands: a plot of ground being part of the townland of Trawnamaddree in the barony of Bantry and county of Cork; **Co Cork**

Regd owner: Denis and Maeve O'Mahony; folio: 53782; lands: a plot of ground being part of the townland of Clooncalla More and barony of Carbery East (East Division) and county of Cork; **Co Cork**

Regd owner: Conor and Cheryl O'Brien; folio: 53009F; lands: a plot of ground known as site no 4 St John's Mews, situate to the north side of Douglas Street, being part of the parish of St Nicholas and county borough of Cork; **Co Cork**

Regd owner: Michael J Dennehy; folio: 52606; lands: a plot of ground being part of the townland of Ballynabointra and barony of Barrymore and county of Cork; **Co Cork**

Regd owner: John and Johanna Brett; folio: 40150F; lands a plot of ground being part of the townland of Mileen and barony of Muskerry West and county of Cork; **Co Cork**

Regd owner: Sheila and Cornelius Cooney; folio: 11374; lands: a plot of ground being part of the townland of Deeshart and barony of Muskerry East and county of Cork and a plot of ground being part of the townland of Meeshal and barony of Muskerry East and county of Cork; **Co Cork**

Regd owner: Patrick Creedon; folio: 28524; lands: a plot of ground being part of the townland of Knockane in the barony of Muskerry West and county of Cork; **Co Cork**

Regd owner: Michael Sexton and Leonora Ursula Sexton; folio: 22275; lands: a plot of ground being part of the townland of Cappaghnacallee in the barony of Carbery West (West Division) and county of Cork; **Co Cork**

Regd owner: Patrick J Lynch and Kathleen Lynch, 51 Ballyraine Park, Letterkenny, Co Donegal; folio: 753F; lands: Ballyraine; **Co Donegal**

Regd owner: Patrick L McGinley, Falcarragh, Letterkenny, Co Donegal; folio: 20947; lands: Ballyconnell, area: 0.3035; **Co Donegal**

Regd owner: Hugh Columba Grant and Sadie Grant, Middle Illies, Buncrana, Co Donegal; folio: 12907; lands: Illies and Illies; area: 23.3504 hectares and 11.3000 hectares; **Co Donegal**

Regd owner: James McTaggart, Glencar, Letterkenny, Co Donegal; folio: 41910; lands: Glencar Irish; area: 0.0556 hectares; **Co Donegal**

Regd owner: the county council of the county of Dublin; folio: DN14354; lands: property situate in the townland of Balcurris and barony of Coolock; **Co Dublin**

Regd owner: Catherine Carpenter; folio: DN74291L; lands: property known as no 35 Norfolk Road, Phibsborough, situate in the parish of Grangegorman and district of North Central; **Co Dublin**

Regd owner: Anthony and Marie Cully; folio: DN17988L; lands: property known as 65 Harmonstown Road situate in the parish of Clontarf and district of Artane East and property situate in the parish of Raheny and district of Raheny North; **Co Dublin**

Regd owner: Timothy Farrelly, Edward Farrelly and Kevin Farrelly; folio: DN8920; lands: a plot of ground situate on the east side of the road leading from Finglas to Ashbourne in the parish of Finglas and district of Finglas East and city of Dublin; **Co Dublin**

Regd owner: Frances J Hensey; folio: DN602L; lands: property known as 15 Belton Park situate on the south side of Collins Avenue in the district of Clonturk; **Co Dublin**

Regd owner: George Hill and Kathleen Hill; folio: DN2779L; lands: property situate in the townland of Bluebell and barony of Uppercross; **Co Dublin**

Regd owner: Clare Kelly and Charles Kelly; folio: DN1959L; lands: property situate in the townland of Mount Merrion or Callary and barony of Rathdown; **Co Dublin**

Regd owner: Neil and Daphne McBride; folio: DN114432F; lands: townland of Balgaddy and barony of Uppercross known as 10 Foxborough Close; **Co Dublin**

Regd owner: John Reid; folio: DN91401L; lands: property being an apartment known as 41 Malton House, Custom House Square, situate in the district of North Central and parish of St Thomas; **Co Dublin**

Regd owner: Gerry McDermot and Bridie McDermot; folio: DN99213F; lands: property situate in the townland of Balally and barony of Rathdown; **Co Dublin**

Regd owner: Peter M Conlon and Patricia Conlon; folio: DN19075; lands: property situate in the townland of Glenamuck North and barony of Rathdown (plan 21) **Co Dublin**

Regd owner: Timothy Bray and Sabrina Bray; folio: 51385; lands: townland of Townparks (5th division) and barony of Dunmore; area: 0.1138 hectares; **Co Galway**

Regd owner: Patrick Kerrins; folio: 3247F; lands: townland of (1) Grannagh Beg, (2) Moneen East and barony of (1) and (2) Loughrea; area: (1) 18.479 acres, (2) 13 acres, 2 roods, 18 perches; **Co Galway**

Regd owner: Mary Carr (deceased); folio: 812; lands: townland of (1) and (2) Glennascaul and barony of (1) and (2) Dunkellin; area: (1) 27.2390 hectares, (2) 0.4724 hectares; **Co Galway**

Regd owner: Patrick Lohan (deceased); folio: 44856; lands: townland of Cloonshivna (Kelly) and barony of Killian; area: 5.3460 hectares; **Co Galway**

Regd owner: Kerry Co-operative Creameries Limited; folio: 19325; lands: townland of Ballinclemesig and barony of Clanmaurice; **Co Kerry**

Regd owner: Noel and Andrea O'Connor; folio: 42326F; lands: townland of Rahoonane and barony of Trughanacmy; **Co Kerry**

Regd owner: John McEvoy and Carol Brady; folio: 31907F; lands: townland of Blackparks and barony of Narragh and Reban West; **Co Kildare**

Regd owner: Matthew O'Brien; folio: 15177F; lands: townland of Carrigeen South and barony of Kilkea and Moone; **Co Kildare**

Regd owner: Patrick Byrne; folio: 7629; lands: townland of Whitehouse and barony of Offaly West; **Co Kildare**

Regd owner: Daniel Sullivan; folio: 11610; lands: townland of Pitchfordstown and barony of Ikeathy and Oughterany; **Co Kildare**

Regd owner: Sean Daly; folio: 4229F; lands: Ballybeg and barony of Ida; **Co Kilkenny**

Regd owner: Joseph Moore; folio: 15894; lands: Moanmore and barony of Kells; **Co Kilkenny**

Regd owner: Michael Woods, Towneycorry, Lough Allen PO, Co Leitrim; folio: 6717; lands: Townycorragh; area: nine acres and three roods; **Co Leitrim**

Regd owner: Annette Moore; folio: 16184F; lands: parish of St Nicholas; **Co Limerick**

Regd owner: Timothy Murphy; folio: 1139F; lands: townland of Monaster South and barony of Coshma; **Co Limerick**

Regd owner: Patrick Myers; folio: 9902F; lands: townland of Kilglass and barony of Coshlea; **Co Limerick**

Regd owner: Michael and Josephine O'Dwyer; folio: 14020; lands: townland of Stonepark and barony of Clanwilliam; **Co Limerick**

Regd owner: Joseph and Ann Heagney; folio: 14035F; lands: townland of Rathurd and barony of Clanwilliam; **Co Limerick**

Regd owner: Brian A Smyth, Mountpleasant, Dundalk, Co Louth; folio: 3674; **Co Louth**

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

Regd owner: Michael O'Malley; folio: 46898; lands: townland of Keel East and barony of Burrisoole; **Co Mayo**

Regd owner: Sarah Flynn (deceased); folio: 47695; lands: townland of Foxford and barony of Gallen; **Co Mayo**

Regd owner: Kenneth and Mary E Barker, site 45 Huntsgrove, Ashbourne, Co Meath; folio: 19282F; lands: Killegland; **Co Meath**

Regd owner: Kate Keague, Primatestown, Ashbourne, Co Meath; folio: 11054; lands: Primatestown; area: 0.4047 hectares; **Co Meath**

Regd owner: Michael Garland (junior), Macken Hill, Drumconrath, Navan, Co Meath; folio: 18318F; lands: Birdhill, Mandistown; area: 14.044 acres, 12.042 acres; **Co Meath**

Regd owner: Mary Bruton, Newtown, Dunboyne, Co Meath; folio: 8142; lands: Clonymeath (part); area: 49.062 acres; **Co Meath**

Regd owner: Simon Columcille Donnelly, Nutstown, Oldtown, Co Dublin; folio: 3985, 3986; lands: Coolfore; area: 11.6144 hectares, 1.8893 hectares; **Co Meath**

Regd owner: Martin and Fiona Traynor, 37 O'Neill Park, Clones, Co Monaghan; folio: 10531F; lands: 37 O'Neill Park; **Co Monaghan**

Regd owner: Michael Francis O'Neill (deceased); folio 12089; lands: Ballymacwilliam and Clonmore and barony of Warrenstown; **Co Offaly**

Regd owner: James Feeney; folio: 12341; lands: Kildalloge and barony of Roscommon; area: 0.6879 hectares; **Co Roscommon**

Regd owner: James Garahan (deceased); folio 33822; lands: townland of (1) Cloonbony, (2) Ballinderry, (3) Derrycanan, and barony of Ballintober South; area: (1) 93 acres, 2 roods, 12 perches, (2) 2 acres, 25 perches, (3) 7 acres, 12 perches; **Co Roscommon**

Regd owner: Sean Fleming; folio: 6613F; lands: townland of Hundred Acres and barony of Castlereagh; area: 0.3136 hectares; **Co Roscommon**

Regd owner: Peter J Marren; folio: 4401; lands: townland of Streamstown and barony of Leyny; area: 0.1510 hectares; **Co Sligo**

Regd owner: Tipperary NR County Council; folio: 1413L; lands: townland of Grange and barony of Ikerrin; **Co Tipperary**

Regd owner: John Ryan; folio: 838; lands: Killeen and barony of Owney and Arra; **Co Tipperary**

Regd owner: Geraldine O'Dwyer; folio: 10277F; lands: townland of Borheenduff and barony of Iffa and Offa East; **Co Tipperary**

Regd owner: Patrick Purcell; folio: 31113; lands: townland of Gortnaskehy and Gortatooda and barony of Kilnamanagh Upper; **Co Tipperary**

Regd owner: James and Bridget Phelan; folio: 15990; lands: townland of Killinane and barony of Eliogarty; **Co Tipperary**

Regd owner: Anthony Coughlan (deceased); folio: 10573; lands: a plot of ground being part of the townland of Newtown and barony of Gaultiere and county of Cork; **Co Waterford**

Regd owner: Thomas Donnelly; folio: 9164 (closed to 6940F) Co Wexford; lands: Grovemill and barony of Gorey; **Co Wexford**

Regd owner: Matthew Rowe; folio: 6004F; lands: Grageen, Courtlands and Bog East and barony of Forth; **Co Wexford**

Regd owner: Paul Earls; folio: 20666F; lands: townland of Abbeylands and barony of Arklow; **Co Wicklow**

Regd owner: Donal O'Shea; folio: 11725; lands: townland of Coonanstown and barony of Talbotstown Upper; **Co Wicklow**

Regd owner: Annie Kelly; folio: 371; lands: townland of Rathdrum and barony of Ballinacor North; **Co Wicklow**

WILLS

Broy, Eamonn (deceased), late of 142 Foxfield Grove, Raheny, Dublin 5. Would any person having any knowledge of a will made by the above named deceased who died on 3 January 2002 at Beaumont Hospital, Dublin, please contact Sean Gallagher & Company, Solicitors, Merchants Court, 24 Merchants Quay, Dublin 8; tel: 01 677 2218, fax: 01 677 2421, e-mail: info@seangallagher.ie

Conlon, Mark (deceased), late of 26 Broadfield Manor, Rathcoole, in the county of Dublin. Would any person having knowledge of a will made by the above named deceased who died on 1 January 2003 at St James's Hospital, Dublin, please contact Malcomson Law, Iceland House, Arran Court, Smithfield, Dublin 7; tel: 01 874 4422, e-mail: info@mlaw.ie

Connaughton, John (deceased), late of Clostoken, Loughrea, Co Galway. Would any person having knowledge of a will made by the above named deceased who died on 11 June 2003, please contact VP Shields & Son, Solicitors, Westbridge, Loughrea, Co Galway; tel: 091 841 044, fax: 091 842 156

Conroy, Patrick (deceased), late of 206 Rafters Road, Crumlin, Dublin 12. Would any person having knowledge of a will made by the above named deceased who died on 30 July 1991 at St James Hospital, Dublin, please contact B & P Byrne, Solicitors, 5 Tyrconnell Road, Inchicore, Dublin 8; tel: 01 453 3309, fax: 01 453 8180. Reference: LM

Crowley, Christopher (deceased), late of 21 Tower Hill, Kilcoolishal, Glanmire, Co Cork and formerly of 39 Hazelwood Avenue, Glanmire, Co Cork who died on 30 August 2001. Would any person having knowledge of the whereabouts of a will made by the above named deceased please contact Henry PF Donegan & Son, Solicitors, 74 South Mall, Cork; tel: 021 427 7155, fax: 021 427 4805, e-mail: lharney@donegans.ie

Cullen, Fedelma (deceased), (actress), late of 16 St Teresa's Place, Glasnevin, Dublin 11. Would any person having knowledge of a will made by the above named deceased who died on 15 November 2003 at 16 St Teresa's Place, Glasnevin, Dublin 11, please contact Anne Colley & Co, Solicitors, 6 Main Street, Dundrum, Dublin 14; tel: 01 296 0488, fax: 01 296 0490, e-mail: info@annecolley.ie. Ref: 03/682

Dunne, Phyllis (otherwise Halligan) (deceased), late of 10 Ardbrae Park, Vevay Road, Bray, Co Wicklow. Would any person having knowledge of the existence of any next of kin of the above deceased please contact Elizabeth Ward & Co, Solicitors, Clifton House, Lower Fitzwilliam Street, Dublin 2, tel: 01 661 3788, before 14 February 2004

Greer, Malachy (deceased), late of 70 Brian Road, Marino, Dublin 3. Would any person having knowledge of a will made by the above named deceased who died on 2 January 2003, please contact O'Donohoe, Solicitors, 11 Fairview, Dublin 3 (ref: Michael O'Donohoe)

Kennedy, John F (deceased), late of no 2 Richmond Hill, Fermoy, Co Cork, and formerly of The Shamrock Bar, Fitzgerald Place, Fermoy, Co Cork. Would any person having knowledge of a will made by the above named deceased please contact Declan Carroll & Company, Solicitors, Courthouse Road, Fermoy, Co Cork; tel: 025 34114, fax: 025 34115, e-mail: declancarroll@eircom.net

Kennedy, Mary (deceased), (ob 8 January 1997), late of 8 Deerpark Drive, Castleknock, Dublin 15. Would any person having knowledge of a will made by the above named deceased please contact Brendan Moriarty, Solicitor, Moriarty & Co, 11 Anglesea Street, Dublin 2; tel: 01 677 7306

O'Keeffe, Elizabeth (deceased), late of Barryscourt, Carrigtwohill, Co Cork. Would any person having knowledge of a will made by the above named deceased who died on 12 November 2003, please contact Kevin White of Eoin C Daly & Co, Solicitors, 38 South Mall, Cork; tel: 021 427 5244, fax: 021 427 5243, e-mail: kevinecd@eircom.net

O'Reilly, Mary (deceased), late of 9 Fontenoy Street, Dublin 7. Would any person having any knowledge of a will made by the above named deceased who died on 14 August 2003, please contact Doyle & Company Solicitors, 1 Main Street, Blanchardstown, Dublin 15; tel: 01 820 0666, fax: 01 822 0880

EMPLOYMENT

Conveyancing solicitor with at least one year's PQE required for busy Limerick practice. Attractive benefits package and excellent career prospects for the right candidate. Send CV to Fionnuala Keating & Co, 91 O'Connell Street, Limerick; e-mail: post@fbk.ie

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Locum solicitor required for Nathaniel Lacy & Partners, Kenlis Place, Kells, Co Meath, for five to six months from end April 2004. Experience in personal injury litigation essential. Please reply to JL at 046 928 0717 or in writing

Solicitor – conveyancing and probate solicitor, very experienced, seeks position in Dublin or adjoining counties. Please reply to **box no 10/04**

Solicitor required for general practice in Midlands. Please apply with CV to O'Sullivan & Hutchinson, Solicitors, Portarlington, Co Laois, or e-mail: osulhutc@iol.ie

Locum solicitor required for July and August 2004 or part thereof for Limerick City practice. Apply with CV to **box no 11/04**

Solicitor with experience in conveyancing required for established practice in Tralee. Reply to **box no 12/04**

Experienced conveyancing solicitor with eight years' PQE seeks a move to a part-time position in the Cork city/county area (commuting distance from Cork city). Please reply to **box no 13/04**

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MISCELLANEOUS

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

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

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

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TITLE DEEDS

In the estate of Fedelma Cullen (deceased), late of 16 St Teresa's Place, Glasnevin, Dublin 11. Anybody with any information regarding the whereabouts of the title deeds of 16 St Teresa's Place, Glasnevin, Dublin 11, please contact Anne Colley & Co, Solicitors, 6 Main Street, Dundrum, Dublin 14; tel: 01 296 0488, fax: 01 296 0490, e-mail: info@annecolley.ie. Ref: 03/682

In the estate of Mary (May) McCabe (deceased), late of 4 St Mark's Terrace, Scarlett Street, Drogheda, Co Louth. The property may have been registered in the name of Mary McCabe or in joint names Mary McCabe and Catherine McCabe. Anybody with information regarding the whereabouts of the title deeds of the above property, please contact Lawlor O'Reilly & Company, Solicitors, 43 Upper Gardiner Street, Dublin 1; tel: 01 878 7255, fax: 836 3202

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 192 (incorporating 192A) Whitehall Road, Terenure, Dublin 6W, in the functional area of South Dublin County Council: an application by Jarlath Cox of 192 Whitehall Road, Dublin 6W

Notice to persons having any interest in the freehold estate of the following property: 192 (incorporating 192A) Whitehall Road, Terenure, Dublin 6W, in the city of Dublin, formerly referred to as part of the lands of Perrystown in the barony of Uppercross and county of Dublin.

Take notice that Jarlath Cox, the applicant, intends to submit an application to the county registrar for the county/city of Dublin for the acquisition of the freehold interest in the aforesaid properties and any party asserting that they hold a superior interest in the aforesaid premises (or any of them) are called upon to furnish evidence of title to the aforementioned premises to the below named within 21 days from the date of this notice. The applicant holds the property under lease dated 27 July 1954 made between Burnside Society Ltd of the first part, Richard Murray of the second part and Thomas C Walsh of the third part for a term of 500 years from 29 September 1952 at the yearly rent of £35.

In default of any such notice being received, the applicant, Jarlath Cox, 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: 6 February 2004

Signed: Gore & Grimes (solicitors for the applicant), Cavendish House, Smithfield, Dublin 7 (reference KH/AB)

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 Joseph Lynch of 6 Fonthill Road, Rathfarnham, Dublin 14

Take notice any person having any interest in the freehold estate of the following property, namely no 37 Thomas Street, Dublin 8.

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

In default of any such notice being received, 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 and 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: 6 February 2004

Signed: John Gaynor & Co (solicitors for the applicant), 42/46 Thomas Street, Dublin 8

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 Alan McGrory and Terence McGovern

Take notice that any person having any interest in the freehold estate of the following property: Bridge Street in the barony of Swords, Co Dublin, and more particularly described along with other property in an indenture of lease dated 10 September 1850 and made between Philip O'Dwyer Greene of the first part, William Greene of the second part and George Waters of the third part for a term of 200 years from 25 March 1850, subject to the yearly rent of £5 thereby reserved.

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

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

Date: 6 February 2004

Signed: Patrick W McGonagle (solicitors for the applicant), North Street, Swords, Co Dublin

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

Take notice that any person having an interest in the following property: all that and those 59 Main Street, Leixlip, Co Kildare, more particularly described in a lease dated 2 April 1946 between Francis M Graham of the one part and William Lyons of the other part for a term of 900 years from 25 March 1946, subject to an annual rent of £7.10.0 and to the covenants and the conditions therein contained.

Take notice that Moriarty Investments Limited intends to apply to the county registrar of the county of Kildare for the acquisition of the freehold interest in the aforesaid property and that any party asserting that they hold a superior interest in the aforesaid property or any part thereof are called upon to furnish evidence of title to the aforementioned property to the below named within 21 days from the date of this notice.

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

Date: 6 February 2004

Signed: Porter Morris & Co (solicitors for the applicant), 10 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 Peter Murphy

Take notice that any person having any interest in the following premises: all that and those the hereditaments and premises known as 12 South Frederick Street in the parish of St Anne and city of Dublin, being the property more particularly described in a lease dated 24 August 1926 and made between Frances E Orpen, Mary Margaret Byrne, Arabella Bodkin, Emma Norman, Andrew John Horne, Frances J Horne, Frances Edith Byrne, Maude Dove, the said Andrew J Horne and Arthur Cox of the one part and Valentine Miley of the other part.

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

In default of any such notice being received, Peter Murphy 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 or persons beneficially entitled to the superior interest including the freehold reversion in the aforementioned premises are unknown or unascertained.

Date: 6 February 2004

Signed: Haughtons (solicitors for the applicant), Ashton House, 6 Martello Terrace, Dun Laoghaire, Co Dublin

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

Take notice that any person having an interest in the freehold estate of the following premises: all that and those that part of the townland of Roebuck in the barony of Rathdown and county of Dublin now known as the lands at Goatstown Road, Goatstown, Co Dublin, and more particularly described along with other properties in an indenture of lease dated 26 July 1800 made between Thomas Dillon of the one part and Richard Borough of the other part for the lives therein mentioned or the term of 295 years from 25 March 1800, subject to the yearly rent and the covenants and conditions therein contained.

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

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

Date: 6 February 2004

Signed: Beauchamps (solicitors for the applicant), Dollard House, Wellington Quay, 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*. In the matter of premises situate at 6/7 Granby Place in the parish of St Mary and city of Dublin: 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 6 and 7 Granby Place in the parish of St Mary and city of Dublin (which said premises are reputed to be held under a sub-lease from the persons entitled to the lessee's interest under a lease of 9 September 1760 made between Martha Kane of the one part and Sophia Hamilton of the other part) 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 city of Dublin for the 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 city of Dublin for such directions 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: 6 February 2004

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

In the matter of the *Landlord and Tenant Acts, 1967-1994* and of the *Landlord and Tenants (Ground Rents) (No 2) Act, 1978*: an application by AJ Edge Limited

Take notice that Messrs AJ Edge Limited intend to submit an application to the county registrar for the county of Wicklow for the acquisition of the freehold interest in the following property: all that and those the hereditaments and premises known as Brighton Terrace, Bray, in the county of Wicklow.

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

In default of any such notice being received, Messrs AJ Edge Limited intend to proceed with the application before the county registrar at the end of the 21 days from the date of this notice and will apply to the county registrar for the county of Wicklow 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: 6 February 2004

Signed: Lockhart & Company (solicitors for the applicants), 99 Vernon Avenue, Clontarf, Dublin 3

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

Take notice any person having any interest in the freehold estate of the following property: all that and those the property known as 205A Emmet Road, Inchicore, in the city of Dublin held under an indenture of lease dated 25 January 1871 and made between John Cuddihy of the one part and Joseph Egan of the other part for a term of 100 years from 1 January 1871 (but which said term has been extended by 100 years by an indenture of reversionary lease dated 4 January 1906 and made between John J O'Meara of the one part and Margaret Murray of the other part) subject to an annual yearly rent of £9 and to the covenants on the lessee's part and the conditions therein contained.

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

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

Date: 6 February 2004

Signed: Eugene F Collins (solicitors for applicant), Temple Chambers, 3 Burlington Road, Dublin 4 DE /RY

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 the George's Street Partnership

Notice to any person having any interest in the following property: 'All that and those the plot of ground with the coach house and stable erected thereon at the end or turn of the stable lane leading thereto from the gateway entrance in North Great George's Street opposite said gateway and rere of numbers 28 and 29 said street being the first coach house and stable in the said stable lane containing in breadth in front to said lane 20 feet 6 inches in breadth in the rere 23 feet nine inches in depth from front to rere on the north side 17 feet and in depth from front to rere to the south side 16 feet nine inches being the said several admeasurements the more or less bounded on the east by premises in the possession of Messrs Egan & Rourke Bakers on the west by

said stable lane on the north by the stable belonging to said Patrick Dargan and on the south by premises belonging to Mary Anne Hackett which said demise premises are situated in the parish of Saint George and city of Dublin together with free liberty of ingress, egress and regress to and for the said Patrick Dargan his executors, administrators and assigns and his or their servants attendance's or workmen or others employed by him or them with cars, carts, carriages and horses at all times in and through the gateway and passages leading from Great George's Street aforesaid to the premises hereby demised and said Stable Lane in common with the other tenants of the adjoining premises'.

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

In default of any notice being received by the below named solicitor, the said applicant intends to proceed with the application before the county registrar at the end of 21 days of this notice and will apply to the county registrar for the county and 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: 6 February 2004

Signed: Liam Moran & Company (solicitors for the applicant), Swords, Co Dublin,

In the matter of the *Landlord and Tenant (Ground Rents) Acts, 1967-1994*: an application by Peter Houlihan and Tim O'Driscoll, executors of the estate of John McCarthy, deceased (the applicants)

Take notice that any person having an interest in the next superior interest or freehold estate of the property known as 36A Main Street, Bray, Co Wicklow, formerly known as 37 Main Street, Bray, Co Wicklow, being a portion of the property held under an indenture of lease dated 22 June 1888 between the Very Reverend Robert Humphreys of the one part and James Lawlor of the other part for the term of 150 years from 25 March 1888 subject to the yearly rent of IR£18 and the covenants and conditions therein contained and an indenture of lease dated 31 December 1946, Esther McGarry of the one part to Elizabeth McCarthy of the other part for the residue of the term demised by the 1888 lease and subject to the rent, covenants and conditions as therein contained and being all of the property held under an indenture of assignment dated 1 May 1972 between Elizabeth McCarthy of the one part and John McCarthy of the other part the unexpired residue of the term of the lease dated 22 June 1888.

Take notice that the applicants intend to submit an application to the county registrar for the county of Wicklow at the Court House, Wicklow, for the acquisition of the freehold interest in the aforesaid property and that any party asserting that they hold a superior interest in the aforesaid property are called upon to furnish evidence of title to the below named within 21 days from the date of this notice. In default of any such notice being received, the applicants intend to proceed with the application before the county registrar for the county of Wicklow for directions as may be appropriate on the basis that the some of the person or persons beneficially entitled to the superior Interest including the freehold reversion in the aforesaid property are unknown or unascertained.

Date: 6 February 2004

Signed: O'Donnell Sweeney (solicitors for the applicants), One Earlsfort Centre, Earlsfort Terrace, Dublin 2