Law Society Gazette

Regulars

COVER PIC: REX FEATURES

Cover Story

Editor: Conal O'Boyle MA. **Assistant editors:** Kathy Burke, Garrett O'Boyle. **Designer:** Nuala Redmond. **Editorial secretaries:** Catherine Kearney, Valerie Farrell. **Advertising:** Seán Ó hOisín, 10 Arran Road, Dublin 9, tel: 837 5018, fax: 884 4626, mobile: 086 8117116, e-mail: seanos@iol.ie. **Printing:** Turners Printing Company Ltd, Longford. **Editorial Board:** Pat Igoe (Chairman), Conal O'Boyle (Secretary), William Aylmer, Tom Courtney, Eamonn Hall, Mary Keane, Ken Murphy, Michael V O'Mahony, Alma Sheehan, Keith Walsh

Published at Blackhall Place, Dublin 7, tel: 01 672 4800, fax: 01 672 4877.
E-mail: c.oboyle@lawsociety.ie Law Society website: www.lawsociety.ie

Volume 98, number 5
Subscriptions: €57.15

ALL TOGETHER AGAINST CRIME

On 20 May, justice minister McDowell announced government approval to draft the *Criminal Justice (International Collaboration) Bill, 2004*. This bill will provide for amendments to the *Criminal Justice Act, 1994* and transpose the 1996 section 46(6) regulations made under that act into primary legislation.

The bill also gives effect to four mutual assistance instruments at EU level:

- **The *Convention on mutual assistance in criminal matters* between EU member states, signed at Brussels on 29 May 2000**
- **The protocol to that convention, which provides for mutual assistance in relation to information on bank accounts and transactions**
- **The second additional protocol, and**
- **The mutual assistance aspects of the council decision signed in Brussels on 6 June 2003 concerning an agreement between the EU and the United States on extradition and mutual legal assistance.**

Law Society means business, says independent adjudicator

The message is getting through that 'the Law Society means business', the society's independent adjudicator Eamon Condon has said.

In his recently published annual report, covering the period from 1 September 2002 to 31 August 2003, Condon writes: 'I can happily report that the level of timely and appropriate response by solicitors to correspondence from the complaints section has shown a dramatic improvement. It is obvious that the message is getting through that the society, in its role as regulatory body, means business'.

However, the statistics showed a slight increase in the number of admissible complaints: 1095, compared to 1039 the year before. Over 30% of those complaints were generated by just 80 solicitors. 'This stark statistic should concentrate the mind', notes Condon.

Condon: 'dramatic improvement'

Included in the latest figure are 35 complaints concerning compliance with the *Solicitors advertising regulations*, which came into effect on 1 February 2003. The number of inadmissible complaints also rose, from 194 to 344.

Commenting on the report, Condon said he was not concerned by the small increase in the number of complaints, as the Law Society had worked hard over the past year to publicise the mechanisms for making complaints against lawyers. He also welcomed a marked improvement in the speed and quality with which complaints were addressed. Almost 80% of all complaints were dealt with within 90 days.

Two issues stood out as serious in the report, he said: the constraints on the society in investigating complaints about solicitors in family law proceedings, and the number of solicitors attracting multiple complaints, 'many on a regular and on-going basis'. Condon noted that justice minister Michael McDowell had promised that the constraints that currently prevent the Law Society from investigating complaints about solicitors acting in family law cases would be addressed in an imminent court bill.

ONE TO WATCH: NEW LEGISLATION

New rule of the superior courts concerning the *ECHR Act, 2003*

The practice direction concerning the *ECHR Act, 2003* that was featured in last month's *Gazette* (p5) has now been partially superseded by SI no 211 of 2004, Rules of the Superior Courts *(right of attorney general and Human Rights Commission to notice of proceedings involving declaration of incompatibility issue rules) 2004*.

The statutory instrument reads: '1) *The* Rules of the Superior Courts *(SI no 15 of 1986) are hereby amended by the insertion after order 60 thereof of the following order:*

Order 60A

Right of attorney general and Human Rights Commission to notice of proceedings involving declaration of incompatibility issue

1) In this order "declaration of incompatibility" has the meaning it has in section 1(1) of the European Convention on Human Rights Act, 2003 *(no 20 of 2003)*

2) If any issue as to the making of a declaration of incompatibility shall arise in any proceedings, the party having carriage of the proceedings shall forthwith serve notice upon the attorney general and the Human Rights Commission

3) Such notice shall state concisely the nature of the proceedings in which the issue arises and the contention or respective contentions of the party or parties to the proceedings

4) These rules may be cited as the Rules of the Superior Courts (right of attorney general and Human Rights Commission to notice of proceedings involving declaration of incompatibility issue rules) 2004.'

The practice direction still stands in relation to proceedings under section 3:

'Contravention claims

In every claim for damages for injury, loss or damage arising from contravention of section 3(1) of the European Convention on Human Rights Act, 2003 *(no 20 of 2003), the plenary summons shall be headed as follows:*

The High Court

In the matter of the European Convention on Human Rights Act, 2003, *section 3(1).'*

And in relation to filing a copy with the Central Office:

'2.3. A copy of the said notice shall be filed forthwith in the Central Office of the High Court.'

It is a pity that the new SI did not incorporate the practice direction fully, and also that it did not make clear that a case under section 3 could seek remedies other than damages, such as injunctions or declarations. The practice direction in relation to section 3 will enable the Courts Service to collect statistics on cases in which the convention is pleaded. G

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

Society demands withdrawal of 'outrageous' remarks

The Law Society has called on the chairman of the National Safety Council, Eddie Shaw, to withdraw remarks that he made about the legal profession on RTÉ's *Morning Ireland* programme on 24 May, *writes Ken Murphy*.

In the course of an interview about levels of death on the road, and the fact that the use by gardaí of radar guns in speeding cases had been found unlawful in a District Court case, Shaw twice suggested that the legal profession was operating against the common good and was opposed, for its own interests, to measures that would reduce the levels of death and injury on the roads.

Mentioning in particular the Law Society's response to the setting up of the Personal Injuries Assessment Board (PIAB), he said: 'The legal industry has set out not just to challenge legislation but really to challenge what is a common good, that is, the substantive reduction that has taken place both in the incidence of collisions on the roads, but also in the reduction in consequent personal injury claims going through the courts'.

Five hours later, in the top news story on RTÉ radio's *News at one* programme, Law Society director general Ken Murphy responded to Shaw's implication that solicitors wished to see a continuation of high levels of death and injury on the roads. Murphy said: 'If it were true, it would be a shameful thing – but it's not true, and it's a shameful thing for Mr Shaw to have said it'.

Murphy continued: 'I take offence at that. I think every solicitor in the country will take offence at that. It seems a completely gratuitous and unworthy comment to make. It's a new low in debate, as far as we are concerned, and I think that Mr Shaw went much, much too far. I don't know Mr Shaw personally, but I assume he's an honourable man and I think the honourable thing for him to do would be to withdraw these remarks'.

Murphy: 'cheap and unworthy'

Pressed by interviewer Richard Downes on whether solicitors had a vested interest in 'making a mess of the laws' because of the work it generates from people 'who are doing extremely dangerous things, causing death and mayhem on the road', Murphy responded that what lawyers were doing was perfectly legitimate, and was also in the common good. 'It is clearly in the common good that death and injury on the road should reduce, and ideally be eliminated, but there is also another common good. There is a common good in seeing that people should only be convicted of criminal offences in accordance with the law. That, also, is a common good. It's part of the rule of law and is an essential cornerstone of a democracy', he said.

He pointed out that if the law was truly flawed, and was found to be so on appeal, by way of case stated to the High Court, then the Oireachtas could proceed to fix the flaw.

Making it clear that solicitors would be very pleased to see further huge reductions in road accidents, he said: 'The record will show, and I have made the point many times in this studio, that the proper answer to the problem with insurance in Ireland is to eliminate the negligence culture and to reduce accidents on the road and accidents in the workplace'.

Turning again to Eddie Shaw's remarks on the radio that morning, Murphy concluded: 'The proper thing for him to do, instead of implying that solicitors are cheerleaders for death and carnage on the roads, which is absolutely outrageous, cheap and unworthy of somebody in a position like his, is to withdraw these remarks'.

CORRECTION

In the article headlined *Family values* in last month's issue (page 17), it was incorrectly stated that 'a pension adjustment order (PAO) is not available on divorce because the parties will no longer be spouses' (paragraph 3). This should have read 'a *pension preservation order* is not available on divorce …'. Similarly, the sentence reading 'The benefit of the PAO is that it protects the spouse of the pension scheme member …' (paragraph 5) should have read 'The benefit of the *pension preservation order* is that it protects the spouse of the pension scheme member'. These mistakes occurred during the editing process and we apologise to the author of the report, Keith Walsh, for the errors.

LONGER OPENING HOURS FOR COURT OFFICES

The Courts Service has announced that the offices of the Supreme and High Court will be open from 10.30am to 4.30pm all year round. The extended opening hours are expected to take effect from the long vacation.

EXTRA PUBLIC SEARCH TERMINAL

A fourth public search terminal has been added in the Central Office. Users can now access the Courts Service website (*www.courts.ie*) from all the public search terminals as well. The website gives you access to the on-line *Legal diary* as well as other useful information.

LOCUMS REQUIRED

Anyone interested in locum work should e-mail a copy of their CV and a short covering letter to Trina Murphy in the Law School. They should also state the area of law they are interested in and the locations they are prepared to travel to. For further details, contact t.murphy@lawsociety.ie or tel: 01 672 4982, fax: 01 672 4991.

TRANSNATIONAL CRIME CONFERENCE.

The International Bar Association is holding its seventh *Transnational crime conference* in Dublin from 10-13 June. The conference will cover issues such as investigation, global policing and due process. Among the participants will be Judge Maureen Harding Clark of the International Criminal Court, justice minister Michael McDowell, and the director of public prosecutions, James Hamilton. For further information, visit *www.ibanet.org*.

RETIREMENT TRUST SCHEME

Unit prices: 1 May 2004
Managed fund: 438.199c
All-equity fund: 104.153c
Cash fund: 254.971c
Long-bond fund: 113.253c

Murphy and Dowling go head to head over fairness of PIAB

Pat Kenny's radio show was the venue for a recent lengthy exchange of views between Law Society director general Ken Murphy and Dorothea Dowling, chairperson of the Personal Injuries Assessment Board (PIAB), on what PIAB is likely to mean for the victims of workplace accidents, for whom it is a mandatory stage in the compensation-seeking process from 1 June, *writes Ken Murphy*.

Dorothea Dowling, as usual, predicted that, through PIAB, personal injury claims would be resolved with the same level of compensation from the claimant's point of view, but much more quickly and cheaply without the involvement of lawyers and therefore 'without the litigation overhead'. Ken Murphy sharply disagreed with her on all of these points.

On whether solicitors would continue to be involved, apart from the very real need that accident victims will have for solicitors' services, he pointed out that even at the highest levels of PIAB it was expected that solicitors would be retained in most cases. He said: 'I was talking to PIAB's deputy chairman, senator Joe O'Toole, after the launch on Wednesday last, and he acknowledged that he expected that, in the overwhelming majority of cases, people will still go to solicitors right from the start'.

Dowling: solicitors will tell clients if they have to go to PIAB

Murphy added: 'Dorothea and I were speaking at a conference in Trinity about six weeks ago and a question came from the audience. Dorothea was asked how people would know they would have to bring their case to PIAB, and Dorothea's own words, I took them down carefully at the time, were: *Their solicitors will tell them*'.

A central theme of the interview was whether PIAB, in its composition and operation, would be fair to all parties, as Dowling claimed, or if it was inherently biased and designed to disadvantage claimants, as Murphy asserted, in his insistence that any claimant who does not first go to a solicitor will leave themselves at a considerable disadvantage.

Murphy continued: 'One of our concerns is the inherent bias, which we perceive will exist in PIAB, in that the insurance industry will pay for PIAB's operation. A claimant will pay €50 while the insurance company will pay €850 on a case-by-case basis. This will inevitably create at least the perception, and probably the reality, of a bias towards the defence interest'.

'The culture will come from the top', he continued, to reinforce the point. 'Dorothea Dowling, in the course of her day job as chief claims manager of CIE for many years, very successfully, has been picking holes in, and undermining, accident victims' cases. The senior management of the PIAB, both the chief executive and the senior management, generally all come from Hibernian insurance company. We would say that, unless people have someone unambiguously on their side, their family or local solicitor, right from the start in the correspondence that precedes the case going to PIAB, they may well find themselves at a disadvantage'.

IRISH FIRMS WIN AWARDS

A&L Goodbody was named *Irish law firm of the year* 2004 at the Chambers Awards in London last month. The Chambers Awards are sponsored by legal publisher Chambers and Partners. Meanwhile, McCann FitzGerald was awarded *Irish law firm of the year* by the *International financial law review* in recognition of achievements in M&A, banking and capital markets, and projects/public private partnerships.

JESUITICAL LAWYERS

The Jesuits have arranged a 'day of reflection' for lawyers at the Jesuit Centre of Spirituality in Dublin on Thursday 23 September. This will be followed by a discussion evening on Thursday 30 September. The programme is intended to 'respond to the constant demands of legal practice which make it extremely hard for a legal practitioner to create time and space for an inner life'. According to the Jesuits, the law 'is an exceptionally demanding profession which creates demands upon a practitioner's time, conscience and relationships with few parallels in other occupations'.

And it adds: 'The continuous onslaught by the media upon the role of lawyers in Irish society is grossly misleading when set against the daily realities of legal practice encountered by the vast majority of solicitors and barristers. The underlying conviction giving rise to this programme is that the value of legal practice needs to be re-articulated, not just for the good of legal practitioners, but also for the common good and for the advancement of a civil society'.

For further information about the programme, contact Manresa House, Jesuit Centre of Spirituality, 426 Clontarf Road, Dollymount, Dublin 3, tel: 01 833 1352.

NATIONWIDE
News from around the country

DUBLIN

Honours even

On behalf of the DSBA council, John O'Connor recently awarded honorary membership to Mr Justice Joseph Finnegan, president of the High Court, and his judicial colleague Michael Peart – both of whom are former Dublin solicitors and members of the association. At a small reception in the High Court president's chambers, O'Connor, along with DSBA vice-president Orla Coyne, honorary secretary Kevin O'Higgins and programmes director John P O'Malley, made a presentation of a framed scroll of honour and a Dublin Crystal decanter.

Midsummer Ball

The Younger Members Committee of the DSBA is holding a Midsummer's Ball on Saturday 19 June in the Gresham Hotel. This pioneering event has been organised by Keith Walsh and his committee, and tickets can be obtained from Keith on tel: 01 492 6153 or Karen Devine on e-mail: karen@dsba.ie.

Forthcoming events

DSBA programmes director John P O'Malley advises of a forthcoming seminar on a subject that puts most of our colleagues in a state of apoplexy, *VAT on property transactions*. The venue is the Westbury Hotel at 2.15pm on 21 June, and speakers include Brian Bohan. Please contact karen@dsba.ie.

President of Ireland

The President of Ireland, Mary McAleese, is to honour the DSBA with a private audience in mid-June. DSBA president John O'Connor hopes to use that occasion to create better awareness among the profession as to the existence of the solicitors' helpline – a facility established, managed and maintained by the DSBA for many years and operating on a nationwide basis, with colleagues drawn from all corners of the land.

Golden times

The Dublin Solicitors' Bar Association hosted a dinner in conjunction with AIB chairman Dermot Gleeson SC in May to mark the careers of solicitors who have been qualified for 50 years. Pictured at the event are *(from left)* Mr Justice Michael Peart, Law Society president Gerard Griffin, Helen Griffin (qualified 1947), DSBA president John O'Connor, Jack Nagle (qualified 1939), Mr Justice Joseph Finnegan, president of the High Court, and Dermot Gleeson SC

CAVAN

Laughing all the way to the bank

Solicitors are increasingly having to do banks' work, but without being paid anything for it, according to Rita Martin, secretary of the Cavan Solicitors' Association. 'The banks are laughing at our expense', she said.

The association had recently passed a resolution complaining that the banks do not tell their house-buying customers of the various detailed non-legal matters that they then insist must be attended to. Banks knew that solicitors would then have to attend to these matters. 'We then have to spend half the day on the phone to these lending institutions chasing cheques – but we don't get paid for this time', she noted. 'If solicitors concentrated only on the legal documents – which is only what we are paid for – and did not do the non-legal work, loan cheques would never issue'.

The association had written to the Conveyancing Committee and was optimistic that something would be done to redress the balance between solicitors and the banks.

County registrar appointed

On a happier note, Cavan solicitors were pleased to see the recent appointment of local colleague Joseph Smith as county registrar. Joe, who practised in Cootehill for many years since qualifying as a solicitor in 1984, is a popular appointment. 'We are particularly pleased that a local solicitor who knows the issues facing practitioners from his own daily work over the years has been appointed', said Rita Martin.

KILKENNY

Land Registry access

On-line access to the Land Registry is a major boost to the profession and is a facility that more and more solicitors should adopt, according to Martin Crotty, president of the Kilkenny Bar Association.

The association recently held a seminar with Land Registry officials, which was well attended and well received. The technology was amazing. All solicitors' practices in Kilkenny, with just one or two exceptions, are now going on-line. They can get their dealing number immediately and it facilitates early registration of their clients' titles, he noted.

SLIGO

Will to suceed

A recent 'wills week' was held in Sligo, with participating solicitors providing their services free for people to make wills. The event raised more than €2,000 for local causes. Last month, cheques were presented to Sligo social services and the Sligo branch of the Irish Kidney Association.

'Wills week was a great success here', said Sligo Bar Association president Michele O'Boyle. 'It is important for people to make wills. Many did so, and we helped two local charities'. The event attracted a lot of local media coverage and publicity and was good for the general public, the local causes and the solicitors' profession, she added.

WEXFORD

Continuing professional development

There has been great demand for places at the continuing professional development (CPD) courses that are being run by the Wexford Solicitors' Association, according to its secretary John Garahy.

'Geraldine Clarke, then president of the Law Society, and director general Ken Murphy were here last year and encouraged us to organise the CPD seminars ourselves', he said. The association took up the challenge and it has been an on-going success, with more than 40 solicitors, from the total pool of 93 solicitors in the area, attending each seminar. G

rochford brady group

...information as you need it

- Company Registration Office
- Closing Searches
- Copy Folio/File Plans
- Folio Inspections
- Registry of Deeds
- Licensing
- Planning
- Probate
- Title Registration
- Birth, Marriage & Death Certificates
- Mapping Searches

rochford brady legal services
64 francis street
dublin 8
tel 1850 529 732
fax 1850 752 436
www.lawsearch.ie
email: rochford@lawsearch.ie

- Irish Company Information
- UK Company Information
- Land Registry
- CID Search
- Watch List
- Closing Searches
- Judgment Searches
- Global Company Information
- Legal Diary
- Legal search archive
- Bonded searches

LawLink Ltd.
7/8 mount street crescent
dublin 2
tel +353 1 480 1800
fax +353 1 480 1801
www.lawlink.ie
email: support@lawlink.ie

HUMAN RIGHTS WATCH

High Court gives effect to Strasbourg judgment

Alma Clissmann reports on developments in relation to the practical application of the *European convention on human rights*

***Quinn v His Honour Judge Sean O'Leary, Judge Michael C Reilly, Ireland, the DPP, the AG and the Government of Ireland*, O'Caoimh J, High Court, 23 April 2004**

The applicant was charged under section 52 of the *Offences Against the State Act, 1939* for failing to account for his movements, and in May 1997 was convicted and sentenced to six months' imprisonment. He withdrew his appeal in January 1998 and was released in June 1998.

Meanwhile, in March 1997, he had taken a case to the European Court of Human Rights (ECtHR). Giving judgment in his case (*Quinn v Ireland* 36887/97, 21 Dec 2000) and the parallel case of *Heaney & McGuinness v Ireland* (34720/97), the court found that compelling the applicants to give an account of their movements 'extinguish[ed] the very essence of [their] rights to silence and against self-incrimination guaranteed by article 6.1 of the convention'. The judgment became final in March 1997, and Quinn received £4,000 in damages.

Although the ECtHR found that Quinn's conviction under section 52 was a direct consequence of a violation of the convention, the conviction remained in place and on record. This had implications for his employment and travel prospects and other matters into the future. In April 2001, his solicitors wrote to the director of public prosecutions and the attorney general asking for their consent to have the conviction set aside. When this drew a blank, judicial review proceedings were instituted to have the applicant's conviction quashed.

Among his arguments, the applicant argued that section 52 was unconstitutional and void, that the judgment of the ECtHR was binding and that article 29(3) of the constitution required the state to repeal or nullify legislation authoritatively determined to contravene an international treaty, in this case, the ECHR. In fact, prior to the ECtHR judgment, the Supreme Court had held that section 52 was constitutional and that it did not constitute a disproportionate interference with the right to free speech (*Heaney v Ireland* [1996] 1 IR 580).

The High Court judgment

O'Caoimh J's judgment surveyed the various arguments made by the applicant and respondents, the convention jurisprudence concerning the right to silence (*Murray v United Kingdom* [1996] 22 EHRR 29, *Saunders v United Kingdom* [1997] 23 EHRR 313, and *Quinn v Ireland*), and considered the authority of the decision in *Heaney v Ireland* in the light of the subsequent decision of the Supreme Court in *Re National Irish Bank Ltd* (no 1 [1999] 3 IR 145). This decision was crucial in the reasoning of the ECtHR because it was only in this case that the legal position regarding the admissibility of any statements made by an arrested person in a subsequent criminal prosecution was clarified. The Supreme Court held that the evidence obtained pursuant to a statutory demand could not be admitted in a subsequent criminal trial. The applicant argued that this threw the validity of the *Heaney* decision into doubt, and therefore the constitutionality of the law under which he had originally been convicted.

The respondents argued that no international agreement is part of the domestic law of the state until incorporated by the Oireachtas, and this went for the ECHR at that time. So, the court should not give priority to the convention over domestic law and the constitution, even though there is an obligation on the state to give effect to a judgment of the ECtHR.

The judge also considered arguments in relation to the delay of the applicant in seeking relief by means of this action. From March 1997 (when the application to Strasbourg was made) or from January 1998 (when the applicant abandoned his appeal in the Circuit Court), there was a considerable delay to May 2001, when these proceedings were initiated. However, after a lengthy consideration of the law and the facts, including the two strands of proceedings (domestic and under the convention), O'Caoimh J decided to exercise his discretion to allow the application.

O'Caoimh J held himself bound by the decision of the Supreme Court in *Heaney v Ireland*, upholding the constitutionality of section 52. He expressed himself satisfied that a confession made in pursuance of section 52 of the 1939 act would in principle not be admissible in evidence in a subsequent criminal trial unless the court was satisfied that that confession was voluntary. He rejected the submission that *Heaney v Ireland* was incompatible with the reasoning in *Re National Irish Bank Ltd*.

He did not accept that the effect of the judgment of the ECtHR is a requirement on the state to repeal or otherwise nullify legislation (including section 52).

Finally, in all the circumstances of the case, he held that the interests of justice required that he grant the applicant the relief of an order of *certiorari* in respect of the conviction entered against him, having regard to the unusual circumstances of this case.

> The *Rules of the Superior Courts* have recently been amended to accommodate the requirements of the *ECHR Act, 2003* – see *One to watch*, page 2.

Implications for redress under the *ECHR Act, 2003*

During the Dáil debate on the *ECHR Bill*, there was discussion on how to deal with a conviction or arrest which is valid under the constitution but is held to contravene the convention – precisely the facts of the *Quinn* case. The consensus was that it would have to be by way of presidential pardon (see the debate at report stage, 21 May 2003).

It now appears, however, subject to the possibility of an appeal, that a discretionary presidential pardon will not be necessary to reconcile the convention with domestic law, and that the judiciary will be prepared to exercise their discretion to quash a conviction that was obtained in contravention of the convention. G

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

Law Society welcomes

'This really was an inspired idea. I congratulate the Law Society for bringing to Dublin, for this historic weekend, the leaders of the legal professions in the ten new members of the European Union family. No more appropriate initiative could have been taken by the society to mark this unique event', said President Mary McAleese in Blackhall Place on 30 April.

On the following day, 1 May, she was hostess to all 25 heads of government of the expanded European Union. She presided at a moving flag-raising ceremony in the sun-splashed grounds of Áras an Uachtaráin. It would be the highpoint of Ireland's EU presidency, *writes Ken Murphy*.

While the preparations for this were at their height, however, she found an hour to visit Blackhall Place, and, with her usual informality, grace and charm, participate in one of the most prestigious events ever hosted by the Law Society of Ireland.

The society's special guests for the weekend were the presidents of the national law societies of Estonia, Lithuania, Latvia, Poland, the Czech Republic, Slovakia, Hungary, Slovenia, Cyprus and Malta. All ten accepted our invitations. They were accompanied in most cases by their spouse or partner. In one or two cases, additional personnel travelled with them to assist with translations.

The main purpose of the weekend was to express the friendship and welcome of Irish solicitors towards lawyers in all ten new member states. Both at the business sessions and at the social engagements, the key objective for all was to discover how we could help and learn from each other.

Law lies at the very centre of the entire EU project. All its achievements result from making and enforcing laws. Given the post-war history of most of the new EU member states, the EU's guarantees of democracy and the rule of law were particular cause for celebration.

As more astute commentators pointed out, in historic terms, the events of the weekend represented something even more important than the European Union expansion from 15 to 25 member states. It symbolised the reunification of Europe

Law Society president Gerard Griffin welcomes President McAleese to Blackhall Place

President McAleese greets Rytis Jokubauskas, secretary general, and Audrone Bugeleviciene, president, both of the Law Society of Lithuania

Gerard and Catherine Griffin present President McAleese with a bouquet

accession colleagues

The business session with the presidents of the law societies of the accession states in the council chamber

President McAleese and director general Ken Murphy look on as president Gerard Griffin makes a welcome speech

President of Ireland, Mary McAleese

President McAleese greets Andrzej Kalwas, president of the Law Society of Poland, with Teresa Stecyk and Maria Slazak, also from Poland

Law Society president Gerard Griffin, Vladimír Jirousek, president of the Law Society of the Czech Republic, and Martin Vychopen, vice-president of the Law Society of the Czech Republic

following the fascist and communist tyrannies that had oppressed nearly half of Europe for more than half a century. The *Yalta agreement* and its effects are finally consigned to the scrap heap of history.

The truth of these observations was brought home in the powerful, and at times emotional, contributions made by many of the law society presidents when they addressed the business session, as each was invited to do in turn. Vladimír Jirousek from the Czech Republic related some of his personal experiences as a lawyer under the communist dictatorship. Lawyers were practically the only form of opposition, and the legal profession, as best it could, resisted efforts to make it simply an arm of the state.

It was not until late 1989 that the Czech legal profession could embrace the principles of democracy and begin to develop the self-regulation that is essential to an independent legal profession serving a free people. Since 1989, the profession in the Czech Republic has experienced a boom, growing from a few hundred then, to 10,000 lawyers now. Yet there was still further need for reform. Efforts to reintroduce elements of control by a distrustful state needed to be resisted. Accession to the EU would be beneficial but would not bring only advantages.

Ain Alvin, president of the Law Society of Estonia, spoke of the abolition in 1940 not only of the independent legal profession in Estonia, but of Estonia itself. He described his joy at being present in Dublin and his pride that the legal profession of Estonia is now rightfully viewed as part of the legal profession of Europe.

However, in a thoughtful presentation, he identified issues of concern such as the tensions between big and small member states, between big and small law societies, between democracy and efficient decision-making within law societies and the need to develop new models of discipline and education for lawyers. There are only 425 independent lawyers in Estonia, in 155 firms, most of whom are based in, or near, the capital Tallinn.

President McAleese with Miha Kozinc, president of the Law Society of Slovenia, and Natasa Jelusic, also from Slovenia

Nikos Papaefstathiou, president of the Law Society of Cyprus, former Law Society president Elma Lynch, Pat and John Fish

Law Society director general Ken Murphy addresses the distinguished guests

Chief Justice Ronan Keane in deep conversation with Kalvis Torgans and Janis Grinbergs, president of the Law Society of Latvia

Rita and Dr Robert Mangion, president of Malta's law society, make a presentation to President McAleese

John Pinkerton, president of the Law Society of Northern Ireland, and director general Ken Murphy

Rita Mangion and Dr Robert Mangion, president of the Law Society of Malta, Dr Olga Herezeg and Laszló Fekete, president of the Law Society of Hungary, and Stefan Detvai, president of the Law Society of Slovakia

President McAleese leaving Blackhall Place, accompanied by Ken Murphy and Gerard Griffin

Poland, by contrast, has close to 30,000 lawyers with a division in the profession between legal advisers and advocates. So we were told by Andrzej Kalwas, who is president of the 21,000 legal advisers. The independence of the legal profession is guaranteed by article 17 of the Polish constitution.

How essential it was to defend the independence of the legal profession was the main theme of an impromptu address to our guests from the attorney general, Rory Brady SC, who was one of many senior figures in the legal profession in Ireland to meet our visitors. He thought that the Law Society's hosting of the conference was 'a really brilliant idea', adding 'I am certainly going to mention it to the taoiseach'.

The special guest speaker at the dinner in Blackhall Place on the night of Saturday 1 May was Chief Justice Ronan Keane, who also spoke of the special role that independent legal professions play in the European Union and in western democracies generally.

Most of the ten law society presidents had never met each other before. In expressing thanks at the end, the Slovenian society's president, Miha Kozinc, who is a former minister for justice in Slovenia, proposed that the ten had so much in common that they should arrange to meet again in the future. 'And the Irish should chair the meeting', he announced to enthusiastic applause.

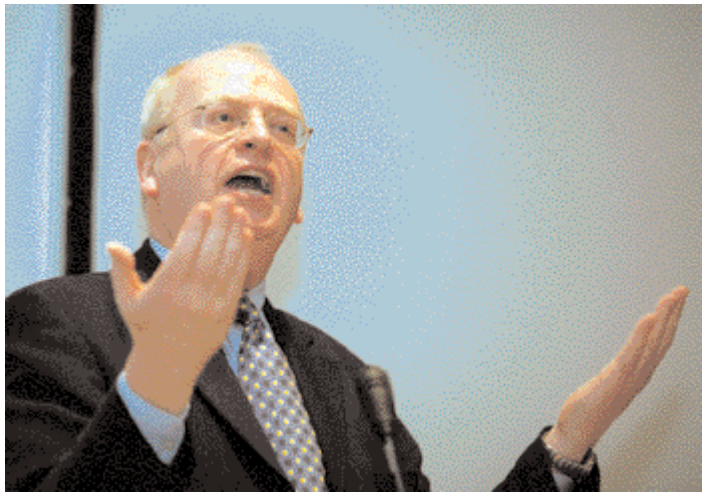
It seems that a relationship has been formed that will be relevant to all for many years to come. G

The *Chen* decision: striking a

Ireland's approach to the issue of citizenship goes against the spirit of the European Union, but the *Chen* decision may turn out to be a timely coup for human rights, writes Conor Quigley QC

Much has been written and discussed in the media about the forthcoming referendum on Irish citizenship, which will limit the effects of the constitutional amendment caused by the *Good Friday agreement*. One of the many issues that have been raised in support of the need to have a referendum is the effect of the rights of free movement and residence in the European Union that citizenship gives rise to.

In particular, reference has been made to the *Chen* decision, awaited from the European Court of Justice (ECJ). Recently, the opinion of the advocate general has been delivered in that case and judgment is expected by the end of this year. If the court follows the advocate general, the decision will be far-reaching and of the utmost importance in the field of non-discrimination and fundamental rights.



McDowell: unsustainable argument

The *Good Friday agreement*

A most important feature of the *Good Friday agreement* was the extension of the pre-existing right to citizenship on birth in the Irish Republic to those born anywhere in the island of Ireland. This was reflected in the amendment to the Irish constitution, which now states that anyone born in the island of Ireland is entitled to be part of the Irish nation. This acceptance of the notion of belonging was critical, for nationalists as well as for unionists who wished to have their birthrights protected in a similar vein.

It was entirely correct that this should be enshrined in the constitution as representing a *grundnorm* (a statement against which all other statements can be validated), while still leaving it to the Oireachtas to determine whether other persons should also be entitled to Irish citizenship and to regulate the circumstances in which citizenship might be lost. The *Good Friday agreement* was specifically approved by all the people of Ireland voting on the same day in joint referendums.

Unsustainable argument

It is now argued that there is a 'loophole' that causes harm to our EU neighbours and that the change in the constitution is necessary to prevent 'citizenship tourism' in order to comply with some duty of solidarity under EU law. No evidence has been produced to show that any EU country was actually concerned. In the light of the *Chen* opinion, this argument has become wholly unsustainable.

Advocate general Tizzano makes it clear that citizenship remains a matter for each member state to determine, and that acquiring that citizenship lawfully cannot be regarded as an abuse. On the contrary, a person endowed with citizenship of a member state of the EU is entitled, as a matter of EU law, to have that right upheld and respected.

Mrs Chen, a Chinese national living in England, deliberately gave birth to a daughter in Northern Ireland in order that the child would have Irish nationality. Article 17 EC, coupled with directive 90/364/EEC, guarantees the child – as an EU national – the

blow for human rights?

right to move and reside freely within the territory of the member states, as long as she is not a burden on their resources. Luckily, Mrs Chen is rather wealthy, so the child is able to exercise her right to stay in the UK.

Advocate general Tizzano has held that Chen should also be able to stay in the UK. His decision (quite the contrary of the Irish Supreme Court in its recent decision on the rights of non-national parents of Irish citizens) is primarily based on the notion that the child's right of residence would be ineffective if she could not have her parents with her. He also invokes, as being equally important, the respect for family rights enshrined in article 8 of the *European convention on human rights*. Moreover, since UK law provided that a non-national parent of a UK child national would be automatically entitled to reside in the UK, it is discrimination contrary to article 12 EC to deny that same right in the case of parents of a child national of another member state.

Tizzano utterly rejected any notion that these rights could be rejected merely because Chen had taken legal advice to have her baby born in Northern Ireland.

Conor Quigley: referendum at this time is seriously flawed

Boston or Berlin?

If, as is to be hoped, the ECJ follows the recommendation of the advocate general, a major blow will be struck for the protection of human rights of children and their parents. This is the true spirit of the modern European Union. It also reflects the spirit of the United States. Those who invoke Boston rather than Berlin in praise of economic liberalism are strangely at odds with the ethos of the United States when it comes to citizenship. Under US law, citizenship is granted on birth to anyone born in the territory, regardless of the reason for being there; by contrast, Germany has been castigated for decades because of its harsh denial of citizenship to 'guest workers' and their descendants.

With its tradition of emigration to America and the UK, Ireland might have been expected to have naturally embraced the notion of citizenship on birth rather than through blood. It is the height of hypocrisy to alter this tradition just because Ireland is now attractive to immigrants for various, mostly economic, reasons.

Given the shifting nature of the justification for holding this referendum – from stresses on Dublin maternity wards, to solidarity with EU states, to tackling citizenship tourism – and the shabby way in which concerns about the integrity of the *Good Friday agreement* were discarded, it is hard to disagree with the argument that holding the referendum at this time is seriously flawed, without full and proper consultation of all interested parties and without a comprehensive and informed debate based on a rational consideration of the facts.

We should be proud of the fact that Ireland has become more open and international in recent years. That pride should extend to welcoming as part of the Irish nation all who are born here for whatever reason. A shift in the right to citizenship away from a birthright based on the place of birth will be a most shameful decision. G

Conor Quigley QC specialises in European Union law at Brick Court Chambers in London.

Following the recent *Naomi Campbell* judgment, the 'blockbuster tort' of privacy has arrived in England by way of the old common law breach of confidence action and article 8 of the ECHR. But is it relevant to practitioners here? Without a doubt, says Pamela Cassidy

MAIN POINTS

- ***Naomi Campbell* judgment**
- **Right to privacy**
- ***European convention on human rights***

A model

The House of Lords' judgment in Naomi Campbell's action against the *Daily Mirror* represents a seminal decision on two issues: the impact of the *European convention on human rights* in private domestic law and the conflict between privacy rights and free speech. The case underlines the potential importance to practitioners in this country of the *European Convention on Human Rights Act, 2003*, which came into force on 31 December last year.

By a majority of three-to-two, the law lords decided that the *Mirror* had infringed Campbell's privacy in disclosing information about the supermodel's treatment for drug addiction. There was dissent on the issue of whether information about the actual treatment was peripheral to information that she was an addict and seeking therapy from Narcotics Anonymous (which Naomi accepted they could publish because she had lied about her drug problems), but all the law lords agreed that the old breach of confidence action now protected the 'right to respect for private life' without the constraints of proving the existence of a confidential relationship between intruder and complainant.

Mirror, mirror on the wall

The first crucial issue for the House of Lords to consider was whether convention rights could extend existing causes of action to cover privacy, since the court had decided in 2003 that the introduction of the convention into English domestic law did not permit the creation of a free-standing tort of privacy. Baroness Hale answered 'yes': 'The 1998 [*Human Rights Act*] does not create any new cause of action between private persons. But if there is a relevant cause of action applicable, the court as a public authority must act compatibly with both parties' convention rights. In a case such as this, the relevant vehicle will usually be the action for breach of confidence, as Lord Woolf CJ held in *A v B plc* ([2003] QB 195, 202, para 4): *The court is able to achieve [compatibility with the convention] by absorbing the rights which articles 8 and 10 protect into the long-established action for breach of confidence*'.

Nicholls LJ was even more forthright: 'This cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. In doing so, it has changed its nature … The continuing use of the phrase *duty of confidence* and the description of the information as *confidential* is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called *confidential*. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information'.

Eye of the beholder

An Irish court would not have to undertake the somewhat artificial exercise of fitting privacy into a breach of confidence action, because a general right of privacy has been recognised as a constitutional right since 1987 in the *Kennedy* telephone-tapping

PIC: REX FEATURES

decision

case. Hamilton J ruled that 'the right to privacy is not an issue; the issue is the extent of that right'. And in 1992 the High Court held that the constitutional right to privacy and confidentiality were co-extensive with the common law right to confidentiality (*Desmond v Glackin (No 2)* – confidential information obtained from the Central Bank).

But privacy balanced against free speech has suffered a check. In 1994, the High Court confirmed that the right to privacy is 'an unspecified right deriving from the constitution' but held that privacy protection 'demanded the intervention of the courts' only in 'extreme cases', and 'in general it was desirable that the legislature, and not the courts, should prescribe the exceptions to the right of freedom of speech'.

That case, *M v Drury* ([1994] 2 IR), involved an injunction application by a wife and her five children to prevent publication of an interview with her husband in several newspapers, in which he blamed the break-up of his marriage on the wife's alleged adultery with a priest. Reporters had door-stepped the wife's home, photographing her and the children without consent. In refusing an injunction, O'Hanlon J noted that the allegations did not concern the intimacies of married life – rather, they concerned adultery – and that the truth of the allegations was not contested and much of the material had already been published. He also noted that neither wife nor husband would be named and the photographs would not be used.

O'Hanlon clearly regarded free speech as being entitled to a higher constitutional protection than the right to privacy, even though the case concerned low-value speech (he castigated the husband as immature, irresponsible, selfish and self-indulgent).

The free speech versus privacy issue was addressed in the *Campbell* case (*Campbell v MGN Ltd* [2004]

IT SAYS IN THE PAPERS

As a result of the *Campbell* judgment, the media may have to exercise caution with regard to certain issues. These include:

- The state of a person's health. But what about the health of people in whom the public has a legitimate interest, such as Tony Blair or (arguably) Brian Curtin? After *Campbell*, the media would be wise to consider carefully before publishing intimate details of actual treatment. And *Data Protection Act* issues (not explored here) could also arise
- Where a public figure chooses to make untrue pronouncements about his private life, the media will normally be entitled to put the record straight. But there remains a residual right to privacy in respect of areas of his life that he has chosen not to make public
- Adultery. This is a difficult one. Hoffman LJ distinguished Naomi's case 'from cases in which (for example) there is a public interest in the disclosure of the existence of a sexual relationship (say, between a politician and someone whom she has appointed to public office), but the addition of salacious details or intimate photographs is disproportionate and unacceptable. The latter, even if accompanying a legitimate disclosure of the sexual relationship, would be too intrusive and demeaning'
- Photographs. 'The publication of a photograph taken by intrusion into a private place (for example, by a long-distance lens) may in itself be such an infringement, even if there is nothing embarrassing about the picture itself', warned Hoffman LJ
- Family life (already protected by article 41), including the home and personal correspondence.

'Where a public figure chooses to make untrue pronouncements about his private life, the media will normally be entitled to put the record straight'

UKHL 22). Nicholls LJ, basing his decision on the European convention, which gives equal prominence to both rights, said: 'The case involves the familiar competition between freedom of expression and respect for an individual's privacy. Both are vitally important rights. Neither has precedence over the other. The importance of freedom of expression has been stressed often and eloquently, the importance of privacy less so. But it, too, lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well-being and development of an individual'.

And Hope LJ said: 'Neither article 8 nor article 10 has any pre-eminence over the other ... As resolution 1165 of the Council of Europe (1998) pointed out, they are neither absolute nor in any hierarchical order, since they are of equal value in a democratic society'.

The question for practitioners in this country is whether the priority given to free speech in the *Drury* case will survive the enactment of the *European Convention on Human Rights Act, 2003*, which incorporated the convention into Irish law with direct effect. Section 2 of the act contains this core provision: courts are now obliged to interpret and apply rules of law in a manner compatible with the state's obligations under the convention provisions.

Up close and personal

So far, so good. But do convention rights apply between private individuals, as distinct from the citizen and the state? This difficult question was also considered in the *Campbell* case, where Nicholls LJ said: 'The values embodied in articles 8 and 10 are as much applicable in disputes between individuals or

RIGHTS AND DUTIES

The *European convention on human rights*

Article 8

1) Everyone has the right to respect for his private and family life, his home and his correspondence
2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 13

Everyone whose rights and freedoms as set forth in this convention are violated shall have an effective remedy before a national authority, notwithstanding that the violation has been committed by persons acting in an official capacity.

European Convention on Human Rights Act, 2003

Section 2

1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the state's obligations under the convention provisions
2) This section applies to any statutory provision or rule of law in force immediately before the passing of this act or any such provision coming into force thereafter.

Resolution 1165 (1998) of the Council of Europe

11) The assembly reaffirms the importance of everyone's right to privacy, and of the right to freedom of expression, as fundamental to a democratic society. These rights are neither absolute nor in any hierarchical order, since they are of equal value.

between an individual and a non-governmental body such as a newspaper as they are in disputes between individuals and a public authority'.

Hoffman LJ agreed: 'I can see no logical ground for saying that a person should have less protection against a private individual than he would have against the state for the publication of personal information for which there is no justification'.

Would the courts here agree? The answer may lie in article 13 of the convention, which requires states to provide an effective remedy for breach of a convention right (article 13 is a convention provision under the 2003 act, but has not been directly incorporated into English law by their 1998 act, and so did not inform the reasoning of Nicholls and Hoffman LJJ). If article 8 privacy values are recognised here as having equality with free-speech values in private cases (as distinct from cases involving an 'organ of the state'), the media is likely to face greater restriction.

Hold the front page

So what is privacy and what type of information might be protected?

In Ireland, definitions prior to the 2003 act included 'a complex of rights, varying in nature, purpose and range, each necessarily a facet of the citizen's core of individuality within the constitutional order'. The many aspects of the right of privacy 'would all appear to fall within a secluded area of activity or non-activity which may be claimed as necessary for the expression of an individual personality, for purposes not always necessarily moral or commendable, but meriting recognition in circumstances which do not endanger considerations such as state security, public order or morality, or other essential components of the common good'.

In *Campbell*, the court considered definitions of privacy from Australia (whether disclosure of the information would be highly offensive to a person of ordinary sensibilities) and North America (where disclosure of private life material would be highly offensive to a reasonable person and not of legitimate public interest). But the court adopted a more simple formulation, based on article 8: respect for the private life and personal information of an individual where there is a reasonable expectation that the information will be kept private. Nicholls LJ was careful to confine the tort to misuse of private information: 'the present case concerns one aspect of invasion of privacy, wrongful disclosure of private information'.

Which brings us back to the balance between privacy and free speech. Lord Hope explained how this will work in practice: 'Any interference with the public interest in disclosure has to be balanced against the interference with the right of the individual to respect for their private life ... The test: whether publication of the material pursues a legitimate aim and whether the benefits that will be achieved by its publication are proportionate to the harm that may be done by the interference with the right to privacy'.

Hope LJ also relied on the jurisprudence of the European Court of Human Rights, citing *Dudgeon v UK*: 'The more intimate the aspects of private life which are being interfered with, the more serious must be the reasons for doing so before the interference can be legitimate'. G

Pamela Cassidy is a partner in the Dublin law firm BCM Hanby Wallace.

PIC: REX FEATURES

Naomi Campbell: judgment means that the media will have to be more cautious

HE SAID, SHE SAID

'What's important for me is that people in recovery should be free to receive treatment without fear of press intrusion – and that's what today's judgment guarantees'

Supermodel Naomi Campbell after the House of Lords verdict

'This is a very good day for lying, drug-abusing prima donnas who want to have their cake with the media and the right to then shamelessly guzzle it with their Cristal champagne. If ever there was a less deserving case for creating what is effectively a back-door privacy law, it would be Ms Campbell, but that's showbiz'

Reaction of then Mirror *editor Piers Morgan*

MODER

A recent report has highlighted the need to provide a broader definition of the family in light of social changes. Geoffrey Shannon explains why the Irish family law system now requires a major overhaul

MAIN POINTS

- Recent report on family life
- Changing nature of families in Ireland
- ECHR and the Irish constitution

In February, the minister for social and family affairs launched a report on family life in Ireland. The report, *Families and family life in Ireland: challenges for the future*, identified the issues that arose during public consultation fora hosted by minister Mary Coughlan last year. The minister held that state policy should not favour one family form over another. Alluding to the fora discussions, she stated: 'Given the major social and demographic changes that have occurred in Ireland in recent years, it is necessary now to bear in mind the different forms of family in developing policies to promote the well-being of individual members and social cohesion, a point that came through from many participants at the fora'. However, minister Coughlan stated that she did not favour constitutional change to reflect government policy.

The existing legislative framework does not reflect the on-going changes in family structures (see **panel, page 21**). The reluctance to legislate in this area must now be addressed as a matter of some urgency. As Claire Archbold notes in her paper on divorce in the Northern Irish context: 'Marriage is no longer the only, or even the preferred, life choice for enormous numbers of people, even in Northern Ireland, and if our legal system ignores these trends, it risks becoming irrelevant, and worse, providing no protection to people who may be in great need of it'. (Shannon [ed], *The* Divorce Act *in practice* (Dublin, Round Hall, 1999).

This does not prevent marriage being regarded as a type of utopia representing durability, security and

N LOVE

PIC: STOCKBITE/REX FEATURES

stability in a relationship. As Mrs Justice Heureux-Dubé noted in *Canada (Attorney General) v Mossop*: 'It is possible to be pro-family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form, and non-traditional family forms may equally advance true family values' ([1993] 1 SCR 554 at p634).

Primary unit of society?

Why is the legal definition of 'family' in Ireland so rigid, so inflexible and fixed? The answer to this question lies in article 41 of the constitution, which recognises the family as the natural and primary unit group of society. The family that the constitution sees as deserving such protection is the nuclear family based on marriage alone. The institution of marriage therefore enjoys a privileged position in the Irish constitutional order. Article 41.3 of the constitution provides that the state shall 'guard with special care the institution of marriage on which the family is founded and protect it against attack'.

The Irish courts have remained steadfast in asserting the exclusivity of the constitutional 'family'. The courts cannot be accused of inconsistency in this regard. The rights that the constitution guarantees do not belong to individual family members but to the family unit as a whole. The constitution fails, for example, to recognise the child as a legal person with individual rights to which separate representation must be given. It lacks a child focus. In summary, parents have inalienable and imprescriptible rights – rights that cannot be lost by the passage of time. By contrast, child rights are subordinate to parental rights.

In the face of such a restrictive interpretation of the 'family', individuals have sought redress under international law through international human rights treaties. The most significant international human rights treaty from an Irish perspective is the *European convention on human rights* (ECHR).

Indeed, it is in relation to the concept of 'family life' that the European Court of Human Rights (ECtHR) has been most expansive (see **panel below**).

Article 8 of the ECHR guarantees, as a basic right, the right to respect for private and family life, home and correspondence. From very early on, the ECtHR indicated that the protection afforded by article 8 did not depend on the existence of formal legal ties between the individuals involved. It is concerned more with the substance rather than the form of the relationship. The convention, unlike the Irish constitution, makes no distinction between the family life of a marital and non-marital family. The law in Ireland, on the other hand, leans strongly against the non-marital family. *De facto* families are effectively outside the ambit of legal protection in Ireland. Cohabitation agreements, for example, are not generally recognised by Irish law, as such contracts are viewed as contrary to public policy and so are unenforceable. The High Court has recently stated that unmarried people are 'free agents' who owe no duty to each other.

Obligations of the state

The *European Convention on Human Rights Act, 2003*, signed into Irish law on 30 June 2003 and effective since 31 December 2003, now guarantees that the Irish courts, in interpreting and applying any statutory provision or rule of law, shall so far as is possible do so in a manner that is compatible with the obligations of the state under the ECHR. Where this is not possible and where no other legal remedy is adequate and available, the High Court and the Supreme Court may grant declarations of incompatibility in relation to legislation and awards of damages against 'organs of the state' (for example, health boards but not the courts) that act in a manner contrary to the state's obligations under the ECHR. Prior and subsequent legislation may be declared to be incompatible with the convention. The 2003 act facilitates the bringing of cases involving alleged breaches of rights under the ECHR in Irish courts.

The *European Convention on Human Rights Act, 2003* has been incorporated at a sub-constitutional level. If there is a conflict between a provision of the constitution and the convention, the constitution prevails. This is to be regretted, in that the ECtHR has on a number of occasions found Ireland to be in breach of the convention standard for the protection of family rights in situations where the Irish courts had found the law at issue not to be in breach of the constitution. For example, in 1994 the ECtHR was critical of the Supreme Court's treatment of Joseph Keegan, an unmarried father who unsuccessfully objected to his child being adopted without his consent.

The court held that the father's rights under article 6 of the convention (which provides for the right to a fair hearing) and article 8 had been violated. Article 8 was applicable, the ECtHR emphasised, despite the fact that the natural parents of the child were never married to each other. For two years prior to the making of the adoption order, the mother and father had been living in a stable relationship and that, essentially, formed a family for ECHR purposes.

Alluding to article 6, the court held that the father's right to a 'fair and public hearing by an independent and impartial tribunal' had also been violated. Effectively, the father had 'no rights under Irish law' to challenge the decision to place his child for adoption, either before the adoption board or before the courts. Indeed, he had 'no standing in the adoption procedure generally'.

In light of this, the failure to establish a guardianship register in the recently-enacted *Civil Registration Act* is a missed opportunity. Section 4 of the *Children Act, 1997* introduced a new and simplified procedure for appointing a natural father as guardian of a non-marital child, which does not involve a court appearance but merely requires the execution of a statutory declaration. There are practical difficulties with the operation of this section. For example, where does one 'file' the declaration or what happens if this declaration is lost?

Therefore, in the 'family life' arena, there will continue to be cases where a remedy for a breach of

THE EUROPEAN 'FAMILY'

The wider definition given to the term 'family' by the ECHR can be gleaned from the jurisprudence of the European court. In *Berrehab v The Netherlands* (1989), for example, the ECtHR held that the traditional family relationship between a divorced man and his marital child did not cease to exist on the separation or divorce of the parents. In *Kroon v The Netherlands* (1994), the relationship between a man and a child conceived during an extra-marital affair, which amounted to a long-term relationship wherein the parties had four children by the time of the application, constituted a family within the meaning of article 8 of the ECHR. In *Boyle v UK* (1995), family life was held to exist between an uncle and a nephew. And in *Boughanemi v France* (1996), family life was held to exist where the father could show a close relationship to the child.

Family life under the ECHR constitutes not only relations between parents and their children, but also extends to grandparents and grandchildren. For other relationships, it is necessary to produce evidence of a real and close family tie. The existence of family life is therefore a question of fact and degree. Family life, for example, has been held by the ECtHR to include the relationship between a foster parent and a foster child, although the court has noted that the content of family life may depend on the nature of the fostering arrangement. This broad view of family life is in marked contrast to that traditionally taken by the Irish courts, and it is not surprising that article 8 has featured prominently in the Irish cases that have come before the ECtHR.

More than in any other area of law, the development of conflict is now likely between the Irish domestic concept of the family and concepts set down by the ECtHR.

an ECHR right cannot be procured in the Irish courts, with the only avenue at the disposal of such litigants being an application to the Strasbourg court.

Constitutional imperatives

There is a need for a constitution that affords equal rights to all families. We should not forget the children of these families, who are a voiceless and vulnerable minority group in society. Indeed, the constitutional position of these children has proven to be far from secure. It hardly needs to be stated that the measure of a democracy is the manner in which the needs of the most vulnerable are considered and met. That said, one notable feature of the Irish family law system is the relative invisibility of children. For example, children are caught in the crossfire of relationship breakdown. Currently, with no way of exercising their rights, children are in a uniquely vulnerable position in that they cannot exercise their rights during childhood. The constitution should be amended to contain a specific declaration on the rights of children.

The current government has taken steps towards improving the family law system. For example, the need for some form of national machinery to advance the development of support services has, in part, been met by the Family Support Agency. A more tangible link between the court system and support services should also be created, as in New Zealand.

A lot done, more to do

It is time that the government took a more 'functional' approach to the family, an approach based on the fact of the parties living together rather than the nature of the relationship between the parties. This approach was adopted in section 151 of the *Finance Act, 2000*, which established a new 'principal private residence relief' designed primarily to offset the taxation liability that might arise where one person dies leaving any interest in a dwelling house to another person sharing the house, subject to certain conditions.

Since the adoption of the constitution in 1937, the nature of the Irish family has changed dramatically. There is little doubt that the Irish family law system now requires nothing less than a major overhaul if it is to meet the increasing demands placed on it. The law must now root itself in reality, and not emotive or traditional rhetoric.

The time is now ripe to consider changing the law to facilitate a broader and more inclusive definition of the 'family' in a manner that will promote and foster the best interests of children. This may involve amending article 41 of the constitution. We need to depart from a system of family law where legal status alone is the sole determinant of family rights and privileges. Let us hope that the recently published report on family life will provide the impetus for this new approach to family law. G

Geoffrey Shannon is a solicitor and the Law Society's deputy director of education. He is the author of Children and the law *and is the Irish expert on the Commission on European Family Law.*

CHANGING FACE OF THE FAMILY

The issues highlighted in the report on family life are also reflected in the recent census figures. These figures have highlighted the fact that new family forms are on the increase. It is to be particularly noted that the number of lone-parent families is rising. The number of divorced people has risen from 9,800 in the 1996 census to 35,100 in the 2002 census, while the number of separated (including divorced) people has increased from 87,800 in 1996 to 133,800 in 2002. There has also been a significant 35% increase in the number of cohabiting couples, who now make up one in 12 family units. In fact, the number of cohabiting couples has risen since 1996 from 169,300 to 228,600.

Of the 15,909 births registered in the third quarter of 2003, 4,981 (31.3%) of all births were outside marriage. In Limerick city for this period, births outside marriage accounted for 55% of all births. Throughout Europe, and beyond, similar trends emerge. In fact, in Iceland in 1998, two out of every three births were outside marriage. One of the enduring ironies is that the number of children born outside of marriage in Ireland is greater than the European average of one in four births.

Golden g

Peter O'Connor's name has gradually slipped from the national consciousness, but at the turn of the century this solicitor was arguably the most famous athlete in the world, writes Mark Quinn

MAIN POINTS

- Solicitor Peter O'Connor
- Irish Olympic glory
- Lawyer athletes

As sports lovers all over the world look to Athens this summer for the 28th Olympiad, it is appropriate to remember one of Ireland's greatest sporting heroes, Peter O'Connor, one of many Irishmen to win Olympic gold before the founding of the Irish Free State.

In August 1901, O'Connor, a managing clerk in Daniel Dunford's solicitor's practice in Waterford city, leapt from obscurity to fame when he established a new long-jump world record of 24 feet, 11¾ inches at Ballsbridge. In those days, the barrier of 25 feet was something akin to the four-minute mile. No man had ever leapt so far, and O'Connor was seen to be redefining the boundaries of human possibility. His world record would endure for almost 20 years and remain a national record until 1990, when Carlos O'Connell became the first Irishman to surpass O'Connor's mark. From 1901 to 1906, O'Connor won an unprecedented six consecutive English AAA long-jump championships, then considered world championships.

He is chiefly remembered, however, for his Olympic successes and exploits at the Intercalated Games at Athens in 1906. O'Connor took gold in the hop, step and jump and silver in a highly contentious and controversial long-jump competition in which an American judge was accused of 'measuring in his own athlete'. English judges had refused to officiate the long-jump competition, as O'Connor had lodged an official protest with the organising committee some days before when he, Con Leahy and John Daly, the three Irish participants at the games, discovered they were registered as part of the British team.

When the long jump was over and as the Union Jack was raised to mark his silver placing, O'Connor climbed a pole in the center of the stadium and,

Peter O'Connor winning gold in Athens in 1906

perched some 20 feet high and before a crowd of some 60,000, he unfurled a large green flag with an immaculately embroidered gold harp and the words *Erin go bragh* (Ireland forever) displayed on it. His actions, the first overtly political act of the modern Olympics, were calculated to cause maximum embarrassment to the Greek and English royal families, who were in attendance. O'Connor returned to Ireland a national hero and, retiring from athletics at the age of 34, set his mind on developing his legal career.

Great leap forward

After Peter O'Connor's retirement from athletics in 1906, he concentrated on his legal career, finally

...nts

40 medals on his chest

qualifying as a solicitor in 1912 at the age of 40. In the early 1920s, he took over Dunford's practice after an intriguing dispute with his employer, which has only recently come to light. O'Connor had worked in Dunford's office since 1898 at a fixed salary, with the understanding that, in time, he would take over the business. After the breaking of promises, outside interference and double-dealing, O'Connor found his position under threat, eventually being forced to buy Dunford's practice in far from ideal circumstances. The purchase led to the renaming of the practice as Peter O'Connor & Son and, then close to 50, Peter O'Connor at last became his own boss, a significant moment for a largely self-educated man from a modest background. O'Connor's steady rise through the echelons of the Irish legal world reached its zenith in 1932, when he became vice-president of the Incorporated Law Society of Ireland, whose Council he sat on for ten years.

As a solicitor, O'Connor had a reputation for being a great listener and his clients came from all walks of life, backgrounds and social strata. He was an immensely popular figure on the Waterford scene and had a reputation for steely performances in court. The nervous energy that O'Connor harnessed to push himself to the limits of his potential in his athletics career found a natural outlet in courtroom battles. A writer for the *Waterford Star* said in 1930: *'I have never known any lawyer who takes his client's case to heart like him. He seems to become his client! His "set" for cross-examination is a fighting attitude – no subtle questions or deceptive mannerisms. You know he is hostile to you, and your "death" is his pleasure! His address to the bench is usually a clear, lucid statement – trenchant if the case demands it, or on a softer key if this looks wisest! He seems to be me to be always retarding a wonderfully exuberant nature, for explosions happen when there is too much steam!'*

Jumpin' Jack flash

Peter O'Connor was never one to shirk a challenge and earned a reputation as a 'fighting lawyer', willing to take on even the most difficult and doubtful of cases. Perhaps as a result of this standing, he became a key player in one of the most celebrated and mysterious cases in Irish legal history, the case of the missing postman in 1930. Following the disappearance of Laurence Griffin at Stradbally, Co Waterford, on Christmas Day 1929, ten people were eventually charged in court with his alleged murder and with disposing of his body to prevent an inquest. The case attracted huge media attention, as two gardaí stationed in Stradbally figured among the accused. Seven of the accused were represented by O'Connor, who instructed MJ Connolly BL.

A special court was set up, the accused being

16:45_SARAH VISITS OFFICE
16:50_DAD OCCUPIED WITH CLIENT
17:05_SARAH DOWNLOADS FUNNYBUNNY.EXE
17:06_NETWORK KILLS FUNNYBUNNY
17:14_DAD TAKES SARAH TO KARATE PRACTICE

Sometimes threats don't look like threats. They look like your accounts department, your fee earners, even your senior partner's daughter. Downloading a corrupt file by accident can create a costly security breach that can take your practice offline for days, and compromise your clients' confidentiality. So how do you defend against it? A network with integrated security can detect and contain potential threats before they become actual ones. Whether they're viruses, hackers or well-meaning humans. It's security that's about prevention. Not reaction. To learn more visit cisco.com/uk/security or call 0800 999 0822.

SELF-DEFENDING NETWORKS PROTECT AGAINST HUMAN NATURE.

THIS IS THE POWER OF THE NETWORK. NOW.

Cisco Systems

LAW OF (ABOVE) AVERAGES

The fact that Peter O'Connor was both a solicitor and a world-class jumper may seem of little consequence, but in the late 19th and early 20th centuries, lawyers and judges seemed to have an uncanny predilection for long jumping, leading a journalist to note in 1925: *'In sport, the lawyer has also played a prominent part, and in one particular branch has established a world's record which no member of any other profession or of any trade can ever hope to equal. The branch referred to is athletics and the particular event, broadjumping'*.

A cursory glance at the medallists in the controversial long-jump competition at Athens in 1906 provides adequate evidence to support this contention. Myer Prinstein, who was awarded gold, was a law graduate of Syracuse University and was practising in New York. O'Connor, who took silver, had been a managing clerk in Dunford's Waterford office for eight years. Hugo Friend of the United States, who won the bronze medal, later became a judge in Chicago and achieved considerable fame when he presided over the infamous trial of the Chicago White Sox baseball team, which was accused of throwing the 1919 World Series. Three days after the long jump, in the hop, step and jump competition (the precursor to the modern triple jump), Peter O'Connor took gold, just ahead of another Irishman, Con Leahy, and bronze was taken by an Irish-American, Thomas Curran, who later qualified as a lawyer.

When Peter O'Connor's long-jump world record was finally broken in 1920, after almost two decades, an American commentator noted that *'Ireland, the land of the jumpers, has surrendered its last great record, one that the Celts were justly proud of'*. The celebrated Harvard athlete Edward 'Ned' Gourdin was the first person to cross the magical barrier of 25 feet and became the first African-American athlete to take a world record in a field event, ushering in a new era in international athletics. Yet Gourdin's jump of 25 feet, 3 inches, also ended the unusual monopoly that lawyers had held over the long-jump world record in the previous 50 years.

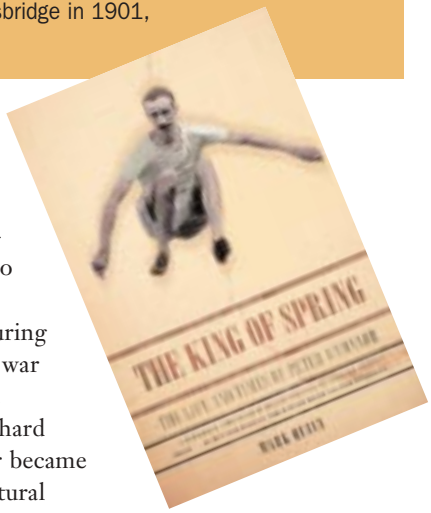
The first and most famous legal professional credited with a long-jump world record was the Englishman Lord Alverstone in the 1870s. Between 1887 and 1889, Lord Alverstone acted as barrister for *The Times* of London following allegations in the paper that Charles Stewart Parnell had supported the subversive IRB faction known as the Invincibles, who assassinated the Irish chief secretary, Lord Cavendish, and his assistant TH Burke in the Phoenix Park in Dublin in 1882. A commission was set up to investigate the claim, but the letters were eventually proved to be forgeries and *The Times*'s case collapsed, while Parnell was cleared to great acclaim. Lord Alverstone later became lord chief justice of England.

In 1883, solicitor Pat Davin, brother of Maurice, the first president of the GAA, set his own record of 23 feet, 2 inches, from a grass take-off at Monasterevin. This record lasted 15 years. The next legal mind to stake his claim to the long-jump world record was Myer Prinstein, O'Connor's great Olympic rival, who jumped 24 feet, 7¼ inches in America in 1900. Prinstein's mark stood for less than two years, until Peter O'Connor established his world record of 24 feet, 11¾ inches at Ballsbridge in 1901, which stood for 19 years.

Peter O'Connor with the Law Society Council in December 1933

remanded in custody in Waterford jail despite the fact that there was no hard evidence. When the case was eventually dismissed for lack of evidence and the absence of a body, O'Connor successfully pursued libel cases against the *Waterford News* and *Cork Examiner* on behalf of five of the acquitted defendants. To this day, Laurence Griffin's disappearance has never been accounted for.

After his son Peter Jr qualified in 1928, he worked alongside his father. The 1930s were difficult times for the practice, as many of O'Connor's clients – farmers and shopkeepers – were pushed to the brink of bankruptcy during the economic war with England. During these hard years, Peter Jr became his father's natural successor to the practice, although another son, Jimmie, also qualified as a solicitor in 1937 and established his own practice in Thurles. O'Connor kept an active interest in the running of the office right up to his death in 1957 at the age of 85, when Peter Jr's succession ensured that the practice, his life's work and pride and joy, would remain a landmark on the Waterford legal scene.



The offices of Peter O'Connor & Son remained in the family until the unexpected death of Peter Jr in 1981. Following his death, the office passed out of family hands, although the practice continues today as Peter O'Connor & Son. G

The king of spring: the life and times of Peter O'Connor, by Mark Quinn (€17.95, ISBN: 1-904148-52-2), is available from The Liffey Press, Ashbrook House, 10 Main Street, Raheny, Dublin 5, tel: 01 851 1458, e-mail: sales@theliffeypress.com.

LexisNexis™ Butterworths

...you've got the best hand

20% Discount on orders before 31st July 2004

Irish Planning Law and Practice

Contributors: A&L Goodbody, Solicitors
Consultant Editor: James Macken SC

Irish Planning Law and Practice is a two volume looseleaf work which combines authoritative commentary and lucid analysis of the law with a practical guide to planning regulations and procedure. It comprises ten main Divisions which explore key topics such as Appeals, Enforcement, Compensation, Environmental Protection and Building Control. Each Division is divided into narrative section and case law sections. All the leading cases are reproduced, with headnotes. The work also includes a Digest of Cases summarising all the key decisions under the appropriate headings, as well as an Annotated Statutes section setting out the text of all the relevant Planning and Environmental Law Acts and important regulations, as amended.

Product Code: IPLPWW
ISBN: 1854750518
Price: €685

Irish Conveyancing Precedents

General Editor: The Hon. John F. Buckley, former Judge of the Circuit Court

This authoritative collection of conveyancing precedents is an essential tool for all Irish conveyancers. Originally founded by Mr Justice Mary Laffoy and now drafted by eminent practitioners, each precedent is self-contained and is fully annotated to assist in the use of each form. Alternative clauses in regular use are also highlighted. Published in looseleaf format, featuring a fully comprehensive range of material – from the most basic conveyance of a fee simple to the most complex commercial lease, the service provides you with all the information a busy lawyer could possible need.

Product Code: ICPWW
ISBN: 1854753002
Price: €470
One volume looseleaf

Irish Copyright and Design Law

By Robert Clark B.A, LLM, PhD, BL, Professor of Law, University College, Dublin

At the heart of the Butterworths Intellectual Property Library, this service is the definitive work on all aspects of Irish copyright and design law. Irish copyright law was radically transformed by the Copyright & Related Rights Act 2000, which implemented three EC Directives (on rental and lending rights, on satellite broadcasting and cable transmission and on the legal protection of databases). Part I of this looseleaf service fully considers the effect of the Act while case law and the international context are used to provide a detailed examination of the legislation. Part II comprises commentary on the Industrial Design Act 2001 and the regulations made there under. Part III contains all the relevant legislation, Irish, EU and international.

Product Code: ICDWW
ISBN: 1854752804
Price: €245

To order these titles please contact your Regional Sales Manager Madeleine Roche, on 087 2597659 (Tax & Accountancy) or Gary Harkin on 0044 7802768215 (Northern Ireland)

NITA faculty, tutors, co-ordinators, witnesses and participants from the USA, Ireland, Northern Ireland and Scotland pictured at the recent *Further advanced advocacy for solicitors* course in the Burrendale Hotel, Newcastle, Co Down

TALK yourself UP

Now in its third year, demand for the advanced advocacy programme continues to grow. In response, a new course is scheduled for November, says Lindsay Bond

Much has happened since Dundalk solicitor and Council member James MacGuill attended an advanced advocacy course in Belfast in 2001. Recognising the importance of such a course, he approached the Law Society's continuing professional development (CPD) team with the idea of running an identical course here. With the support of the society's director of education TP Kennedy and James MacGuill, I duly adopted the programme developed by the Northern Ireland Advocacy Working Party in conjunction with the US-based National Institute for Trial Advocacy (NITA) and launched the course in 2002.

This annual advanced advocacy for solicitors course is now in its third year, and places on the course continue to be in extremely high demand. I owe a huge debt of gratitude to Professor Lonny Rose, executive director of NITA, and the Northern Ireland Advocacy Working party, in particular Tony Caher and Fiona Donnelly. Without them, the course would never have happened.

Last year, following many requests north and south for more advocacy training in the same vein, the two law societies jointly organised a further advanced advocacy course. This took place over a weekend in the Slieve Russell Hotel, Cavan, and was only open to past participants of the advanced advocacy programme. In March, we ran a similar event in the Burrendale Hotel, Newcastle, County Down, but this time we had three jurisdictions represented, with nine participants from the Scottish Society of Solicitor Advocates.

Together with the local tutors, Professor Lonny Rose, former judge Jeanne Jourdan and Mike Roake, one of San Diego's foremost criminal lawyers, put the advocates through their paces, concentrating on the essential elements of advocacy as they ran a complex commercial case. NITA has now identified this event as one of their most prestigious foreign programmes. The weekend concluded with an international conference on advocacy, which discussed strategies for pooling resources to ensure a proactive approach to progressing solicitors' advocacy skills.

A participant conducting examination and cross-examination of a witness in a role-play scenario

In response to many requests for more advocacy courses, a new course, entitled *Essential advocacy for solicitors*, has been scheduled to take place in November. It will be a residential weekend course beginning on Thursday 11 November and concluding Sunday 14 November. NITA tutors will lead the course, supported by a panel of local tutors who are trained in the NITA methodology. The course is open to all solicitors and demand for places is expected to be extremely high. Places will be allocated on a first-come, first-served basis on receipt of completed application forms with payment.

Further details about this course and an application form are available in this month's CPD brochure and in the CPD section of our website at *www.lawsociety.ie*. G

Lindsay Bond is the Law Society's CPD executive.

MAIN POINTS

- **Continuing professional development**
- **Advanced advocacy for solicitors**
- **New advocacy course soon**

Riding the

If you're not in, can you still win anyway? Currently, non-union employees can benefit from collective agreements negotiated by trade unions, without paying a penny in subs. Anthony Fay looks at the concept of 'bargaining fees' in other jurisdictions and considers what is likely to happen in this controversial area here

MAIN POINTS

- Non-union employees
- Bargaining service fees
- Registered employment agreements

The last few months have been turbulent for industrial relations and social dialogue in Ireland, with several contentious issues hitting the headlines. These include SIPTU members taking industrial action over the proposed break-up of Aer Rianta and the Prison Officers' Association at loggerheads with the Department of Justice over overtime entitlements.

One controversial issue that exists in other jurisdictions – and which might well make its way here – is whether trade unions are entitled to seek reimbursement from non-union employees who avail of benefits under union-negotiated agreements. This phenomenon is known as 'free loading' and has been recognised in the USA, Canada and Australia. This article explores the issue from a legal perspective and points out the practical implications it could have for social partnership and other forms of collective agreements in Ireland.

Bargain hunt

In Australia, trade unions – including the Australian Council of Trade Unions (ACTU) – have attempted to impose on non-union employees a 'bargaining fee' for the costs of these negotiated agreements. The ACTU has recently claimed that the argument is particularly strong, given that the *Workplace Relations Act 1996* (the principal act currently governing industrial relations in Australia) prohibits the exclusion of non-members from union negotiated agreements.

The rationale behind this is that a union, employer or another party is not entitled to interfere with an employee's freedom of association or the converse right to dissociate. This is similar to the principles expounded in *Educational Company of Ireland Ltd and Ors v Fitzpatrick and Ors* ([1961] IR 323) and *Meskell v CIE* ([1973] 121), which recognised the unenumerated right of dissociation that arises in particular under article 40(6) of the constitution.

Traditionally, Australia operated under a system

coat tails

Turbulence: Aer Lingus cabin crew on strike at Dublin Airport last October

of awards that were industry-specific legal documents setting out an employee's minimum rights and entitlements within that industry, dependent on such things as length of service. The *Workplace Relations Act 1996* provided for the establishment of 'certified agreements' that are negotiated between an employer and employee(s), with or without the assistance of a trade union. These draft workplace agreements have to be approved by the Australian Industrial Relations Commission (AIRC). The result is that the terms and conditions of many Australians' employment contracts are either governed by the whole of a certified agreement, or in part as supplemented by the terms within the relevant industry award.

Compulsory fees

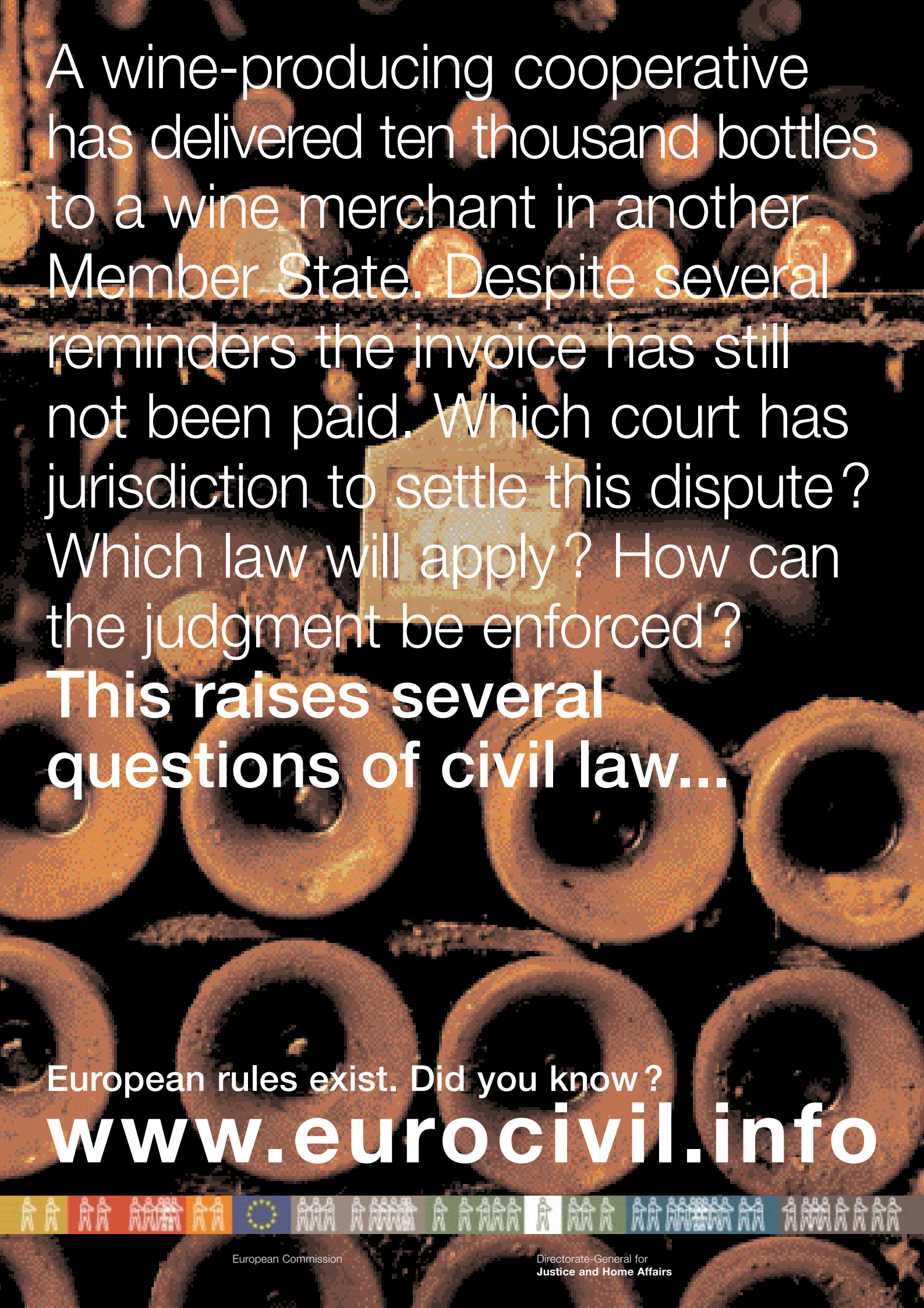
Since the introduction of the *Workplace Relations Act 1996*, Australian trade unions have sought to incorporate a bargaining service fee clause within these certified agreements. Section 170 of the act provides that for an application to be made before the AIRC for a workplace certification, there must be a written agreement about matters pertaining to the relationship between an employer and an employee.

In *Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union v Electrolux Home Products Pty Limited* ([2002] FCAFC 199), the Federal Court of Australia held that a bargaining fee clause may be incorporated on the basis that it '*might give rise to a matter pertaining to the relationship between Electrolux (an employer) and those employees, notwithstanding that the relevant union, and its members, will benefit from the imposition*'.

The ACTU welcomed the judgment, which it believed accepted the validity and enforceability of a bargaining fee clause in principle. However, in response, the federal government enacted the *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Act 2003*. The key provisions of this act include a prohibition on conduct designed to compel people to pay bargaining service fees and a prohibition on the inclusion of bargaining fee clauses in certified agreements. The act most likely represents the political views of the Liberal Party-led coalition government as opposed to the union-supported Labor Party.

Bargaining fees in Ireland?

There does not appear to be similar Irish or EU legislation that specifically prohibits or prevents trade unions from making bargaining services


A wine-producing cooperative has delivered ten thousand bottles to a wine merchant in another Member State. Despite several reminders the invoice has still not been paid. Which court has jurisdiction to settle this dispute? Which law will apply? How can the judgment be enforced?
This raises several questions of civil law...
European rules exist. Did you know?
www.eurocivil.info
European Commission
Directorate-General for
Justice and Home Affairs

available to non-union employees and charging a fee. A bargaining fee clause for non-union employees would probably be of limited relevance in the context of the Irish model of free and voluntary collective bargaining at a national level. Collective agreements are generally not intended to be enforceable unless there is evidence to create legal relations between the parties (see *Kenny & Ors v An Post* [1988 IR 285]).

However, the *Industrial Relations (Amendment) Act, 2001* allows the Labour Court, under certain circumstances, to make a binding determination in respect of pay and conditions of employment where no collective bargaining arrangements are in place between the employer and employees. The inclusion of a bargaining fee would fundamentally alter the voluntary approach and prove difficult to enforce at a national level.

Registered employment agreements

There may, however, be some latitude under the provisions of part III of the *Industrial Relations Act, 1946* to incorporate a bargaining fee clause within a registered employment agreement (REA) as ratified by the Labour Court. REAs and employment regulation orders are workplace agreements that set out minimum remuneration rates and other employment conditions for a number of Irish industries and sectors.

The contents of an REA are comparable to the terms of an Australian certified agreement in that they are industry-specific legal documents. For example, the *Construction industry wages and conditions of employment* agreement contains provisions dealing with guaranteed working weeks, protective clothing, early starts and building site conditions.

The procedure for the registration of an agreement is set out in section 27 of the act. The effect of registration under section 27(3) is to make the provisions of an REA binding not only on the negotiating parties (trade union and employers), but also on parties not involved in the negotiation who are in categories covered by the agreement.

A trade union seeking to recover a fee from an existing non-union employee could be differentiated from the *Meskell* case, as there is no compulsion on the employee to associate/dissociate with a trade union. The bargaining fee clause, however, would have to be drafted taking into account the provisions of the *Payment of Wages Act, 1991*. In particular, section 5 of that act says that an employer shall not make a deduction from the wages of an employee unless the deduction is authorised by virtue of any statute or any instrument made under statute, the deduction is authorised under the employee's contract of employment or the employee has given his prior written consent. The Labour Court would need to decide whether the deduction was authorised under the statute (part III of the *Industrial Relations Act, 1946).*

'A trade union seeking the inclusion of a bargaining fee clause within an REA ought to have realistic expectations in relation to an application before the Labour Court'

The following clause could be drafted, based upon the standard clauses adopted by the US Federal Court of Appeals and Australian trade unions:

'No employee shall be required to become or remain a member of a trade union as a condition of employment. Each union member shall have the right to freely retain or discontinue his membership. The employer shall advise all non-union employees that a negotiating fee of X euro per month is payable to the union in consideration for its efforts in negotiating the agreement Y, and will facilitate individual employee authorisation for deduction of the fee from his or her wages. The employer agrees to deduct this fee from the wages of all employees on a monthly basis and forward it to the union'.

In relation to new employees, a bargaining fee clause could be incorporated into the contract of employment prior to the offer of employment being made to the prospective employee to ensure compliance with the 1991 act.

According to recent reports from the Labour Court and the Department of Enterprise, Trade and Employment, there were 44 REAs covering 80,000 workers at the end of 2000. Although REAs are of relatively minor importance in the current climate of social partnership, their prominence may increase in the event that there is no successor to the current *Sustaining progress* agreement, which expires in 2005.

Realistic expectations

A trade union seeking the inclusion of a bargaining fee clause within an REA ought to have realistic expectations in relation to an application before the Labour Court. The union would need to take into consideration the criteria to be met, in particular the possibility that the imposition of bargaining fees might be knocked back or curtailed to affect only new employees.

In essence, what is required of the Labour Court is to reformulate the traditional legal definition of the employer and employee relationship, which was based primarily on contract law. Part III of the *Industrial Relations Act, 1946* may provide sufficient scope for this interpretation.

Practitioners should also note that a bargaining fee clause is not confined to an REA and could possibly be used as a viable alternative where an employer no longer wished to operate a closed shop with a union or where a prospective employee did not wish to join the union (see also *Sigurjonsson v Iceland* [1993] 16 EHRR 4262, regarding the right of association under the *European convention on human rights*). In addition, a clause could be used by non-union employees who wish to enter into a separate agreement with a trade union to act on their behalf, for example, in relation to negotiations concerning an individual's employment contract. G

Anthony Fay is an employment law solicitor with the Sydney-based law firm Morrisseys Lawyers.

Despite equality legislation, inequalities in the workplace and at home mean that women are much less likely to be covered by a pension plan. Consequently, they should prepare for retirement early, advises Olive Donovan

MAIN POINTS

- Gender-specific challenges
- Pension provisions
- Part-time work and career breaks

Planning for retirement is an absolute necessity for women today. According to a national survey carried out on pension provision in Ireland, just over 44% of the female workforce have a personal occupational pension, compared with 55% of men.

Certainly, both sexes should look to their financial futures, but gender-specific challenges facing women mean that making the most of savings and building an individual pension plan must be carefully considered elements in any long-term financial strategy.

Some of these challenges include working within lower salary scales and having to take time out of the workforce due to family commitments, such as care-giving or parenting. Additional issues include the greater likelihood of women living alone on a single income and the fact that women live longer and will need more to live on.

Live long and prosper

Married women often mistakenly subscribe to the belief that their husbands' pensions will support them in old age. Unfortunately, most women will spend a good portion of their retirement years having outlived their spouses. These extra years can be difficult to budget for as pensions can be dramatically reduced should the pension-holder die before his wife. However, steps can be taken to lessen the financial strain:

- Proper beneficiary designations, where applicable, will allow for tax-free transfer of pension investments
- Purchase of life assurance on the male partner can provide additional capital, which can be invested to make up any shortfall in remaining retirement savings

THE TWILI

- Life assurance can cover income tax liabilities that may be payable by the estate on capital gains on the death of a second spouse.

Social welfare issues

The state provides certain social welfare pensions, such as the old-age contributory pension or the widow's contribution pension. It also provides a way in which you can protect your entitlements for when you are not in paid employment, through, for example, the homemakers' scheme. But the social welfare pension in Ireland amounts to about 30% of average industrial earnings. Its primary purpose is to provide the bare minimum of protection.

In addition to state social welfare benefits, it is important to participate in schemes sponsored by employers and to set up personal pensions.

Private pension provision

Private pensions can provide an important source of income to women. However, coverage is 15% less for female employees than it is for their male counterparts. Looking only at the private sector, these figures are even lower, with 31% coverage for women.

There are three primary benefits to contributing to a good private pension:

- Full tax relief on contributions paid
- Tax-exempt investment returns on monies invested
- Money is 'put away' – removing the temptation to dip into future income.

Other pension issues that particularly affect women include maternity leave, part-time work and separation or divorce.

Maternity leave

Under the *Maternity Protection Act, 1994* women are entitled to statutory minimum maternity leave of 18 weeks. Some schemes may provide more than the statutory minimum (in cases of maternity, adoptive and parental leave) and women can obtain details from the trustees or pension scheme administrator.

Membership of the pension scheme must continue while on statutory maternity leave. In other words, a member of a defined benefit scheme will continue to accrue pensionable service during statutory maternity leave. Holders of personal pensions may be able to continue contributions, provided total contributions for the tax year are within the limits permitted by the Revenue Commissioners.

PRSI credits will be given while in receipt of the state maternity benefit, so entitlement to retirement benefits from the state will not be reduced in respect of the period of statutory maternity leave.

The entitlements with regard to pensions and adoptive leave are very similar to those with regard to maternity leave.

Part-time work and career breaks

In the past, part-time workers were often denied access to company pension schemes. However, the EU directive requires that part-time and full-time employees must be treated as equals. So, if an employer provides access to a pension scheme, it must be open to part-time workers (unless exclusion can be justified on objective grounds).

Members of occupational pension schemes should

GHT ZONE

seek clarification from employers as to how membership is affected by a career break. For example, some schemes treat this as conclusion of service, while others treat the period of service before and after the career break as continuous. Normally, retirement benefits would not be accrued while on a career break. Since this is typically the case, it is always wise to continue saving for retirement through contributions to a personal pension plan.

Separation and divorce

Due to changing family and career patterns there is a growing need for personal financial responsibility. Increases in single parenthood and marriage breakdowns are just two reasons highlighting the need for individual rights. Ironically, despite rising divorce rates and separation, almost a quarter of women assume their partner will provide for them in later life.

For those getting divorced or judicially separated, both parties' pension entitlements must be taken into account when arriving at a financial settlement. In the event of marital breakdown, there are various options based on earmarking part of the spouse's pension or a 'clean break' option. Advice should be taken on these.

Under spouses' pension plans, women and/or their children may be entitled to benefits. Beneficiaries are entitled to information from the plan administrator or trustee.

Planning and saving for retirement may seem like a distant aspiration, yet saving for retirement should start early and continue for life. It is clear from the following challenges that there are specific reasons why saving matters:

- Women tend to earn less than men and work for fewer years
- Women tend to change jobs or work part-time more often, interrupting their career to raise children. Benefits received from company-sponsored pension plans may be affected
- On average, women live six years longer than men, and need a higher amount for retirement
- Studies indicate that women tend to invest less aggressively than men
- Women tend to lose more income than men following divorce
- Annuity rates are smaller for women than men of the same age, who have contributed to the same level, because average life expectancy is longer.

'Inequities in the workplace and in family roles mean that women continue to be less likely to be covered by pension plans'

Although the pension laws are gender-neutral, inequities in the workplace and in family roles mean that women continue to be less likely to be covered by pension plans and to receive benefits. Allowing these inequities to persist through lack of knowledge could result in a dark retirement profile for future generations. G

Olive Donovan is a business development manager at Bank of Ireland Private Banking.

Funding for stem-cell research continues to be a divisive issue between EU member states. Niamh Pollak outlines the ethical debate and legal uncertainty around this controversial area of biotechnology

On 3 December 2003, the European Council of Ministers failed to agree on whether EU central budgets could be used to fund research on the stem cells of human embryos. Such research is thought to provide the possibility of cures for diseases such as Alzheimer's and Parkinson's. The previous month, the European Parliament had voted in favour of using the EU's €17.5 billion sixth framework programme research budget for stem-cell research.

Ireland took over the union's rotating presidency from Italy at the start of this year, and the government is refusing to pursue the issue. Italy had failed to overcome disagreements between EU member states that, on ethical grounds, oppose the use of human embryos for medical research. Opponents include Germany, Austria, Italy and Portugal, whereas Sweden, Finland, Greece, the Netherlands and Britain allow the harvesting of stem cells from 'supernumeracy embryos', or those that are left over from *in vitro* fertilisation, under certain conditions.

This makes Britain the only EU member that allows the actual creation of human embryos for

CELL DIV

WHAT ARE STEM CELLS?

Stem cells are primitive cells that have not yet developed their final function. They occur at all stages of human development, from early embryos to foetuses to adults. They are valuable because they can develop into other types of cells under certain conditions. For instance, the cells could someday replace a failing liver or grow a new one. Scientists say these cells may be able to treat and cure degenerative diseases and may be able to replace damaged or sick cells in a patient with an injury.

But controversy surrounds the issue as to whether embryonic or adult stem cells should be used for this purpose, and it is this dilemma that is stalling further research.

Embryonic stem cells, when isolated and cultured by scientists, have the ability to reproduce themselves and mature into various specialised types of cells that could provide a ready supply of replacement tissue – for example, nerve tissue, blood, heart muscle and even brain cells. Scientists also hope to find a method to persuade stem cells to grow into complete organs.

PIC: BURGER/PHANIE/REX FEATURES

ISION

stem-cell research. The EU research commissioner, Phillipe Busquin, has condemned the failure of member states to reach a consensus, as there is a fear that Europe will fall behind other jurisdictions in the potentially lucrative area of biotechnological development. Asian regions – Singapore and China in particular – continue to forge ahead with research, although neither country has set down any legal or ethical guidelines.

The EU's failure to reach agreement has left the legal position on the area of research unclear. Instead of weighing up cases through precedents, the commission will now have to proceed on a case-by-case basis, causing legal headaches and uncertainty. Scientists say such limitations only hinder the potential of invaluable research.

MAIN POINTS

- Embryonic stem-cell research
- EU funding
- Ethical and legal concerns

Scientific curiosity

The controversy doesn't relate to the potential of the research; rather, it focuses on the ethics of using embryonic cells. Embryonic stem cells are taken from a developing embryo at blastocyst stage, causing destruction of the embryo. Most research up to now has been conducted on unwanted embryos from IVF treatment and from aborted foetuses, usually with the consent of those donating the embryos. But opponents fear the specific creation of embryos for the purposes of research, claiming that this would be tantamount to the destruction of human life in order to advance scientific curiosity.

Stem-cell opponents are less vocal about the use of adult stem cells because they are taken from the blood or organs of healthy adults. These, however, do not seem to have the flexibility of embryonic stem cells. Adult bone-marrow cells can become liver cells, but embryonic stem cells are necessary to produce the full range of body cell types and, as adult stem cells do not replicate as quickly as their younger counterparts, they are not currently as useful to scientists.

Embryonic stem-cell advocates include some who might indeed benefit from such experiments. Celebrities such as Christopher Reeve (paralysed following a horse-riding accident) and Michael J Fox (who suffers from Parkinson's Disease) have lobbied in favour of embryonic stem-cell research with a view to 'therapeutic cloning' **(see panel, page 39)** that could help to cure their illnesses.

Ethical solution?

Following the 3 December deadlock, no project involving the derivation of new stem-cell lines from human supernumeracy embryos will be funded from any EU research budget. This will not prevent individual member states, such as the UK, from continuing with such research, provided it is permitted under national legislation. Scientists there have recently developed a technique to create, from a patient's own blood, stem cells that are purported to match the flexibility of embryonic stem cells. This patented 'TriStem' technique claims to provide an ethical solution to the exploitation of embryonic stem cells, but further clinical trials are required. The United States currently allows government funding for research on embryos that were stored before the year 2001, but President Bush is now trying to revive a UN

Whose copy of the *Gazette* are you reading?

Why not subscribe ...

I would like to subscribe to the *Law Society Gazette*

☐ I enclose my cheque for €57.15

☐ Please charge my ☐ Access ☐ Visa ☐ Mastercard ☐ Eurocard

Credit card number ☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

Expiry date: ☐☐☐☐
MONTH/YEAR

Name: _____

Address: _____

_____ Telephone: _____

Signature: _____

Please return to *Law Society Gazette*, Blackhall Place, Dublin 7.

www.lawsociety.ie

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

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

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

Have you accessed the Law Society website yet?

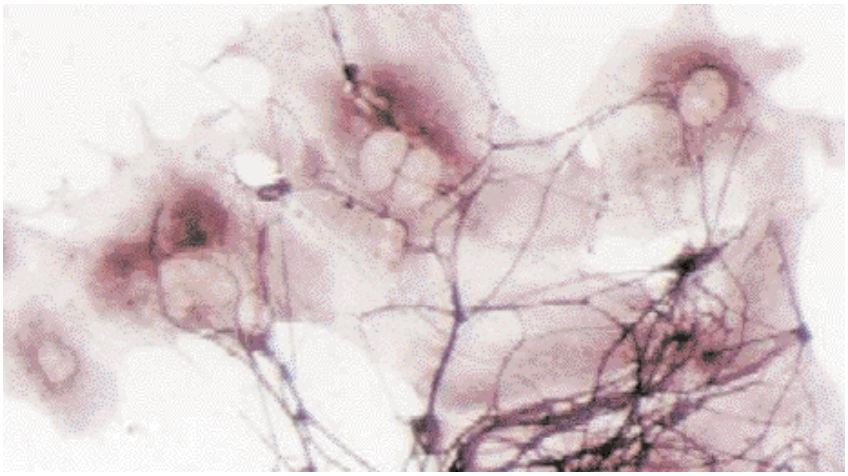
ATTACK OF THE CLONES

'Therapeutic cloning' does not involve the creation of human beings and is better described as somatic cell nuclear transfer; that is, the transplantation of a patient's DNA into an unfertilised egg in order to grow stem cells that could cure devastating diseases.

The aim is to treat patients by creating tailor-made genetically identical cells that their bodies would not reject, as they are effectively treated using their own DNA. Scientists also hope the technique could allow for the development of stem cells that cannot be destroyed by the body's immune system. This holds promise for the sufferers of diabetes and heart disease.

However, therapeutic cloning requires the actual creation of new embryonic stem cells, and the EU Commission research proposal recommends only the use of supernumeracy embryos that were donated for research by parents and would otherwise be destroyed and were created before 27 June 2002, the date of the adoption of the EU sixth research framework programme.

Without legal certainty, this leaves advocates facing the same cloudy dilemma.



Nerve cells derived from mouse embryonic stem cells

treaty that would provide a long-term ban on human embryonic research worldwide.

Continuing uncertainty

The 3 December vote is particularly disappointing for patients who believe that life-saving medical breakthroughs are being put on hold indefinitely and for scientists based in Europe who argue that the techniques might be developed in other countries without any ethical guidelines or regulation, with nothing to prevent maverick scientists from experimenting with reproductive cloning. Opponents believe that such research is unethical, imperfect and (probably) immoral. The success rate of therapeutic cloning in the animal model is telling: Dolly the sheep was the only survivor among 29 embryos after an incredible 227 cloning attempts by scientists. Therefore, although the technology clearly exists, it is far from being perfected in animals, let alone humans.

The Netherlands favours central funding for stem-cell research and assumes the presidency of the EU for the latter part of 2004. It may opt to pursue the agenda during its term. Who knows? Until then, the controversial debate and legal uncertainty surrounding the issue continues. G

Niamh Pollak is a solicitor at the Dublin law firm McCann FitzGerald.

Tech trends

Are you ready for your close up?

Nokia continues to expand the horizons of its mobile phones with the imminent launch of its new model 7610. This new phone is really all about the digital imaging system – that's a camera to you and me. The 7610 takes pictures at a not inconsiderable one megapixel. This is still smaller than the standard 1.3 megs that you would need for a professional quality print, but for a camera phone it's an impressive file size. Needless to say, the 7610 has all the features that you would expect from a Nokia camera phone, such as 4x zoom, standard and night modes, colour display, Bluetooth wireless technology and USB connectivity. It also has an integrated video-recorder, which seems to be the next big thing in mobile technology, allowing you to film ten-minute video clips. The Nokia 7610 will not be available until the summer and no price has yet been decided. *For more information, visit* www.nokia.com.

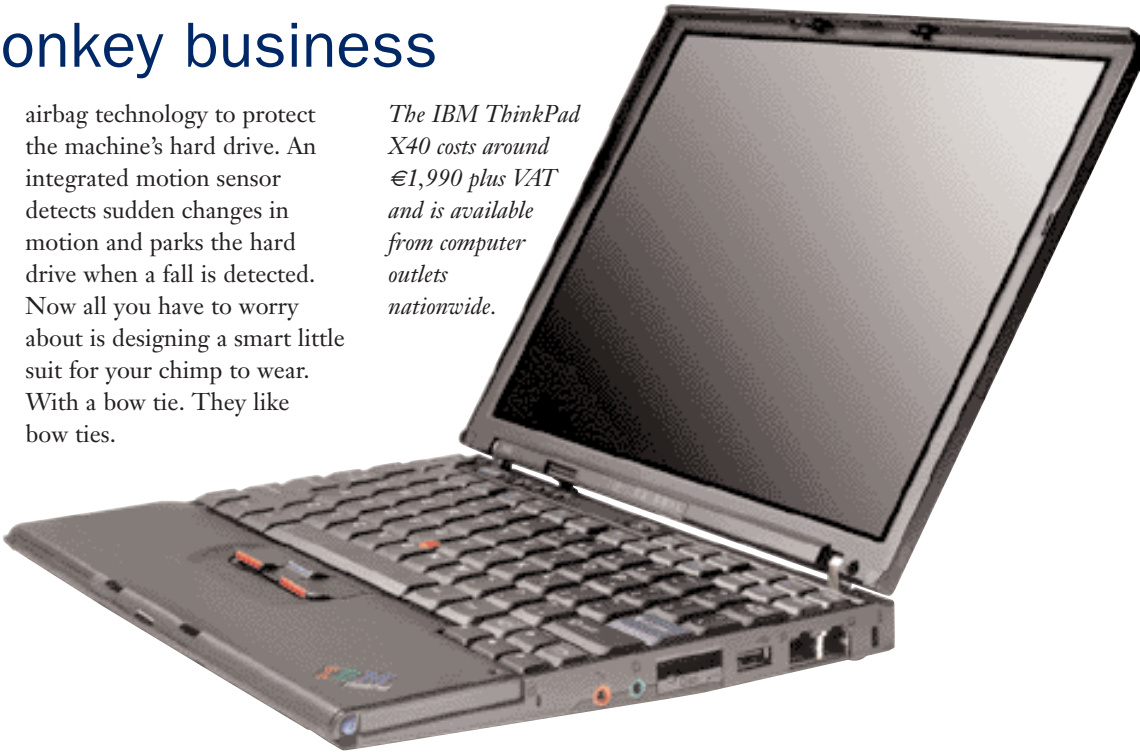
Animal magic and a very tenuous link

The battle of Farthing Wood was one of the turning points in the Duke of Wellington's Peninsular Campaign. Badgered by a superior force and out-foxed by a flurry of woodland creatures, the Duke was hard-pressed on both flanks, and indeed round the back. He might have lost his way in the woods completely had not a mole in the enemy ranks faxed him through a map of his position. It's equally probable that the mole was using the HL 2700CN entry-level colour laser printer from Brother. This new machine claims to print 31 pages per minute in black and white and eight pages per minute in colour. The printer comes network ready and has an ample 64MB memory, which can be expanded to 576MB if your printing needs are particularly

complex. A handy function allows you to reprint the last document handled without having to return to your PC. The new model is compatible with Windows and Mac programs and is refreshingly easy to use. But perhaps its strongest selling point is its price of around €855 plus VAT. If a mole with its wee stumpy hands can use one, so can you. *Available from computer outlets and office suppliers nationwide. For more information, call Brother on tel: 01 241 1911 or visit* www.brother.ie.

Too much monkey business

If you're thinking of training up an office monkey to do odd jobs around your firm, you may want to equip it with the new IBM ThinkPad X40. Sure, it's IBM's thinnest and lightest ultraportable notebook computer ever, weighing only 2.7 pounds and measuring around 0.8 of an inch thick. And yes, it's powered by an Intel Pentium M processor and can be upgraded to 1536Mb of DDR memory. Any self-respecting ape would expect nothing less. But what really makes this notebook genuinely monkey-friendly is its use of airbag technology to protect the machine's hard drive. An integrated motion sensor detects sudden changes in motion and parks the hard drive when a fall is detected. Now all you have to worry about is designing a smart little suit for your chimp to wear. With a bow tie. They like bow ties.



The IBM ThinkPad X40 costs around €1,990 plus VAT and is available from computer outlets nationwide.

In need of assistance

I know you're probably sick of hearing about PDAs (personal digital assistants), especially if you don't have one, but you can't keep on ignoring them – especially when they come as good as the new XDAII from O2. This is a combined mobile messaging device and phone, which allows you to access your e-mail, the internet and your contacts database. You can also plug it into a projector to make a PowerPoint presentation, a rather nifty little function if presentations are your business. The XDAII comes equipped with Word, Excel, Outlook, Explorer and Media Player. Weighing in at a mere 190 grams, it boasts a colour screen, 28Mb of SDRAM and runs on an impressive-sounding Intel Xscale PXA 263 400MHz chip.

That was the science bit. The fun bit is that it includes a camera (of course it does), an MP3 media player, a speakerphone and a voice-recorder facility. Sure what more could you want from a handy little gadget like this? *The XDAII costs €469 and is available from mobile phone outlets. For more information, visit* www.o2.ie.

Sites to see

Big brother really is watching you (*www.cia.gov/cia/publications/factbook*). If you've ever fancied engaging in a bit of spookery behind enemy lines, then knowing a bit about the locals is undoubtedly useful. The CIA factbook provides political, economic, military and demographic information on all the world's countries, so you can remind yourself that Ireland's main ethnic groups are 'Celtic' and 'English', apparently. Great for pub quizzes or swotting up before a meeting abroad.

Cartographers anonymous (*www.lib.utexas.edu/maps*). Everyone loves maps, don't they? Well, any among you that do can top up on your cartographic fix at the University of Texas library site. Here, there are dozens of contemporary and historical maps, so you can satisfy that burning curiosity to find all the US national parks or see the state of Europe in 1400. The library site also has academic journals available on-line, so you can always justify your trip if the boss comes into your office.

While away your billing hours (*www.mousebreaker.com*). If, after browsing the CIA website, your spy fantasies demand that you act out some spook-related activity, why not be a sniper for ten minutes? A sniping game, *Camperstrike*, and *Heli Attack*, where your character is repeatedly attacked by, er, helicopters, are just two of the dozens of Flash games hosted on this site. And after you've made the world safe for democracy, relax with a game of billiards.

Sartorially simian (*www.sewsimplymonkey.com*). Now that you've designed a business suit for your office chimp, you have to think about what the poor ape will wear on your firm's 'dress-down Friday'. Luckily, help is at hand from the owners of this site, who tailor a range of bespoke casual clothes for our little monkey mates. 'Our fashions are designed for the comfort, physical protection and sanitation of the monkey', they say, 'besides which, they are just darn cute-looking'.

Report of Law Society Council meeting held on 19 March 2004

Motion: *Professional indemnity insurance regulations*

'That this Council approves the draft regulations cited as the Solicitors Acts, 1954 - 2002 (professional indemnity insurance) (amendment) regulations, 2003.'

Proposed: James MacGuill

Seconded: Michael Irvine

James MacGuill outlined the contents of the draft regulations and confirmed that they had been circulated to all of the local bar associations for their comments. Mr MacGuill explained that the principal amendments were an increase in the self-insured excess from €6,500 to €10,000 and a new provision enabling a qualified insurer to notify the Law Society where a solicitor failed to co-operate in relation to the handling of a claim. The Council unanimously approved the draft regulations.

In briefing this month...

The solicitors' profession and competition issues

The director general briefed the Council in relation to a number of developments in the competition area in recent weeks. He outlined the contents of a report on competition in the professions, which had been issued by the EU Commission. The report indicated that:

'The five main categories of potentially restrictive regulation in the EU professions are: (i) price fixing, (ii) recommended prices, (iii) advertising regulations, (iv) entry requirements and reserved rights, and (v) regulations governing business structure and multi-disciplinary practices.

'On the one hand, a significant body of empirical research shows the negative effects that excessive or outdated restrictive regulations may have for consumers. Such regulations may eliminate or limit competition between service providers and thus reduce the incentives for professionals to work cost-efficiently, to lower prices, to increase quality or to offer innovative services.

'On the other hand, there are essentially three reasons why some regulation of professional services can be necessary: asymmetry of information between customers and service providers, as a defining feature of professional services is that they require practitioners to display a high level of technical knowledge which consumers may not have; externalities, as these services might have an impact on third parties; and certain professional services are deemed to produce "public goods" that are of value for society in general.'

The report indicated that Ireland was regarded as one of the countries with the least amount of regulation within the EU member states.

In relation to the UK, the director general noted that the *Clementi* consultation paper in relation to the legal profession had been published earlier in the month. He outlined its principal features, but noted that the market for legal services in England and Wales was markedly different from Ireland, as was the size and nature of the legal profession in that jurisdiction.

In relation to the current Competition Authority study of the Irish legal profession, the director general said that the society was satisfied that it had a good story to tell in relation to each of the areas identified for discussion by the authority, particularly in relation to its regulatory function, and was supported in this view by the statement from the authority's consultants, Indecon, that:

'We have examined the complaints, discipline and enforcement procedures in detail and have found no evidence that they are in any way used to institute any anti-competitive practices or damage consumer interests. It appears to us that the enforcement procedures are logically structured, fair and open. Indeed, we believe that they are appropriately designed to protect consumer interests and to maintain high standards in the profession.'

Personal Injuries Assessment Board

Ward McEllin reported that the PIAB had recruited a chief executive officer, was seeking to recruit 85 members of staff and had secured offices in Tallaght. It now appeared that the board would be operational from 1 June for employers' liability cases. It appeared that the PIAB would involve a two-pronged process. Firstly, claimants would make contact with a service centre to obtain forms and copies of the rules for completion. Once completed, the forms would be submitted to the PIAB. No rules governing the completion of forms or the assessment process had been produced as of yet.

Civil Liability and Courts Bill, 2004

Ward McEllin reported that the society had drafted a statement of its preliminary observations in relation to the bill, which had been circulated to the relevant senators in advance of the debate on the bill in the Seanad. The society had adopted a position that the reduction in the limitation period, if introduced, should remain at three years for medical negligence cases and should not be reduced beyond two years for all other cases. Most of those senators who had spoken on the bill in the Seanad had picked up on these points and a number of patient representative organisations had also made representations on the issue.

Housing (Stage Payments) Bill, 2004

Patrick Dorgan outlined the contents of the *Housing (Stage Payments) Bill, 2004*, which had been introduced as an opposition private member's bill. The purpose of the bill was to outlaw the practice of stage payments, which operated to the detriment of purchasers. It was hoped that the bill would secure the support of all parties in the Oireachtas. G

Committee reports

EU AND INTERNATIONAL AFFAIRS

Changes to ECJ procedures

The committee has received a letter from the European Court of Justice regarding changes to the court's rules of procedure. The ECJ said that the changes had been implemented 'to simplify and expedite the handling of cases brought before it'. It added that the changes, introduced in April, were effective immediately. The main points of the changes are described in the letter as follows:

'1a) In order to expedite the written procedure in direct actions and appeals, the court has decided to restrict extensions of time limits for the lodging of pleadings to a single extension of one month on reasoned request, any further extension being granted only exceptionally on duly substantiated request.

b) The reports for the hearing drawn up by the judge-rapporteurs are to be simplified. In references for a preliminary ruling, the report will simply describe the legal and factual background to the case and set out the questions referred and the answers proposed in the written observations submitted. As a rule, the arguments put forward in support of the proposed answers will not be produced

c) In direct actions and appeals, the report will be confined to a concise description of the relevant facts and the rules applicable, and to setting out the forms of order sought by the parties and the pleas in law raised. Arguments put forward by the parties in support of their pleas in law will be reproduced in summary form only

d) Where, in accordance with the provisions of the rules of procedure, there is to be no hearing of oral argument in a case, a report for the hearing will no longer be prepared. In any event, according to the wording of article 20 of the *Statute of the Court of Justice*, it is necessary to draw up such a report only when a hearing is to take place

e) In order to lighten the burden of work placed on the translation service, the court has decided to adopt a policy of selective publishing of decisions in the ECR. The public will, however, still have access to the text of those decisions in electronic form in the language(s) available. First, in direct actions and appeals, judgments will no longer be published in the ECR when given by a chamber of three judges or indeed by a chamber of five judges where, in accordance with the last sub-paragraph of article 20 of the *Statute of the Court of Justice*, the case is determined without an advocate general's opinion. It will nevertheless still be possible for the formation of the court concerned to decide that such a decision should be published in full or in part where the circumstances warrant such a choice. As regards references for a preliminary ruling, the position is unchanged.

2) As mentioned above, the court also proposes very shortly to send to the council, for its approval, draft amendments to the court's rules of procedure. The proposed amendments are intended in the first place to shorten proceedings

a) It is proposed to amend articles ~~44~~a, 104(4) and 120 of the rules of procedure by bringing the period allowed for the submission of an application for a hearing of oral arguments down from one month to two weeks. The period currently prescribed has proved, especially in references for a preliminary ruling, too long and liable to delay proceedings

b) It is also proposed to amend article 104(3) of the rules of procedure which, in the straightforward cases covered by that provision, enables the court to answer questions referred for a preliminary ruling by means of an order. The provision requires the court to notify the national court and to hear the parties and, in particular, all the member states before giving its decision by order. It is proposed to do away with that requirement which, in the court's experience, prolongs proceedings without adding any factor of any use to the decision to be taken

c) Finally, it is proposed to amend article 104(1) of the rules of procedure according to which requests for preliminary rulings are to be notified to the member states in the original version, accompanied by a translation into the language of the addressee state. It is proposed that the translation accompanying the notification should be limited to the questions referred only. Translation of the entire reference into all the official languages constitutes a significant hindrance to proceedings. Furthermore, there is not the slightest need for that translation with regard to the procedure before the court; it takes an undue share of the not inconsiderable resources of the court's translation service, resources which could more advantageously be used in tasks which further proceedings. A translation requested into the working language of the court, which is made in any event, could be sent to those member states which so wish.' G

Practice notes

SECTION 23-TYPE PROPERTIES

The Conveyancing Committee has received a number of queries in relation to the respective obligations of the developer and the purchaser in section 23-type properties.

It was suggested to the committee that the developers should agree in the contract to provide all necessary documents to evidence the availability of tax breaks, and that refusal to do so would be unreasonable, as the tax breaks are usually the principal reason why purchasers acquire such properties.

The committee considers that the foregoing is too broad a statement of the position, and considers that the following represents appropriate practice in the purchase of such properties.

Despite curtailments in recent budgets, the numbers of such schemes, and the particular requirements of each, make it impossible to give more than general guidance.

1) The availability of tax breaks may often depend on the purchaser's own circumstances and therefore it is unreasonable to expect a clause to be inserted by the developer guaranteeing the availability of any, or any particular, tax relief
2) When acting for a purchaser, a practitioner should ascertain the particular relief which the purchaser hopes to achieve, and advise them to take specialist tax advice in relation to the availability of such relief, and what documentation will be required by the Revenue Commissioners to grant such relief
3) Where the documentation necessary to obtain the relief is wholly within the procurement of the developer, for example, a certificate of building cost, then it is reasonable that a condition requiring the furnishing of such documentation is inserted in the contract, specifying as appropriate any monetary amounts or a minimum figure or percentage
4) Where the obtainment of the tax relief requires the issue of certificates by statutory bodies, such as local authorities or the Department of the Environment, it is reasonable that the developer's solicitor insert a condition requiring his client to use his best endeavours to obtain such certification and, in such circumstances, the purchaser's solicitor should advise his client of the possibility that for any reason such documentation may not be available. As with any such advice, it should be in writing to the client, pre-contract
5) A purchaser should consider pre-contract what is to happen if the expected relief is not available for any reason and should deal with the matter in the contract.

Conveyancing Committee

CERTIFICATE OF TITLE SYSTEM AND LAND REGISTRY FORM 17

Practitioners may be aware that the Land Registry form 17, including the electronic version currently in use, states that the lodging solicitor is the 'solicitor for the applicant' for various registrations, including registration of a charge. The lodgment of a dealing containing a deed of charge, including the lodging solicitor's application for registration of the lending institution as owner of the charge, might be open to the interpretation that the lodging solicitor is acting in a legal capacity for the lending institution. The agreed position between the Law Society and the lending institutions under the certificate of title system is that the borrower's solicitor acts only for the borrower and does not act for the lending institution. The Conveyancing Committee sought confirmation from the lenders that the statement in the Land Registry form 17 does not represent a derogation from or any relaxation of the agreed position of the borrower's solicitor under the certificate of title system.

The committee is pleased to advise practitioners that the Irish Mortgage Council (IMC), representing the lending institutions, recently wrote to confirm with the committee that it shares the Law Society's view that the borrower's solicitor is acting for the borrower and not the lender. The IMC further confirmed that, in registering the lender's charge, the borrower's solicitor is discharging part of the undertaking under the certificate of title system but is not specifically acting on behalf of the lender.

Conveyancing Committee

LEGISLATION UPDATE: 20 APRIL – 18 MAY 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 date(s) of each act.

ACTS PASSED

An Bord Bia (Amendment) Act, 2004
Number: 14/2004
Contents note: Amends and extends *An Bord Bia Act, 1994* to provide for the dissolution of An Bord Glas (the Horticultural Development Board) and the transfer of its functions to An Bord Bia, and provides for related matters
Date enacted: 5/5/2004
Commencement date: 5/5/2004 for part 1; transfer day order to be made for part 2 (per s3(1)); commencement order(s) to be made for parts 3 and 4 (per ss10 and 23)

Private Security Services Act, 2004
Number: 12/2004
Contents note: Provides for the establishment of the Private Security Authority to control and supervise individuals and firms providing security services. The authority will operate a licensing system for providers of security services and a publicly-accessible register of licence holders, issue identity cards to licensees, set standards for training, and establish and administer a system of investigation and adjudication of complaints against licensees. Also provides for the establishment of the Private Security Appeal Board to hear and determine appeals against decisions of the authority. Gives effect to the principal recommendations contained in the report of the consultative group on the private security industry, December 1997
Date enacted: 4/5/2004
Commencement date: Commencement order(s) to be made (per s1(2) of the act)

Tribunals of Inquiry (Evidence) (Amendment) Act, 2004
Number: 13/2004
Contents note: Amends the *Tribunal of Inquiry (Evidence) Acts, 1921 to 2002* to enable the person who is the sole member of a tribunal, or the chairperson if the tribunal has more than one member, to make an order in relation to any costs that were incurred before his or her appointment and that have not already been determined. Provides that a tribunal or the chairperson of a tribunal can apply to the High Court for directions relating to the performance of any of the functions of the tribunal or the chairperson, including their functions relating to costs. Provides that a tribunal consisting of more than one member may, whenever the chairperson so decides, act in separate divisions
Date enacted: 5/5/2004
Commencement date: 5/5/2004

SELECTED STATUTORY INSTRUMENTS

Casual Trading Act, 1995 *(section 2(3)) regulations 2004*
Number: SI 191/2004
Contents note: Amend the *Casual Trading Act, 1995* to exempt from its provisions the sale of certain soft fruits and vegetables sold during the period 1 May to 30 September in any year
Commencement date: 1/5/2004

Competition Act, 2002 *(commencement) order 2004*
Number: SI 196/2004
Contents note: Appoints 1/5/2004 as the commencement date for s6(4)(c) of the *Competition Act, 2002*. Paragraph (c) of s6(4) provides that, in proceedings for an offence under s6(1) of the *Competition Act, 2002* in which it is alleged that an agreement, decision or concerted practice contravened the prohibition in art 81(1) of the treaty, it shall be a good defence to prove that the agreement, decision or concerted practice fulfilled the conditions for exemption set out in art 81(3) of the treaty

European Communities (Amendment) Act, 2003 *(commencement) order 2004*
Number: SI 183/2004
Contents note: Appoints 1/5/2004 as the commencement date for the *European Communities (Amendment) Act, 2003* (incorporation into Irish law of the *Athens treaty of accession*, 16/4/2003, insofar as that treaty relates to the European Communities)

European Communities (clinical trials on medicinal products for human use) regulations 2004
Number: SI 190/2004
Leg-implemented: Dir 2001/20
Commencement date: 1/5/2004

European Communities (general product safety) regulations 2004
Number: SI 199/2004
Leg-implemented: Dir 2001/95
Commencement date: 4/5/2004

European Communities (implementation of the rules on competition laid down in articles 81 and 82 of the treaty) regulations 2004
Number: SI 195/2004
Contents note: Give effect to council reg (EC) 1/2003 as amended by council reg (EC) 411/2004 on the implementation of the rules on competition laid down in arts 81 and 82 of the treaty. Designate the national authorities that will be responsible for the implementation in the state of the public enforcement provisions of the council regulation – the courts, the Competition Authority and the DPP
Commencement date: 1/5/2004

European Communities (recognition of qualifications in pharmacy) (amendment) regulations 2004
Number: SI 187/2004
Leg-implemented: Dir 85/433 to the extent that that directive has been amended by the 2003 *Athens treaty of accession*
Contents note: Give effect to the amendments to council directive 85/433/EEC concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in pharmacy, including measures to facilitate the effective exercise of the right of establishment relating to certain activities in the field of pharmacy, contained in the treaty 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. Add the qualifications that are awarded in these member states to the list of qualifications that are already recognised for the purpose of registration as a pharmacist in this country. Also set out the procedures to be followed in the case of applicants from some of these member states where the qualifications in pharmacy that are held do not comply fully with the qualification requirements as laid down in the directives relating to pharmacists
Commencement date: 1/5/2004

Finance Act, 2004 *(section 74) (commencement) order 2004*
Number: SI 140/2004
Contents note: Appoints 1/4/2004 as the commencement date for section 74 of the *Finance Act, 2004*. Section 74(1) substitutes a new s101 of the *Stamp Duties Consolidation Act, 1999,* which provides for an exemption from stamp duty on the sale, transfer or other disposition of intellectual property as defined in that section

Food Safety Authority of Ireland Act, 1998 *(amendment of first schedule) order 2004*
Number: SI 210/2004
Contents note: Amends parts II and III of the first schedule to the *Food Safety Authority of Ireland Act, 1998* in order to update the lists of statutory instruments and EC regulations in force relating to food. The full list of legislation contained in the first schedule is set out in the explanatory note to SI 210/2004

Garda Síochána (Police Co-operation) Act, 2003 *(commencement) order 2004*

Number: SI 186/2004
Contents note: Appoints 1/5/2004 as the commencement date for all sections of the act

Social Welfare (Miscellaneous Provisions) Act, 2004 *(section 17) (commencement) order 2004*
Number: SI 184/2004
Contents note: Appoints 1/5/2004 as the commencement date for s17 of the act. Section 17 amends the *Social Welfare (Consolidation) Act, 1993,* as amended, to provide for habitual residence as a qualification for certain social welfare payments

Social Welfare (Miscellaneous Provisions) Act, 2004 *(sections 22 and 23) (commencement) order 2004*
Number: SI 141/2004
Contents note: Appoints 5/4/2004 as the commencement date for ss22 and 23 of the act. Section 22 provides for the substitution of a new part VII (equal pension treatment in occupational benefit schemes) of the *Pensions Act, 1990.* Section 23 provides for miscellaneous amendments to other sections of the *Pensions Act, 1990.* 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 Brendan McManus, solicitor, and in the matter of an application by the Law Society of Ireland to the Solicitors Disciplinary Tribunal and in the matter of the *Solicitors Acts, 1954 to 2002* [4089/DT400]
Law Society of Ireland (applicant)
Brendan McManus (respondent solicitor)

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

a) Up to the date of swearing of the society's affidavit, sworn on 30 May 2003, he failed to hand over the title documentation relating to two properties owned by a former client in a timely manner or at all, despite being requested to do so
b) He failed to communicate with the complainant in a timely manner or at all
c) He failed to comply with an undertaking to the Registrar's Committee that he would revert to the society within two weeks, which undertaking was given to the Registrar's Committee meeting on 5 November 2002
e) He failed to reply to correspondence from the society and in particular the society's letters of 5 September 2002, 18 September 2002, 30 September 2002, 8 November 2002, 21 November 2002, 19 December 2002, 13 January 2003 and 21 February 2003.

The tribunal ordered that the respondent solicitor:

a) Do stand censured
b) Pay a sum of €500 each in respect of charges (a), (b), (c) and (e) to the compensation fund
c) Pay the whole of the costs of the Law Society (including witnesses' expenses) as taxed by the taxing master of the High Court in default of agreement.

In the matter of Derek Stewart, solicitor, carrying on practice under the style and title of Stewart & Company, Solicitors, at 12 Parliament Street, Temple Bar, Dublin 2, and in the matter of the *Solicitors Acts, 1954 to 1994* [4498/DT337]
Law Society of Ireland (applicant)
Derek Stewart (respondent solicitor)

On 21 October 2003, the Solicitors Disciplinary Tribunal found that the respondent solicitor was guilty of misconduct in his practice as a solicitor in that he had:

a) Failed to file an accountant's report for the year ended 28 February 2001 in a timely manner or at all, in breach of regulation 21(1) of the *Solicitors' accounts regulations no 2* of 1984
b) Failed to comply with a written undertaking given to the society on 31 January 2002 to complete and lodge his accountant's report for the year ended 28 February 2001 and 28 February 2002 on or before 31 March 2002.

The tribunal ordered that the respondent solicitor:

a) Do stand censured
b) Pay the sum of €7,500 to the compensation fund
c) Pay the whole of the costs of the Law Society of Ireland to be taxed by a taxing master of the High Court in default of agreement.

In the matter of Valentine A Kirwan, solicitor, carrying on practice under the style and title of Kirwan & Company at 12 Herbert Place, Dublin 2, and in the matter of an application by the Law Society of Ireland to the Solicitors Disciplinary Tribunal and in the matter of the *Solicitors Acts, 1954 to 2002* [6158/DT412]
Law Society of Ireland (applicant)
Valentine A Kirwan (respondent solicitor)

On 25 March 2004, the Solicitors Disciplinary Tribunal found that the respondent solicitor was guilty of misconduct in his practice as a solicitor in that he had:

- Failed to file his accountant's report for the year ended 30 April 2002 in a timely manner or at all, in breach of regulation 21(1) of the *Solicitors' accounts regulations no 2* of 1984 as amended by regulation 21(1) of the *Solicitors' accounts regulations 2001* (statutory instrument no 421 of 2001).

The tribunal ordered that the respondent solicitor:

a) Is hereby advised
b) Pay a sum of €500 to the compensation fund
c) Pay the whole of the costs of the Law Society of Ireland as taxed by the taxing master of the High Court in default of agreement.

In the matter of Christopher Ryan, solicitor, carrying on practice under the style and title of Chris Ryan, Solicitor, at 18 North King Street, Dublin 7, and in the matter of an application by the Law Society of Ireland to the Solicitors Disciplinary Tribunal and in the matter of the *Solicitors Acts, 1954 to 2002* [4471/DT411]
Law Society of Ireland (applicant)
Christopher Ryan (respondent solicitor)

On 25 March 2004, the Solicitors Disciplinary Tribunal found that the respondent solicitor was guilty of misconduct in his practice as a solicitor in that he had:

- Failed to file his accountant's report for the year ended 30 April 2002 in a timely manner, in breach of regulation 21(1) of the *Solicitors' accounts regulations 2001* (statutory instrument no 421 of 2001), having only filed same with the society on 30 May 2003.

The tribunal ordered that the respondent solicitor:

a) Is hereby advised
b) Pay a sum of €500 to the compensation fund
c) Pay the whole of the costs of the Law Society as taxed by a taxing master of the High Court in default of agreement. G

Personal injury judgment

Employer liability – employee of the state – exposure to asbestos – application by state to dismiss claim on the basis that pleadings disclose no cause of action – whether any physical injury – issue of whether cases should be dismissed or stayed

CASE

***Kiernan Rafter v the Attorney General, the Minister for Justice, Equality and Law Reform and the Commissioner of An Garda Síochána*, High Court, judgment of Finnegan P on 26 February 2004.**

THE FACTS

Kiernan Rafter was employed by the state at Government Buildings. In the course of his employment, he was exposed to asbestos. He claims that in consequence of his exposure to asbestos he sustained personal injury. He issued a plenary summons on 8 May 2002. In the statement of claim, it was pleaded that when he became aware of his exposure to asbestos he suffered from worry and anxiety.

By notice of motion dated 18 July 2003, the state sought an order pursuant to order 19, rule 28 of the *Rules of the Superior Courts 1986* that Rafter's claim be struck out on the grounds that it disclosed no reasonable cause of action. In the alternative, the state sought an order dismissing Rafter's claim pursuant to the inherent jurisdiction of the court.

Order 19, rule 28 of the *Rules of the Superior Courts* provides as follows: 'The court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious the court may order the action to be stayed or dismissed, or judgment to be ordered accordingly, as may be just'.

JUDGMENT OF THE HIGH COURT

The case came before Finnegan P, who delivered judgment on 26 February 2004. Having set out the facts above, Finnegan P referred to the case of *Barry v Buckley* ([1981] 306), to the effect that the court can only make an order when the pleadings disclose no reasonable cause of action. The judge noted that the court had an inherent jurisdiction to stay proceedings and, on application made to exercise it, the court was not limited to the pleadings of the parties but was free to hear evidence and affidavits relating to the issues in the case.

Finnegan P stated that the court must be slow to exercise its jurisdiction to dismiss an action, referring to *Sun Fat Chan v Osseous Limited* ([1992] 1 IR 425).

The judge then considered issues in relation to the 'fear of disease cases' dealt with by the Supreme Court in *Fletcher v Commissioners of Public Works in Ireland* ([2003] 1 IR 465). In that case, Fletcher had been awarded damages by the High Court (O'Neill J) for psychiatric illness resulting from exposure to asbestos in the course of his employment, due to the want of care of the defendants, and Fletcher's subsequent awareness of the risk to his health arising from such exposure. The Supreme Court (Keane CJ, Denham, Murray, Hardiman and Geoghegan JJ) allowed the appeal and held that the law in Ireland should not be extended by the courts so as to allow the recovery by plaintiffs of damages for psychiatric injury resulting from an irrational fear of contracting a disease because of their negligent exposure to health risks by their employers while the risk was characterised by the medical advisers as remote. The court held that it was unreasonable to impose a duty of care on employers to guard against mere fear of disease, even if such fear might have led to a psychiatric condition.

Finnegan P noted that in Rafter's statement of claim, it was not pleaded that Rafter suffered from a recognised psychiatric illness but merely that he suffered from worry and anxiety. Finnegan P noted that the plaintiff must establish a physical injury and that no physical injury was expressly pleaded. Accordingly, based on the pleadings, Rafter's claim must fail and the state was entitled to have the claim dismissed or stayed under the *Rules of the Superior Courts*.

Where the inherent jurisdiction of the courts is relied upon, Finnegan P stated that he was entitled to have regard to evidence, and in this case there was an affidavit from Rafter's solicitor. The affidavit exhibited a report of Dr John A Griffin, consultant psychiatrist, dated 11 July 2002. This was relied upon as showing that Rafter in fact suffers from a recognised psychiatric condition. Having read the report, Finnegan P was not satisfied that the report was to this effect and rejected this argument.

The affidavit, however, raised an argument on the issue of liability. The affidavit referred to evidence given by Professor Luke Clancy in *Fletcher v Commissioners of Public Works in Ireland*, cited above, that persons exposed to inhalation of asbestos particles may suffer microscopic scarring of the inner surface of the lungs and that in Fletcher's case it was likely that he had inhaled asbestos fibres and that some would have remained in his body and caused microscopic scarring. However, Finnegan P stated that there was nothing on affidavit to suggest in the instant case, having regard to the degree of exposure to asbestos, that Rafter was likely to have suffered microscopic scarring.

The judge then stated that it was appropriate under the court's inherent jurisdiction that the claim should be dismissed or stayed.

In the circumstances of the case, Finnegan P considered it appropriate that the action should be stayed rather than dismissed. It may be that, on an application to amend the pleadings, Rafter may be able to produce evidence that he suffers from a recognised psychiatric

condition and that in the circumstances of his exposure to asbestos it was likely that he had inhaled asbestos fibres and some of them would have remained in his body and would have caused microscopic scarring.

Finnegan P stated that he was aware that the Supreme Court refrained from expressing any view as to whether the implantation of fibres into the lung could be described as physical injury. The president ordered that Rafter's action be stayed so however that Rafter should be entitled to amend his statement of claim and may bring a motion to do so. Such a motion should be grounded on an affidavit by medical experts that Rafter suffers from a recognised psychiatric illness and, in the circumstances of Rafter's exposure to asbestos, it was likely that he had inhaled asbestos fibres and that some of them would have remained in his body and caused microscopic scarring. G

This judgment was summarised by solicitor Dr Eamonn Hall.

First Law Update

www.firstlaw.ie

News from Ireland's on-line legal awareness service
Compiled by Karen Holmes for FirstLaw

ARBITRATION

Interest

Courts Act, 1981 – Arbitration Act, 1954 – *whether interest on the arbitrator's award should run from the date of the award or from the date of the High Court judgment enforcing the award*

The plaintiff and the defendant, both of whom are veterinary surgeons, entered into a partnership in 1989. Subsequently, difficulties arose between them as to the affairs of the partnership and they referred those differences to arbitration. The arbitrator made two interim awards before making his final award on 26 November 1996. Both interim awards expressly reserved for a future award the question of costs. In the final award, costs were awarded to the plaintiff. On 2 July 2001, the High Court granted the plaintiff liberty to enforce the arbitrator's award in the same manner as a judgment or order to the same effect. It was further ordered that the plaintiff recover against the defendant the sum of £30,331.65 (being the amount of the plaintiff's bill of costs) and the costs of the proceedings when taxed and ascertained. The plaintiff applied for interest on the bill of costs. The High Court judge refused to grant interest on the arbitrator's award. However, he allowed interest to accrue from the date of his judgment. The plaintiff appealed against that order of the High Court. In written submissions, counsel on behalf of the plaintiff submitted that an arbitrator's award of costs should carry statutory (*Courts Act*) interest as and from the date of the award in the same way as an award of costs in either High Court or Supreme Court proceedings carries statutory interest as and from the date of judgment and not from the date of the ascertaining of the amount of such costs. The plaintiff contended that the term 'sum' contained within section 34 of the *Arbitration Act, 1954* includes a sum that is unquantified at the time of the award, but quantified later. The defendant, on the other hand, maintained that the award in the case did not refer to any 'sum' because that term refers exclusively to a quantified sum, a specific sum of money.

The Supreme Court (Denham, Murray, Hardiman JJ) allowed the appeal, holding that:

1) Given its natural and ordinary meaning, the word 'sum' where it occurs in section 34 of the *Arbitration Act, 1954* is not confined to a specified sum but is capable of referring to a sum (as yet) unspecified
2) Although the term 'award' is not defined in the *Arbitration Act, 1954*, it has a clear meaning and refers to the decision of the arbitrator
3) In light of the construction of the 1954 act, the words 'sum' and 'term' have a plain meaning. It means that money directed to be paid by a decision of an arbitrator shall, unless the decision otherwise directs, carry interest as from the date of the decision and at the same rate as a judgment debt. This construction of section 34 would also be consistent with the principle in the case law on interest payable on costs in court decisions
4) The fact that the arbitration award requires to be enforced by order of the court cannot prevent interest thereon running from the date of the award to be enforced
5) The High Court erred in not including interest from the date of the award and in offering no reasons for departing from the usual rule.

***Horan v Quilter*, Supreme Court, 1/3/2004** [FL8906]

CRIMINAL

Appeal, *autrefois acquit*

Appeal – retrial – Courts of Justice Act, 1928 – *whether a prosecution should be prohibited in circumstances where an alternative charge had been withdrawn from the jury*

The applicant was tried in the Dublin Circuit Court on 7 December 2000 on foot of an indictment that originally contained only one count, namely, robbery contrary to section 23 of *Larceny Act 1916* as amended. The jury indicated to the trial judge that they had encountered difficulties reaching the verdict and, accordingly, the trial judge informed them that they could consider the alternative charges of assault with intent to rob and attempted robbery. The trial judge amended the indictment to contain two charges and the applicant was convicted by the jury of both. The trial judge directed the jury to enter a verdict of not guilty in respect of the original charge of robbery. The applicant appealed his conviction, and on 11 February 2002 the convictions and sentence were quashed and the court ordered that the applicant be retried for the offences on which he was convicted. Subsequently, the applicant was arraigned on foot of an indictment that contained the original charge of robbery only. On his arraignment, the applicant told the court that he had already been acquitted of that charge. The presiding judge took the view that this was a plea of 'not guilty'. At the beginning of the retrial, counsel on behalf of the applicant applied to the trial

judge by way of a plea of *autrefois acquit* on the basis that the applicant had already been found not guilty of this charge. The trial judge discharged the jury and made no further order. A new indictment was prepared by the DPP and contained the charge of attempted robbery only. Consequently, the applicant made an unsuccessful application to the High Court to grant an order prohibiting the respondents from taking any further steps or proceedings in the prosecution of the applicant. The applicant argued that when the matter had been withdrawn from the jury in the second trial, the effect of that was that there were no further charges remaining on the indictment and that it was spent. He further argued that the effect of withdrawing the robbery charge from the jury was that the criminal proceedings against him had been concluded.

The Supreme Court (Murray, Hardiman, McCracken JJ) dismissed the appeal, holding that:

1) The power given to the Court of Criminal Appeal by virtue of section 5 of the *Criminal Justice Act, 1928*, relating to retrials, is not the power to order a retrial in the sense that it makes it mandatory on the prosecution to retry the accused, but rather that its power is limited to 'authorising' a retrial. It is not mandatory for the prosecution to initiate a retrial
2) Section 5 of the 1928 act authorised the retrial of the applicant on the charges that were before the Court of Criminal Appeal, and only those charges. In the second trial, the applicant was not retried for the same offence as that which was the subject of conviction before the Court of Criminal Appeal, nor was he again indicted for such an offence. Instead, it was mistakenly sought to retry him for an offence for which he had already been acquitted, and to indict him for that offence. Accordingly, the authority given by the Court of Criminal Appeal pursuant to section 5 of the 1928 act has not yet been exercised and it remains a valid authority. The indictment that the DPP now seeks to bring before the court, and the retrial that he seeks, are both in accordance with the authority given by the Court of Criminal Appeal and are a perfectly valid exercise of that authority.

***McCowan v DPP*, Supreme Court, 5/3/2004** [FL8912]

Extradition

Correspondence of offences – phrase 'grievous bodily harm' used in warrants – no factual details contained in warrants – whether correspondence made out – Extradition Act, 1965, *ss47 and 50*

Two applications were heard together. The first proceedings related to an application by the attorney general for an order pursuant to s47 of the *Extradition Act, 1965* for the return of Mr Heywood to the UK on foot of three warrants relating to charges of unlawfully causing grievous bodily harm. The second proceedings concerned an application by Mr Heywood for an order pursuant to s50 of the 1965 act directing his release on the grounds that, given the history of the proceedings and the delay in efforts to extradite him, both on the part of the Irish and UK authorities, it would be invidious, unjust or oppressive to now return him to the UK to face his trial.

Peart J ordered Mr Heywood's release in respect of all three warrants, holding that the warrants were deficient in that they contained no factual details upon which the court could decide that the act complained of corresponded to an offence in this jurisdiction. Simply because the phrase 'grievous bodily harm' was a phrase well known in the state did not mean that correspondence was made out.

***Attorney General v Heywood*, High Court, Mr Justice Peart, 24/2/2004** [FL8919]

CONTRACT

Breach of duty, fraud

Breach of contract – misrepresentation – breach of fiduciary duty – whether the majority shareholder of a company is entitled to recover any loss from the defendant, given that any loss suffered was suffered by the company and not the individual shareholder

In 1974, the plaintiff incorporated a company known as Springmound (Holdings) Ltd, and he was the majority shareholder. Subsequently, Springmound purchased two hotels in Dublin, namely the Glencourt Hotel and the Elmar Hotel. Approximately 12 years later, the plaintiff left Ireland in order to pursue business interests abroad. The plaintiff maintained that prior to his departure he entered into an oral agreement with his brother, the defendant, whereby the defendant would run the bed-and-breakfast business being conducted at each hotel. The defendant was to use two trading companies for the purpose of running those bed-and-breakfast businesses, namely, Gembridge Taverns Limited in respect of the business of the Glencourt Hotel and Laurello Limited in respect of the Elmar Hotel. The plaintiff alleged that, on or about 18 June 1986, the defendant wrongfully and fraudulently caused Springmound to sell the Elmar to Gembridge for the sum of £50,000, and on the same date to sell the Glencourt to Laurello for the sum of £50,000 and that those sales were made without the knowledge, authority or consent of the plaintiff, were a fraud on the plaintiff, a fraud on Springmound, were in breach of the defendant's agreement with, and representations and warranties to the plaintiff, were in breach of the fiduciary duty owed by the defendant to the plaintiff, were *ultra vires* the capacity of Springmound, and that they were sold at a gross undervalue. The plaintiff also maintained that the defendant caused Gembridge and Laurello to be liquidated and that the two companies were dissolved on 15 November 2001 and 21 January 2002 respectively. Consequently, the plaintiff sued the defendant for damages for fraud, breach of contract, misrepresentation and breach of fiduciary duty. The defendant contended that the plaintiff's claim in reality was a claim which, if the facts were proven, could be brought only by the company, now in liquidation, because the damage suffered was in fact damage suffered by the company, that is, by the fraudulent sale of two of its assets – namely, the hotels. The defendant also disputed factual matters and maintained that the plaintiff could not succeed on the merits either. Accordingly, the defendant brought an application for an order dismissing the plaintiff's claim on the grounds that it disclosed no cause of action, or, in the alternative, an order dismissing the plaintiff's claim as being an abuse of process and as being frivolous and vexatious, and also sought an order striking out so much of the plaintiff's statement of claim as asserted rights on behalf of Springmound Limited.

Mr Justice Peart struck out as much of the plaintiff's statement of claim as asserted rights on behalf of Springmound (Holdings) Limited, holding that:

1) The essential matter for determination was whether, even if he could prove everything he alleged, the plaintiff was entitled to recover any loss from the defendant, given that the loss, if any, which has been suffered, has been suffered by the company, and not by the plaintiff as an individual shareholder
2) This is an action which is bound to fail, not because the plaintiff could not under any circumstances prove that something irregular occurred by which the hotels in question were sold without his knowledge, consent or agreement, but because, even if he did succeed in proving every-

thing that he alleged against the defendant, the law, as it stands, and as is well settled by now, did not provide him in his personal capacity as a shareholder with a remedy against the defendant in civil proceedings.

***Heaphy v Heaphy*, High Court, Mr Justice Peart, 15/1/2004** [FL8986]

DAMAGES

Redundancy, unfair dismissal

Employment – unfair dismissal – redundancy – injunction – damages – whether plaintiff could make a claim for unfair dismissal under the common law rules and therefore outside the statutory framework

The plaintiff, who was an engineer, joined KAO Information Systems in 1995. Subsequently, there was a transfer of undertaking by KAO to the defendant company in 1999 and the plaintiff's employment continued pursuant to the EU *Acquired rights directive*. The plaintiff was appointed client services manager of Microsoft Business by the defendant, pursuant to a contract dated 16 May 2000. That contract set out the relevant notice period required to be given in order to terminate the contract. In November 2003, the defendant decided to amalgamate the plaintiff's role and the position of contract centre manager to create a new business relationship manager role. The plaintiff unsuccessfully applied for the position. Subsequently, the plaintiff received a letter from the director of the defendant company stating that he was entitled to two months' notice of the termination of his employment together with statutory redundancy. The plaintiff was offered the choice of receiving pay in lieu of notice and an *ex gratia* payment equivalent to one month's salary. Further correspondence and meetings took place and the plaintiff stated that the 'purported redundancy' was not accepted by him. Consequently, the plaintiff was put on 'garden leave' with pay for the duration of the notice period. The plaintiff did not return to work and a plenary summons was issued on 3 February 2004, challenging the validity of the redundancy. On 4 February 2004, the plaintiff issued a notice of motion claiming certain financial and injunctive reliefs, including an order that the defendant continue to pay his salary and fund and maintain his pension and life assurance benefits until the trial of the action and also an injunction restraining the purported termination and the performance of the plaintiff's duties by any person other than the plaintiff. The plaintiff claimed that the issue to be tried was that he was unfairly dismissed because there was no valid redundancy and he was really dismissed because of criticisms made about him by Microsoft. The plaintiff also claimed that there must be an implied term in the contract that the employer must act reasonably and fairly. The defendants countered this argument by submitting that that was not a fair issue to be tried, as unfair dismissal is governed by the *Unfair Dismissals Acts*, which provide a statutory remedy which is mutually exclusive to the common-law remedy for damages.

Carroll J refused to grant the relief sought, holding that:

1) The case law adduced by the defendant supported the proposition that the common law claim for damages for wrongful dismissal and the statutory claim for unfair dismissal were mutually exclusive. The plaintiff was attempting to introduce a new obligation under the common law on the employer to act reasonably and fairly in the case of dismissal. However, at common law an employer can terminate employment for any reason or no reason provided adequate notice is given. There was no allegation by the plaintiff that the notice provided to him was inadequate. Accordingly, the plaintiff failed to demonstrate that there was a fair issue to be tried. *Parsons v Iarnród Éireann* ([1997] ELR 203) and *Johnson v Unisys Limited* ([2001] 2 AER 801) followed
2) *Obiter*: damages would be an adequate remedy and in fact would be the only remedy available to the plaintiff. It was highly unlikely that he would be reinstated in employment where the defendants were unwilling to take him back and had no place for him
3) *Obiter*: if the plaintiff did not succeed at the trial, there would be a real injustice to the defendant if it was obliged to pay the plaintiff his salary until the date of the trial. The case law adduced in support of that application involved cases that were emphasised as containing special or exceptional circumstances. The plaintiff did not allege irreparable loss and damage if deprived of his salary and he failed to make out a case on the balance of convenience that he should be paid his salary after the period of notice expired.

***Orr v Zomax Limited*, High Court, Ms Justice Carroll, 25/3/2004** [FL8944]

TORT

Medical negligence, *res ipsa loquitur*

Whether doctrine of res ipsa loquitur *applied – whether injury could have occurred if plaintiff had received appropriate care at all times*

The plaintiff was admitted to hospital and underwent an operation on his stomach area. After the operation, the plaintiff experienced severe pain in his right arm and right shoulder and had since experienced disability and hypersensitivity in the arm. It was common case that there was nothing wrong with the plaintiff's arm when he entered hospital. He brought a medical negligence action against the consultant surgeon who had carried out the operation and the hospital.

O'Donovan J found that the plaintiff was entitled to succeed against the hospital, holding that the doctrine of *res ipsa loquitur* applied. The plaintiff's claim against the surgeon failed. The injury suffered by the plaintiff had to be attributable to some want of care while he was under the control of the hospital and the court was entitled to conclude that the hospital was responsible without being able to say precisely how it was caused.

***Doherty v Reynolds*, High Court, Mr Justice O'Donovan, 13/2/2004** [FL8899]

Personal injuries, dismissal of proceedings

Exposure to asbestos – no recognised psychiatric or physical injury pleaded – whether oppressive to defendant to allow claim to go to hearing

The defendant sought an order dismissing the plaintiff's claim on grounds that the pleadings disclosed no reasonable cause of action. It was agreed that the determination of the motion would also regulate a number of other identified actions. The plaintiff pleaded that he sustained injury as a result of exposure to asbestos. He pleaded that he became annoyed and upset when he became aware of the exposure but did not plead any recognised psychiatric or physical injury.

Finnegan P made an order staying the actions, holding that the law in general provided no remedy for annoyance, upset or distress. It would be oppressive to allow the claims to go to hearing where, on the pleadings, no recognised psychiatric illness was pleaded.

***Packenham v Irish Ferries Ltd*, High Court, Mr Justice Finnegan, 26/2/2004** [FL8961] G

The information contained here is taken from FirstLaw's Legal Current Awareness Service, published every day on the internet at www.firstlaw.ie. *For more information, contact bartdaly@firstlaw.ie or FirstLaw, Merchants Court, Merchants Quay, Dublin 8, tel: 01 679 0370, fax: 01 679 0057.*

Eurlegal

News from the EU and International Affairs Committee
Edited by TP Kennedy, director of education, Law Society of Ireland

A new era in European merger control

The new EC merger regulation (ECMR) came into force on 1 May 2004. This marks the most significant overhaul of European merger-control law since its introduction over a decade ago. The reform covers the jurisdictional, procedural and substantive aspects of the ECMR. A number of important non-legislative developments have also been adopted.

The reform process began with the publication of a green paper by the European Commission in late 2001. The following year, the commission saw three of its decisions to prohibit a merger overturned by the European Court of First Instance. The shockwaves generated by these setbacks gave further impetus to the commission's efforts to revamp European merger control. In late 2002, after examining the many responses to its proposals, the commission adopted the so-called 'Christmas package' containing a wide range of proposed reforms. This package of initiatives included a legislative proposal for a revised ECMR together with various internal reforms, such as proposed guidelines on horizontal mergers and a series of draft best practices. On 20 January 2004, after a lengthy negotiation period, the EU Council of Ministers adopted council regulation EC 139/2004 on the control of concentrations between undertakings.

Jurisdictional thresholds

The major advantage of the ECMR is the 'one-stop shop' principle. This means that a proposed merger may be assessed by the commission alone, rather than being subject to different review processes in one or more individual EU member states. The one-stop shop reduces red tape and increases legal certainty.

For a merger or acquisition (described in the ECMR as a 'concentration') to be notifiable under the ECMR, the parties involved must have an cumulative global turnover of more than €5 billion, and each of at least two of the parties must have a cumulative EU-wide sales of more than €250 million (unless each achieves more than two-thirds of its EU turnover in one and the same EU member state). There is also an alternative and more complicated test where notification will be required if the parties' cumulative global turnover is more than €2.5 billion and where the parties individually and collectively satisfy a number of EU-wide and EU member-state sales thresholds.

Given that the commission's stated aim was to reduce the number of multiple filings under national merger-control rules, it is perhaps unfortunate that the ECMR's existing turnover thresholds were not lowered. It may nevertheless be easier for merging parties to satisfy these jurisdictional thresholds, as, with the addition of ten new EU member states in May 2004, the ECMR will apply to the parties' sales in a considerably larger geographical area.

Transactions that do not satisfy the ECMR thresholds may require notification under a number of different national merger-control regimes. Given the fact that the individual review periods vary under national merger-control rules, these so-called 'multi-jurisdictional' filings may significantly complicate the completion of transactions. Multiple notifications may also lead to conflicting outcomes.

Therefore, in order to make it easier for companies to avail of the one-stop shop, the EU has reformed the ECMR referral process. The reform allows mergers that fall under national rules to be reviewed by DG Competition (the commission's merger-control department). It also permits transactions that trigger the ECMR thresholds to be examined under national merger-control rules. The referral procedures under the old ECMR were seldom used. This was perhaps because only the national competition authorities had the right to request a referral. Merging parties now have the exclusive right, prior to notification, to request a referral both from an EU member state to the commission and from the commission to an EU member state. Moreover, national competition authorities (either on their own initiative or following an invitation from the commission) retain the right to request a post-notification referral in both directions.

The commission has recently published draft guidelines on case allocation between the commission and EU member states. These outline the legal requirements (and other factors) to be considered by the commission, national competition authorities and the merging parties when contemplating pre- or post-filing referrals. One of the key criteria is the likely *locus* of the competitive effects of the proposed merger. The draft guidelines also describe the mechanics of the referral system. It is expected that these guidelines will be finalised this summer.

Member state to commission

Parties to transactions that do not require a mandatory filing under the ECMR may now seek to benefit from the one-stop shop, provided the proposed merger is capable of being reviewed by the national competition authority in three or more EU member states. Prior to notification to these national authorities, the parties may make a reasoned request to the commission for the transaction to be referred to it. Such a request will be deemed accepted if no affected EU member state objects within 15 working days. Silence will be seen as assent.

This reform poses potential difficulties. For instance, a single EU member state's opposition will be sufficient to prevent a referral to the commission. Therefore it would be worthwhile ensuring that this veto will not be applied before a request is made by the parties. Accordingly, the merging parties should invoke the referral procedure early, well before concluding the agreement.

Commission to member state

In addition, parties will be able, prior to notification under the ECMR, to seek the referral of a merger to a national merger-control body on the basis that it may significantly affect competition within a particular EU member state. Provided that the

EU member state concerned does not object, the commission must decide whether or not to comply with the request within 25 working days. Silence on the part of the commission is deemed to constitute agreement.

The purpose of this reform is to allow the 'best placed' regulator to review the proposed merger. The obvious disadvantage is that, in requesting a referral, merging parties must identify potential competition issues in particular national or local markets. As the commission is not bound to accede to the request, parties should take soundings from the commission, and possibly the relevant national competition authority, at an early stage.

Extraterritoriality

Notably absent from the reforms is any attempt to deal with the extraterritoriality of European merger control. Clearly, the commission should review any transaction (provided the turnover thresholds are met) that, notwithstanding the nationality of the companies involved, may affect competition in the EU. However, should the commission review the establishment of joint ventures where the proposed transaction has no effect in Europe? For instance, if two European construction companies establish a joint venture in Rio de Janeiro and the ECMR thresholds are met, a notification to the commission is required. Is this mandatory filing justified in a situation, such as the Brazilian example, where the joint venture will have no actual impact on competition in Europe? This issue will need to be addressed in the future.

Procedural reform

Another major change is that the new ECMR will allow parties to file a notification prior to the conclusion of a binding agreement. Until now, parties have been required to file within one week of the conclusion of an agreement, the announcement of a public bid or the acquisition of a controlling interest. (The commission has rarely enforced this one-week deadline.) This requirement is retained in the new ECMR, but without any filing deadline. Merging parties should, however, notify their transaction so as to give the commission sufficient time to review and approve the deal before the intended completion date. In addition, the parties may notify where they show in good faith that they intend to conclude an agreement (producing, for example, a letter of intent) or that they plan to make a public bid, provided both situations result in a concentration which satisfies the ECMR's turnover thresholds.

A subtle twist, but one that heralds a major extension in the timing for clearances, is the requirement to calculate all ECMR deadlines in terms of working rather than calendar days. The phase I review period under the previous ECMR was very tight – one calendar month. The commission will now usually take up to 25 working days – in effect five weeks – from the date of receipt of a complete notification to review a merger in phase I.

The new regime strengthens the commission's powers of investigation regarding mergers. In particular, the commission will be able to examine and take copies of documents from a business premises during a surprise visit or 'dawn raid'. However, in contrast to its new powers under European competition enforcement rules, the commission remains unable to conduct searches of private homes.

In addition to its pre-existing powers to request information, the commission will also be able to conduct interviews with an individual or representative of a company for the purposes of its investigation into a merger, providing that consent is obtained. These discussions may be carried out 'face to face', by telephone or by videoconference.

Substantive test

Under the previous regime, the commission was legally obliged to prohibit a merger that would have 'created or strengthened a dominant position'. The difficulty with this test was that it did not allow DG Competition to deal with a situation where there were no dominance issues, but competition concerns nonetheless resulted from the existence of a non-collusive oligopoly. Where such an oligopoly exists, the concentration may have the effect of eliminating or dampening competition.

In the legislative process leading up to the adoption of the new ECMR, the UK and Ireland both recommended the acceptance of the 'substantial lessening of competition' test that each had recently introduced into its national merger-control regime. Certain EU member states wanted to retain the existing 'dominance' test, while others argued for the adoption of compromise wording.

The EU ultimately decided to adopt a new substantive test. A merger will be prohibited if it 'significantly impedes effective competition'. (This is likely to become known as the SIEC test.) This will particularly be the case where a dominant position has been created or strengthened. This SIEC test will extend beyond this, but only to situations where a proposed merger would give rise to anti-competitive effects resulting from the non-co-ordinated behaviour of undertakings that would not have a dominant position on the relevant market.

Guidelines on horizontal mergers

In conjunction with the adoption of the SIEC test, the commission has published guidelines on the assessment of transactions between actual or potential competitors. The purpose of these guidelines is to set out the commission's approach to transactions commonly known as horizontal mergers. The aim is to provide greater predictability with a view to increasing legal certainty for all concerned.

These guidelines explore the possible anti-competitive effects of horizontal mergers and consider the main ways in which a horizontal merger may significantly impede competition. The commission will examine whether a proposed transaction will allow the merged entity to raise prices profitably (non-co-ordinated or unilateral effects) or whether a proposed merger in a concentrated market will increase the likelihood that companies will co-ordinate their behaviour with a resulting increase in prices (co-ordinated effects). The guidelines also examine situations whereby efficiencies may counteract the proposed transaction's adverse effects on competition. The key criterion in examining efficiency claims is that consumers should not be worse off as a result of the

proposed merger. Any efficiencies must be merger-specific, likely to materialise and substantial enough to outweigh any anti-competitive effects of the proposed transaction.

The commission plans to issue guidance on vertical and conglomerate mergers by the end of 2004.

Best practices

DG Competition has adopted a series of best practices regarding the day-to-day conduct of EC merger-control proceedings. It intends to provide the parties with increased and earlier opportunities to defend their proposed merger. The notifying parties will normally be afforded the opportunity of attending a 'state of play' meeting at five different points in the phase I and phase II procedure. The purpose of these meetings is to provide a voluntary forum for the exchange of views between the notifying parties and the DG Competition case team.

The best practices also encourage the parties to enter into pre-notification contacts with DG Competition. This will provide an opportunity to discuss jurisdictional, substantive and other issues regarding the proposed transaction.

From the parties' perspective, it is important that any competition issues are identified as early as possible.

Fines and forms

Under the old ECMR, the maximum penalty for failure to notify was €50,000. Under the new rules, this has been increased to 10% of the relevant company's global turnover. Moreover, a company may be fined up to 1% of its worldwide turnover for supplying incorrect information to the commission in the context of a notification or for giving incorrect answers to question asked by commission officials during a 'dawn raid'. These changes align the commission's power to impose fines for breaches of the ECMR with its powers under European anti-trust rules.

Commission regulation EC 802/2004 implementing the new ECMR was adopted on 7 April. This implementing regulation sets out detailed provisions regarding notifications, time-limits, access to the commission's file and treatment of confidential information. Notifications must be submitted to the commission on a revised form CO. This new form is annexed to the implementing regulation. A request made by merging parties for a referral prior to notification must be submitted on a form RS (which is also annexed to the implementing regulation).

The new ECMR, the implementing regulation and other related documents, including the guidelines on horizontal mergers, the draft notice on case allocation and the series of best practices are available at: *http://europa.eu.int/comm/competition/mergers/legislation/regulation/#implementing* .

Companies should welcome the increased transparency brought about by the adoption of substantive guidelines and the introduction of procedural safeguards for notifying parties. However, businesses may worry that changes to the substantive test may lead to increased future intervention by the commission. Moreover, there are clear concerns that the operation of the new referral system will result in undue delays. Therefore, it is all the more important that any merger control or competition issues are addressed as early as possible. G

Cormac Little is an associate with Dublin law firm William Fry.

Recent developments in European law

AGRICULTURE

Case C-294/01 *Granarolo SpA v Comune di Bologna*, 13 November 2003. Granarolo markets in Italy high-temperature pasteurised milk produced in Germany. The Comune di Bologna fined it for marking on packaging a use-by date of more than four days after the date of treatment. Granarolo appealed, arguing that the Italian law was contrary to EC law. It argued that its milk was pasteurised by a steam infusion procedure, which is more powerful than traditional methods and which results in milk with a longer shelf life, but with nutritional qualities comparable to those of fresh pasteurised milk.

The ECJ held that directive 92/46, laying down health rules on the production and marketing of milk, is intended to facilitate the marketing and free movement of milk products covered by it. This measure will be compromised by a member state fixing a use-by date for a milk product that is likely to constitute a serious obstacle to the marketing of those products in a state. Italian legislation fixed the same use-by date for high-temperature pasteurised milk and fresh pasteurised milk. The advantage of high-temperature pasteurised milk is that it has a longer shelf life, and to prevent it being marketed as having this advantage puts a serious obstacle in the way of its free movement. Thus, the ECJ held that the Italian legislation was precluded by directive 92/46 (as amended) and articles 28 and 30 of the treaty.

COMPETITION

Case C-418/01 *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG*, 29 April 2004. Both parties are involved in the tracking of sales of pharmaceutical and healthcare products. IMS provides pharmaceutical laboratories with German regional sales data on pharmaceutical products, formatted in a particular structure. It not only sold this structure but also distributed it to pharmacies and doctors' surgeries for free. As a result, its structure became a model to which clients adapted their information and distribution systems.

In 1998, a director left IMS and established his own company, PII. This company attempted to sell German regional sales data using a different structure. As this did not succeed, it worked with structures very similar to those of IMS. PII was acquired by NDC.

IMS obtained a court order prohibiting NDC from using any structure derived from its structure, as this was a database protected by copyright. Questions were referred to the ECJ asking whether the refusal of a licence by IMS to NDC to use its structures could be construed as an abuse of a dominant position. The ECJ firstly considered whether this database was indispensable to an undertaking to carry out business in the relevant market. In this case, the high degree of participation by the laboratories in the improvement of the structures may have resulted in a high degree of technical dependency by users on these structures. The laboratories would have to make very significant technical and financial efforts to be able to acquire data presented on the basis of an alternative structure.

The exclusive right to reproduction forms part of the copyright-holder's rights. A refusal of a licence cannot, of itself, be an abuse of a dominant position. However, the exercise of an exclusive right can, in exceptional circumstances, give rise to abusive conduct. In order for the refusal by an undertaking that owns a copyright to give access to a product or service indispensable to carry on business to be regarded as an abuse, three conditions must be fulfilled: the undertaking requesting the licence must intend to offer new products or services not offered by the owner of the copyright and for which there is a potential consumer demand; the refusal cannot be justified by objective considerations; and the refusal must be such as to reserve to the undertaking that owns the copyright the relevant market by eliminating all competition on that market.

EMPLOYMENT

Case C-340/01 *Carlito Abler and Others v Sodexho Catering Gesellschaft mbH*, 20 November 2003. In late 1990, an orthopaedic hospital in Austria agreed with an undertaking, Sanrest, that it would take over the management of catering services in the hospital, providing patients and staff with meals and drinks. The hospital provided the premises, water, energy and equipment. Sanrest took over the running of the cafeteria. Until 1998, it provided outside customers with meals prepared in the hospital kitchen. Following disagreements between the hospital and Sanrest, the agreement was terminated. After a tendering process, the contract was awarded to a new undertaking, Sodexho.

Sodexho refused to take over materials, stock and employees from Sanrest. It received no accounts, menu plans, diet plans or general records from Sanrest. In late 1999, Sanrest terminated the contracts of its employees who had worked in the hospital. They brought an action against Sodexho, arguing that their employment continued with it on the basis of a transfer of undertakings. The ECJ held that directive 77/187 on transfer of undertakings did cover a situation such as this. The second contractor used substantial parts of the tangible assets previously used by the first contractor. The second contractor's expression of intent not to take on the employees of the first contractor was not material.

INTELLECTUAL PROPERTY

Case C-216/01 *Budejovicky Budvar, národni podnik v Rudolf Ammersin GmbH*, 18 November 2003. Budvar exports a beer called Budweiser Budvar to Austria. Ammersin markets another beer called American Bud in Austria. In 1999, Budvar brought proceedings against Ammersin, seeking to restrain it from using in Austria the name 'Bud' or similar designations likely to cause confusion for beer or similar goods. An Austrian court granted the order. An appeal court stayed its proceedings and referred a number of questions to the ECJ.

It held that article 28 of the treaty and regulation 2081/92 on the protection of geographical indications did not preclude the application of a bilateral agreement between a member state and a third state under which a simple and indirect indication of geographical origin from that third state is protected. This is the case whether or not there is any risk of consumers being misled. The import of a product lawfully marketed in another member state may be prevented. Article 28 precludes the application of such a bilateral agreement under which a name that in that state does not directly or indirectly refer to the geographical source of the product that is designates is accorded protection in the importing member state. G

Kilroy was here

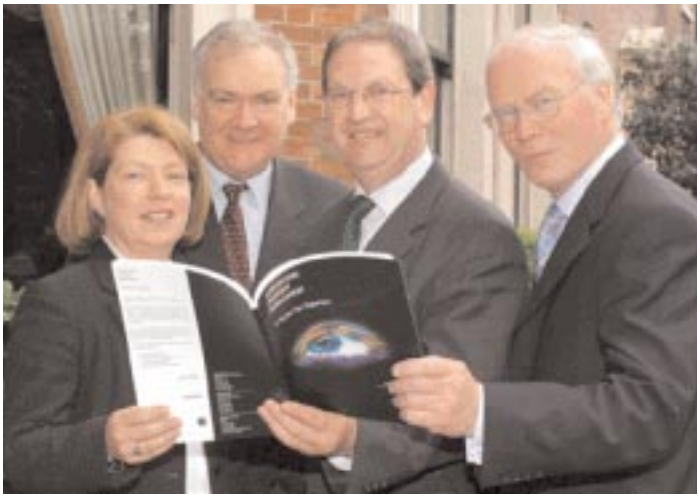
On 6 May, Kilroys Solicitors celebrated 50 years in practice with a party at the Mansion House, Dublin, as guests of the lord mayor. Pictured at the event are Paddy Kilroy, who founded the firm in 1954, and Dorothy Kilroy, alongside some of the firm's partners *(from left)*: Kevin O'Brien, Joanne Griffin, Thomas Simpson, Anthony Layng, Hilary Griffey and Eamon Jones

The justice league

Pictured at the recent CPD seminar on the *European Convention on Human Rights Act, 2003* at Blackhall Place are *(from left)* the Law Society's Barbara Joyce, Terence Lacey of Franklin, Solicitors, Belfast, Michael Farrell of Michael E Hanahoe, Solicitors, Mr Justice Nial Fennelly, of the Supreme Court, Noeline Blackwell of Blackwell & Company, TCD's Professor William Binchy and Muriel Walls of McCann FitzGerald

That's our girl

The Irish Professional Photographers' Association gave Roslyn Byrne the award for the best commercial image for 2004, out of more than 1,000 pictures, at an awards ceremony at the Burlington Hotel. She was also recently named UK Merit Winner by Fuji UK and Kodak. Roslyn *(centre)* is a freelance photographer who regularly shoots for the *Gazette* and is responsible for many of the magazine's covers



Export import

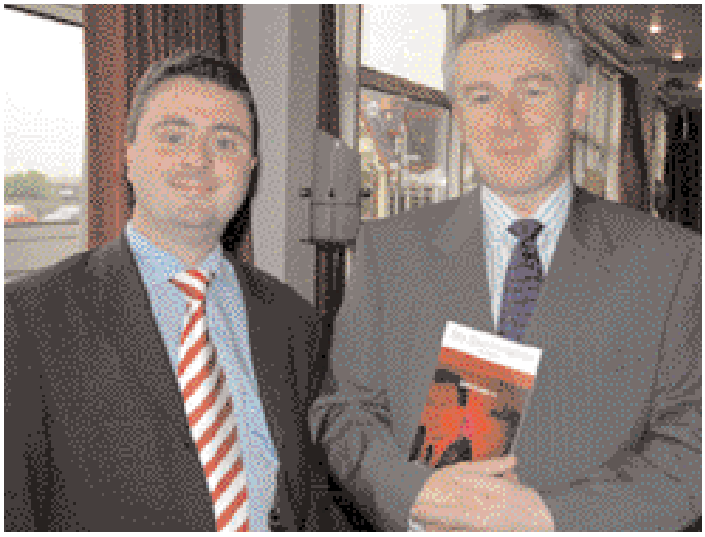
Pictured at the launch in May of *Intellectual property management: a guide for exporters*, published by the Irish Exporters Association in conjunction with Tomkins & Co, are *(from left)* Dr Christina Gates of Tomkins & Co, Mike Feeney of Enterprise Ireland, minister of state for trade Michael Ahern and John Whelan of the Irish Exporters Association

Spring in their step

The Lady Solicitors' Golf Society had a very successful spring outing on 23 April at the City West Golf Club. Overall winners on the day were Maria O'Brien (first), Marie Garaghy (second), Mary Delahunty (third), Maeve Carroll (fourth), Mary Casey (first nine), Rhona Kelly (second nine). Winners in category 1 were Mary C Dillon (first), Rosemary Kirwan (second) and Emer Foley (third) and, in category 2, Michele Linnane (first), Martina O'Gorman (second) and Ursula McSweeney (third). The society's next outing will be on 10 September at Seafield Golf Club, Ballymoney, Co Wexford. If you would like to be on the mailing list, contact Jane Mathews, BCM Hanby Wallace, on tel: 01 418 6900, e-mail: jmathews@bcmhanbywallace.com.

The winners

Crime and punishment
Kerry Law Society members recognise the sterling service of retired District Court clerk Richard Maguire and retired chief superintendent for the Kerry area, Fred Garvey



Keep your hands to yourself
John Eardly BL, author of *Sex discrimination at work: a practical guide to the law in Ireland*, and Gary Byrne, managing partner of BCM Hanby Wallace, who was guest speaker at the book's launch on 12 May

Helping solicitors to respond to the Law Society
The panel that assists solicitors who are in difficulty with the Law Society. Pictured are *(standing, from left)* registrar of solicitors John Elliot, Dundalk solicitor Roger McGinley, Therese Clarke, secretary of the society's Guidance and Ethics Committee, and Tallaght solicitor Oonagh Sheridan; *(seated, from left)* Wicklow solicitor Finola Freehill, John O'Malley, chairman of the Guidance and Ethics Committee, and Maynooth solicitor Mary Cowhey

Six of the best
McCann FitzGerald has elected six new partners: *(from left)* Jane Ward, Hugh Beattie, Valerie Lawlor, Mark White, Fergus Gillen and Sheila Gibbons

Where there's a will, there's a way
The speakers and chairman at the recent *Probate practice revisited* conference in Galway with the Galway Bar Association president *(from left)*: Anne McKenna and Nuala Casey of Daly Lynch Crowe & Morris; Paula Fallon, Paula Fallon & Associates; Donough McGuinness, DP Hurley & Co (chairman); Annette O'Connell, Probate Office, and GBA president Ann Jennings

Certificate in legal Spanish

The Spanish Main
Pictured with the recipients at the conferring ceremony for the inaugural *Certificate in legal Spanish* were Stuart Gilhooly, vice-chairman of the Education Committee, the Spanish ambassador D Enrique Pastor, Law Society director general Ken Murphy and Eva Massa, lecturer on the course

Mainly on the plain
Law Society director of education TP Kennedy, lecturer Eva Massa, Stuart Gilhooly, vice-chairman of the Education Committee, Spanish ambassador D Enrique Pastor and Sra de Pastor, director general Ken Murphy, and Sylvia McNeece, legal development manager

OBITUARY

Eamonn O'Beirne
25 November 1911 – 16 February 2004

Eamonn O'Beirne was born in 1911 at the family home, Prince of Wales Terrace, Bray, Co Wicklow. His father was a Dublin solicitor practising at 2 Inns Quay, Dublin 7, and tragically died before Eamonn was born. His mother also tragically died soon after his birth, and Eamonn and his sister Kitty were reared by the Cullen family at Rathmore, Ashford, Co Wicklow. Eamonn was educated at school in Wicklow town and later at Castleknock College, where he was a boarder for a number of years. He excelled in his examinations at school and also played on the junior and senior rugby teams. He became apprenticed to his cousin, Augustus Cullen, and qualified as a solicitor in 1932. They were partners for many years in the practice Cullen & O'Beirne. Among Eamonn's numerous apprentices were Laurence Cullen (former president of the Law Society), Michael Staines (late of John J O'Hare Solicitors and an active Law Society committee member), Gus Cullen Junior and his son Barry, who is now principal of Cullen & O'Beirne Solicitors. Eamonn's wife Peggy died on 30 June 1980.

Eamonn was well known for his meticulous standards of practice and ethics, and his honesty and integrity was unquestionable. He will be deeply missed by the many clients he loyally served over many years. Eamonn continued working in the practice until his passing on 16 February 2004.

Eamonn died at home at Prince of Wales Terrace, Bray, in the house where he had been born. He was in his 73rd year of practice and was 92 years of age.

Eamonn will be sadly missed by his children, Louise, Brian, Edward and Barry, grandchildren, relatives and friends. His sons, Edward and Barry, are well known solicitors and continue in their father's footsteps. G

BO'B

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 4 June 2004)

Regd owner: Bernard Harten, Callanagh, Kilcogy, Co Cavan; folio: 16543; lands: Cloncovet; area: 9.2141 hectares, 0.2326 hectares, 1466 hectares; **Co Cavan**

Regd owner: Brendan L Brophy; folio: 1360L; lands: Carlow and barony of Carlow; **Co Carlow**

Regd owner: James and Caitriona Curry; folio: 16411F; lands: Castlemore and barony of Rathvilly; **Co Carlow**

Regd owner: Sandra Dempsey; folio: 11963F; lands: Ballyellen and Tomdarragh and barony of Idrone East; **Co Carlow**

Regd owner: Jean Margaret Biggs; folios: (1) and (2) 29494 and (1a) and (2a) 130F; lands: Glencolumbkille South and barony of Burren; area: (1) 1.9670 hectares, (2) 0.4700 hectares, (1a) 0.1188 hectares and (2a) 0.4299 hectares; **Co Clare**

Regd owner: James Fahy and Mary Fahy; folio: 5716F; lands: townland of Clonroad More and barony of Islands; **Co Clare**

Regd owner: John and Esther Corcoran; folio: 5650F; lands: plots of ground being part of the townland of Ballynabearna in the barony of Kinlea and county of Cork; **Co Cork**

Regd owner: Irish Fertilizer Industries Limited; folios: 58810 and 57639F; lands: plots of ground being part of the townland of Marino in the barony of Barrymore and county of Cork; **Co Cork**

Regd owner: Shane Jennings; folio: 64536F; lands: plots of ground being part of the townland of Ballydaheen (Ed Clonpriest) and of Youghal Park (Ed Clonpriest) in the barony of Imokilly and county of Cork; **Co Cork**

Regd owner: Martin and Mary Jolley; folio: 8495F; lands: a plot of ground being part of the townland of Ballygroman Lower and barony of Muskerry East and county of Cork; **Co Cork**

Regd owner: Sarah J Murray (deceased); folio: 9764F; lands: plots of ground being part of the townland of Knocknagorty in the barony of Cork and county of Cork; **Co Cork**

Regd owner: William O'Brien, folio: 22459; lands: plots of ground being part of the townland of Raleigh South in the barony of Muskerry West and county of Cork; **Co Cork**

Regd owner: Jeremiah and Eileen O'Mahony; folio: 3559F; lands: a plot of ground being part of the townland of Loughbeg in the barony of Kerrycurrihy and county of Cork; **Co Cork**

Regd owner: Denis and Gobnait Kelly; folio: 35710F; lands: a plot of ground known as 4 Shandon Court situate in the parish of St Anne's, Shandon and county borough of Cork; **Co Cork**

Regd owner: Patrick R Barry; folio: 30405; lands: plots of ground being part of the townland of Banduff in the barony of Cork and county of Cork; **Co Cork**

Regd owner: Michael Harrington; folio: 28116; lands: plots of ground being part of the townland of Lackavane in the barony of Bear and county of Cork; **Co Cork**

Regd owner: Richard J and Mary C Moloney; folio: 46921F; lands: plots of ground being part of the townland of Ballincollig in the barony of Muskerry East and county of Cork; **Co Cork**

Regd owner: Gerard Roche and Majella McDonnell; folio: 59187F; lands: plots of ground being part of the townland of Ballymacallen in the barony of Fermoy and county of Cork; **Co Cork**

Regd owner: Anne Twomey; folio: 5955F; lands: plots of ground being part of the townland of Ullanes West in the barony of Muskerry West and county of Cork; **Co Cork**

Regd owner: John E Boyle, Ardara, Co Donegal; folio: 5605; lands: Drumbaran; area: 0.0025 hectares and 0.0164 hectares; **Co Donegal**

Regd owner: David Craig, Naran, Portnoo, Co Donegal; folio: 13835F; lands: Naran; area: 0.210 hectares; **Co Donegal**

Regd owner: John Diver, Carnagane, Moville, Co Donegal; folio: 29033F; lands: Ballynally; **Co Donegal**

Regd owner: Pauline Murray, 48 Solomon's Hill, Glencar Scotch, Letterkenny, Co Donegal; folio: 45784F; lands: Glencar Scotch; **Co Donegal**

Regd owner: Geraldine Browne, Porthall, Lifford, Co Donegal; folio: 6525F; lands: Coneyburrow; **Co Donegal**

Regd owner: Michael Slevin, Ruskey, Convoy, Co Donegal; folio: 565R; lands: Roosky Upper; area: 15.7195 hectares; **Co Donegal**

Regd owner: William Doherty, The Rock, Churchill, Letterkenny, Co Donegal; folio: 40484; lands: Manorcuningham Churchland Isle; area: 0.8093 hectares; **Co Donegal**

Regd owner: Samuel McElhinney, Manorcunningham, Co Donegal; folio: 7672F; lands: Raymoghy; **Co Donegal**

Regd owner: Patrick Augustine Daly; folio: DN14296L; lands: property situate on the east side of Ballygall Road East in the parish of Finglas and district of Finglas North; **Co Dublin**

Regd owner: Jane McCrudden; folio: DN5359F; lands: property situate in the townland of Rush and barony of Balrothery;

Co Dublin

Regd owner: John Handley and Niamh Larrissey; folio: DN 61300L; lands: property known as 6 Homelawn Villas situate in the parish and district of Tallaght; **Co Dublin**

Regd owner: Thomas O'Toole; folio: 35684F; lands: Co Dublin; **Co Dublin**

Regd owner: Eoin Quinn and Cathy Quinn; folio: DN10673; lands: property situate in the townland of Ballinascorney Lower and barony of Uppercross; **Co Dublin**

Regd owner: Aylmer J Walsh and Brigid Walsh; folio: DN9521L; lands: property situate on the west side of Killiney Hill Road in the parish of Kill and borough of Dun Laoghaire; **Co Dublin**

Regd owner: Thomas Nolan; folio: 8253; lands: property situate in the townland of Newtown, Castlebyrn Division; **Co Dublin**

Regd owner: Colm Byrne; folio: DN122034F; lands: property situate in the townland of Huntstown and barony of Castleknock; **Co Dublin**

Regd owner: Eastern Health Board; folio: DN6232; lands: (1) a plot of ground being part of the townland of Yellow Walls and barony of Uppercross, (2) a plot of ground situate in the townland of Ballydowd and barony of Newcastle, (3) a plot of ground situate on the south side of Lucan Road situate in the townland of Ballydowd and barony of Newcastle, (4) a plot of ground situate on the south side of the Lucan Road situate in the townland of Ballydowd and barony of Newcastle, (5) a plot of ground situate to the south of the Lucan Road situate in the townland of Ballyowen and barony of Newcastle, (6) a plot of ground situate to the south of the Lucan road situate in the townland of Yellow Walls and barony of Uppercross; **Co Dublin**

Regd owner: Caitriona Scanlon; folio: DN128699F; lands: property at 113 Sundale Park, Tallaght, Dublin 24; **Co Dublin**

Regd owner: SPH Properties Limited; folios: 16468, 36080F, 60840F, 65207F; lands: commercial premises at Lower Ballymount Road, Walkinstown, Dublin 11, being the premises comprised in the above folios; **Co Dublin**

Regd owner: Vincent Cosgrove; folio: DN10961; lands: property situate in the townland of Rathcoole and barony of Newcastle; **Co Dublin**

Regd owner: Martin F O'Malley; folio: 1244F; lands: townland of Cloon and barony of Ballynahinch; area: 1 acre; **Co Galway**

Regd owner: Philip O'Connor; folio: 46355; lands: Galway; **Co Galway**

Regd owner: Thomas Lydon; folio: 22257; lands: townland of Dangan Lower and barony of Galway; area: 2.0610 hectares and 14.75 hectares; **Co Galway**

Regd owner: Daniel Relihan; folio: 25783; lands: townland of Knocknacaheragh and barony of Iraghticonnor; **Co Kerry**

Regd owner: Breda Galway; folio: 3676; lands: Baronsland and barony of Gowran; **Co Kilkenny**

Regd owner: Irish Shell and BP Limited, 13/16 Fleet Street, Dublin; folio: 18502; lands: Knockmacrory; area: 0.2858 hectares; **Co Leitrim**

Regd owner: Michael Callanan; folio: 11295; lands: townland of Castlefarm and barony of Smallcounty; **Co Limerick**

Regd owner: Leslie D Hartigan; folio: 27061; lands: townland of Stradbally North and barony of Clanwilliam; **Co Limerick**

Regd owner: John and Philomena Power; folio: 2267 Co Limerick; lands: townland of Ballyvockoge and barony of Connello Lower; **Co Limerick**

Regd owner: John Donald, James McCourt & Son, Solicitors, Francis Street, Dundalk, Co Louth; folio: 1570L; lands: Long Avenue; area: 0.0202 hectares; **Co Louth**

Regd owner: Michael Murphy, 22 Eaton Square, Terenure, Dublin; folio: 8264 and 8421; lands: Cornamucklagh; area: 0.578 hectares; **Co Louth**

Regd owner: Joseph C Garvey; folio: 30301; lands: townland of (1), (2), (3) and (4) Curraghadooey and barony of Clanmorris; area: (1) 1 acre, (2) 11 perches, (3) 13 acres, 3 roods, 24 perches and (4) 4 acres, 1 rood, 30 perches; **Co Mayo**

Regd owner: Edward Flood, Halfcarton, Oldcastle, Co Meath; folio: 8967R; lands: Halfcarton; area: 1.7704 hectares; **Co Meath**

Regd owner: Jean Anderson, Glear, Newbliss, Co Monaghan; folio: 3687; lands: Drummullan; area: 4.7373 hectares; **Co Monaghan**

Regd owner: Patrick and Phyllis Callan, Killygavna, Tyolavnet, Co Monaghan; folio: 4065F; lands: Killygavna; area: 0.319 acres; **Co Monaghan**

Regd owner: David Patton Limited, Market Street, Monaghan; folio: 20328; lands: Drumgarran and Telaydan; area: 1.9728 hectares and 0.0759 hectares; **Co Monaghan**

Regd owner: Martin and Sandra Reynolds; folio: 14549; lands: Edenderry on the south side of St Francis Street in the town of Edenderry and barony of Coolestown; **Co Offaly**

Regd owner: Andrew Gilmartin; folio: 19054; lands: townland of Creevykeel and barony of Carbury; area: 4.7854 hectares; **Co Sligo**

Regd owner: William Costello; folio: 4682; lands: townland of Graniera and barony of Kilnamanagh Upper; **Co Tipperary**

Regd owner: Noreen Moynihan; folio: 3072F; lands: townland of Kilmacogue/Annaholty/Gortshane East and barony of Owney and Arra; **Co Tipperary**

Regd owner: Wray and Heather Platt; folio: 12556F; lands: townland of Lacka and barony of Lower Ormond; **Co Tipperary**

Regd owner: Thomas and Mary Carew; folio: 11968; lands: townland of Lackenacoombe and barony of Kilnamanagh Lower; **Co Tipperary**

Regd owner: Esmond and Bernadette Coughlan; folio: 249L; lands: Seafield and barony of Ballaghkeen North; **Co Wexford**

Regd owner: Lucan Spa Hotel Ltd; folio: 4420F; lands: Ballyedmund and barony of Ballyaghkeen North; **Co Wexford**

Regd owner: John Condren (deceased); folio: 12354; lands Killybegs and barony of Gorey; **Co Wexford**

WILLS

Byrne, Myles Patrick (Jack) (deceased), late of 101 Springhill Avenue, Deansgrange, Co Dublin. Would any person knowing the whereabouts of the deceased's will please contact Matheson Ormsby Prentice, Solicitors, 30 Herbert Street, Dublin 2; tel: 01 619 9000; fax: 01 619 9010

Curtis, Gerald (deceased), late of 29 College Park, Terenure, Dublin 6W. Would any person having any knowledge of a will made by the above named deceased, who died on or about the 11 March 2004, please contact Frank Ward & Co, Solicitors, Equity House, Upper Ormond Quay, Dublin 7; tel: 01 873 2499, fax: 01 873 3484

Dundon, James (deceased), late of 32 Collins Park, Abbeyfeale, Co Limerick. Would any person having knowledge of a will made by the above named deceased, who died on 25 February 2004, please contact: Stephen J Daly, Solicitors, The Square, Abbeyfeale, Co Limerick; tel: 068 31300, fax: 068 31005

Edwards, Thomas F (deceased), late of 5 Waverley Terrace, Dublin 6, formerly of 21 Eden Quay, Dublin 1. Would any person having any knowledge of the whereabouts of a will made by the above named deceased please contact Woodcock & Sons, Solicitors, 28 Molesworth Street, Dublin 2; ref: PW

Ferguson, Val, otherwise Denis V Ferguson, late of 6 Glenfarne Road, Raheny, Dublin 5; 141 St Declan's Road, Marino, Dublin 11; Shanrath Road, Whitehall, Dublin 9. Would any person having knowledge of the whereabouts of a will made by the above named deceased, who died on 10 March 2004 at the South Infirmary Hospital, Cork, please contact Murphy and Condon, Solicitors, Bank Buildings, 2 Shandon Street, Cork; tel: 021 439 7655, e-mail murcond@indigo.ie; reference: DF M/P 179

Flanagan, John Francis (deceased), late of Brook Cottage, Sixmilebridge, Co Clare, and late of Santa Cruz, Tenerife. Would any person having knowledge of a will made by the above named deceased, who died on 21 March 2004 in Tenerife, please contact Risteard Crimmins, Crimmins & Company, Solicitors, Dolmen House, Shannon Town Centre, Co Clare; tel: 061 361 088, fax: 061 361 001

Hurley, Margaret (deceased), late of Knocknasuff, Blarney, Co Cork. Would any person having any knowledge of the whereabouts of a will made by the above named deceased, who died in December 1964, please contact Diarmaid

Falvey, Solicitors, 40 The Mall, Cork; tel: 021 427 1077

Lacy, William (builder) (deceased), late of *St Patrick's* (Abbey House), Abbey Street, Howth, Co Dublin, and formerly of 'Highfield', Thormanby Road, Howth, Co Dublin. Would any person having knowledge of a will made by the above named deceased, who died on 25 October 1923 at *St Patrick's* (Abbey House), Abbey Street, Howth, Co Dublin, please write to: Miss Deirdre I Lacy, Ballymilish, Dungriffin Road, Howth, Co Dublin (granddaughter) or telephone: 087 287 9105.

McGuill, Ellen (deceased), late of 76/78 Parnell Street in the city of Dublin. Would any person having any knowledge of a will made by the above named deceased, who died on 1 April 2002, please contact James Fagan & Company, Solicitors, 57 Parnell Square West, Dublin 1; tel: 01 872 7655; reference: MB/11776

Murtagh, Patrick (Paddy) (deceased), late of 44 Hammond Street, Dublin 2 and 28 Eden Quay, Dublin 1. Would any person having knowledge of a will made by the above named deceased, who died on 13 April 2004, please contact Aitken Clay & Collins, Solicitors, 17 Fitzwilliam Square, Dublin 2

O'Sullivan, Joseph Patrick (deceased), late of 7a O'Connorville, Tower Street, Cork. Would any person having any knowledge of the whereabouts of a will made by the above named deceased, who died on 3 March at Cork University Hospital, please contact Finnian Dullea of Kelly & Dullea, Solicitors, 5 South Mall, Cork; tel: 021 494 4666, fax: 021 494 4699, e-mail: finian@kellydullea.com

EMPLOYMENT

Apprenticeship required, Dublin area. Eleven years' work experience in multinational environment and service industry. Two years' legal executive experience, conveyancing and litigation (commercial and private). Excellent administration and IT skills; tel: 087 975 8184

Apprentice solicitor available. A resourceful, focused, personable individual with extensive business experience available for immediate start. Ten months' experience as a legal assistant with a family-run law firm and knowledge gained in the area of litigation, private client and applications for refugee status; any area considered; tel: 087 990 8225

Apprenticeship sought; all areas considered. I have passed four FE-1s and confidently await the results for the final four this June. Highly qualified, with first-rate IT skills and excellent references. Particularly interested in conveyancing but will consider all options. Contact Mr Hilary Delahunty at 087 941 3705; e-mail: hdelahunty@yahoo.com

Experienced conveyancing and probate solicitor seeks part-time employment in Kildare or Midlands area. Please reply to **box no 50/04**

Hardworking, focused and reliable law student seeks trainee solicitor position in the south-east of Ireland. Strong academic background, including honours degree. First Irish exam and six FE1 exams passed to date. Eight years' experience in information technology and six months' experience working as a legal executive. Please contact Ian on 087 638 0393 or see *www.legalapprentice.com* for more details

Part-time position available, with knowledge of conveyancing and litigation and with keyboard skills to assist busy principal, Four Courts area, Dublin; reply: 01 671 8800

Solicitor required for conveyancing and probate practice in Mallow, Co Cork office. Apply with CV to **box no 51/04**

Solicitor wanted, Waterford city. Background in general practice a requisite for busy small-to-medium-sized firm. Please reply with CV to **box no 52/04**

Solicitor required for general practice in Ennis. Experience in conveyancing preferable. Please reply to Cashin & Associates, Solicitors, 3 Francis Street, Ennis, Co Clare; tel: 065 684 0060, e-mail: mpc@cashinlaw.com

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

MISCELLANEOUS

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

London solicitors will be pleased to advise on UK matters and undertake agency work. We handle probate, litigation, property and company/commercial. Parfitt Cresswell, 567/569 Fulham Road, London SW6 1EU, DX 83800 Fulham Broadway; tel: 0044 20738 18311, fax: 0044 20738 16723, e-mail: arobbins@parfitts.co.uk

Dublin city centre practice for sale. Average annual fee income €165,000. Application to **box no 53/04**

Office accommodation available to let
Near Four Courts, 3000 sq feet, well laid out in combination of open space and enclosed offices, including reception area and meeting room; rent €18 per sq foot plus three parking spaces; modern mixed occupancy building. Contact **box no 48/04**

Dublin 8, 215sqm ground floor offices near Four Courts, 1½ yr double rent allowance, short lease, four car places. Phone 01 670 9199

PROFESSIONAL MUSLIM SINGLES MATRIMONIAL EVENT
in Dublin, 16 June.
Contact: +44 7980 001426
or + 44 7876 042660.
E-mail:
kamran@kamranabegevents.com
Website:
www.kamranabegevents.com

Exciting opportunity. Residential conveyancing solicitor required for Limerick city practice with at least two years' pqe. Ideal candidate will work with a dynamic team with a modern approach, excellent remuneration package and commissions guaranteed. We require a highly motivated, ambitious self-starter who can work on his/her own initiative. Please apply by e-mail to: celina@fahylaw.com

LOCUMS REQUIRED

If you are interested in locum work, email a copy of your curriculum vitae and a short covering letter to Trina Murphy in the Law School.
You should also state the area of law you are interested in and the locations you are prepared to travel to.

For further details, contact t.murphy@lawsociety.ie, tel: 01 672 4982, or fax: 01 672 4991

Publication of advertisements in this section is on a fee basis and does not represent an endorsement by the Law Society of Ireland.

Tipperary practice for sale – great potential. Quick sale required – principal retiring. Application to **box no 47/04**

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

Solicitors' practice for sale. Small-to-medium sole practitioner's practice for sale; situate in south county Dublin with good and varied client base. For further enquiries please contact: McGinley & Co, Chartered Certified Accountants, Unit 4, St Jude's, Oldtown Mill, Celbridge, Co Kildare; tel: 01 601 2751

TITLE DEEDS

O'Sullivan, Joseph Patrick (deceased), late of 7a O'Connorville, Tower Street, Cork. Would any person having knowledge of storage of title documents relating to the above named deceased, who died on 3 March 2002, please contact Finian Dullea of Kelly & Dullea, Solicitors, 5 South Mall, Cork; tel: 021 494 4666, fax: 021 494 4699, e-mail: finian@kellydullea.com

In the matter of the *Landlord and Tenant Acts, 1967 - 1987* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978*: an application by Peter Mulligan

Take notice that any person having interest in the freehold estate of the following property: all that and those the property formerly known as Savana and Christina's Fashion, now trading as bookmakers at Main Street, Bundoran, in the county of Donegal, otherwise the plot of ground with buildings situate at Main Street, Bundoran, in the parish of Innismacsaint, barony of Tirhugh and county of Donegal.

Take notice that Peter Mulligan intends to apply to the county registrar for the county of Donegal for the acquisition of freehold interest in the aforesaid property, and any party asserting that they hold superior interest in the aforesaid premises are called upon to furnish evidence of title to the aforesaid premises to the below named within 21 days from the date hereof.

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

Date: 4 June 2004

Signed: VP McMullin (solicitors for the applicant), Tirconnail Street, Ballyshannon, Co Donegal

Legal Opportunities

BrightWater Selection is a leader in the Irish recruitment market. Our success has been based upon our level of expertise and professional service. Our specialist Legal Division recruits professionals into practice and in house roles from recently qualified to executive level.

Commercial Property Partner
Top Tier Firm **€100,000 - €150,000**

Excellent opportunity for a Senior Commercial Property Solicitor to join a leading property law firm at Senior Associate or Partner Designate level. You will have significant property investment, taxation, commercial leases, lending and some planning law experience. You will also be looking to take your career a step further with a better firm. Ref: 12292

Corporate Lawyer
Top 10 **€60,000 - €85,000**

Corporate Lawyer required for leading practice. You will have 3-6 years corporate / commercial experience in a top Irish or international law firm coupled with strong corporate transactional experience. An extremely attractive salary and benefits package with exciting prospects will be offered to the chosen candidate. Ref: 12288

Senior Legal Counsel
Dublin Bank **€60,000 - €85,000**

Leading Irish bank wishes to appoint an experienced Legal Advisor. Excellent opportunity to join a large, ambitious legal team. You will have a minimum of 4 years PQE in commercial or financial services law with strong regulatory experience. You will work with all units of the bank from a legal perspective and advise on all regulatory and legislative requirements. Ref: 13141

Senior Commercial Lawyer
Cork Firm **€70,000 - €80,000**

Our client, a reputable Cork firm, have a requirement for an experienced Commercial Lawyer. You will have 5-8 years PQE in commercial law from a respected practice. This is an excellent opportunity for a strong Lawyer to relocate to Cork. Ref: 13930

Funds Lawyer
In-House - Dublin **€70,000 - €80,000**

Our client, have retained us exclusively, to recruit for this important role. You will have 3-5 years funds experience from a reputable funds institution or a successful law firm. You will be responsible for all advisory and regulatory duties as well as the company secretarial duties. This is a key appointment and will suit someone with ambition to succeed within a very professional and respected organisation. Ref: 13389

For further information on these roles and other opportunities, please contact Yvonne Keane or Geneva Allen for a confidential discussion at:

BWS BrightWater Selection
Recruitment Specialists

50 BEST

BrightWater Selection,
36 Merrion Square, Dublin 2
Tel: 01 662 1000 Fax: 01 662 3900
Email: ykeane@brightwater.ie Web: www.brightwater.ie

COMHAIRLE CATHRACH CHORCAI
CORK CITY COUNCIL

Applications are invited from suitably qualified persons for inclusion on a panel from which appointments may be made to the position of:

EXECUTIVE SOLICITOR

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

SALARY: €40,504, €42,032, €43,565, €45,096, €46,628, €48,159, €49,689, €51,216, €52,755, €54,283, €56,043 (following three years service on the maximum) €57,807 (following six years service on the maximum).

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

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

Completed application forms must be returned to the Personnel Dept., Room 233, Cork City Council, City Hall, Cork, not later than 5pm on Friday, 25th June, 2004.

Candidates should note that interviews may be arranged within a very short time of the closing date. Cork City Council complies with the provisions of employment equality legislation.

HUSSEY FRASER
SOLICITORS

We are a leading Construction Law Firm in Ireland acting on behalf of many prestigious clients and we are seeking a Senior Solicitor to join our Construction Law Team.

Reporting to a Senior Partner, the successful candidate will be a highly motivated and ambitious team player. He/she will have at least five years pqe ideally in Construction Law, with a proven track record in litigation/dispute resolution and/or commercial property contracts.

The position will attract an excellent package and prospects for advancement.

Replies by the 18th June, in the strictest confidence, to:

Anne Barrett, Personnel Partner,
Hussey Fraser, Solicitors,
17 Northumberland Road, Dublin 4
or email: abarrett@husseyfraser.com

Hussey Fraser, Solicitors,
www.husseyfraser.ie

MEGHENGROUP

A uniquely responsive approach to your individual job search

As an experienced UK barrister turned legal consultant, Catrin Prys-Williams knows about the impact of lifestyle choices on a career change. Having worked in the recruitment sphere in London, Sydney and Singapore Clare Reed, also a legal consultant at Meghen Group, has gained a thorough understanding of the diverse work environments and cultures across the world. By virtue of their backgrounds both consultants are especially sensitive to the fact that every role and every candidate is unique.

Each legal professional candidate contacting Meghen Group has varying needs and ambitions. Factors that can influence the decision to change jobs and the type of position sought include career progression, work/life balance, salary, location and work environment.

At Meghen Group we understand the importance of listening to candidates' needs and of sharing the vision each individual has for his or her future career. During a personal consultation each solicitor is given the opportunity to clearly define his or her personal job search criteria and will receive comprehensive, industry-specific advice.

CATRIN PRYS-WILLIAMS AND CLARE REED

In canvassing with each candidate his or her aims and ideals, our consultants take care to ensure that all career options have been adequately explored by highlighting the benefits of the various practice environments.

A discussion about the larger practices will focus on the extensive client base, worldwide recognition and fast-paced, challenging work offered there in addition to the way in which each large practice differs in terms of structure and ethos. A solicitor may ideally wish to move to a medium size practice because of the potential for career progression, the prospect of working as part of smaller team focusing on a niche area and the appeal of having wider exposure to a deal in its entirety. A small practice may appeal because of the high degree of client contact and the ability to deal with a case continuously from start to finish.

Whatever the driving ambition in seeking to move within the legal circle we can offer advice, guidance and a discreet approach throughout the job search process.

BELOW IS A SELECTION OF THE CURRENT ROLES AVAILABLE THROUGH MEGHEN GROUP:

Senior Construction Lawyer

An exceptional opportunity for a senior construction lawyer with 4+ years PQE. Acting for building contractors you will advise on contracts, tenders and EU procurement in a predominantly contentious role. This role offers excellent career development prospects and a supportive small team environment.

In-House Legal Compliance

An exciting chance to join this global financial group. A legal advisor is required to review compliance and provide updates on EU directives and domestic legislation capable of impacting on the business. Experience in money laundering and insider-dealing legislation would be beneficial.

In-House Legal Advisor

An excellent opening has arisen in this international asset management company for a 0-2 years PQE lawyer. Experience in Irish and European company law, corporate governance and structuring issues is required. Previous experience in the financial sphere would be beneficial.

Corporate Finance Lawyer

This top tier firm is looking for a corporate finance lawyer with experience in M&A's, MBO's and inward investment. You will need excellent drafting and advisory skills with 2-4 years PQE, preferably gained within a top tier environment.

General Practitioner

A versatile solicitor with 3-6 years PQE is sought for this exciting opportunity to join this medium sized practice in South Dublin. With an emphasis on conveyancing this role will be varied and challenging.

Locum Solicitors

With contracts ranging from 3-6 months, if you have 4-5 years PQE and are multi- disciplined or highly specialised we would welcome the opportunity to discuss these opportunities with you.

Commercial property

Meghen Group is dealing with a number of positions in this discipline, one of which may be ideal for you if you have 4 + years PQE with experience in secured lending, construction and exposure to large-scale developments, disposals and acquisitions.

FOR A CONFIDENTIAL CONSULTATION, WHATEVER YOUR LEGAL CAREER ASPIRATIONS, PLEASE CONTACT CATRIN OR CLARE ON 01 433 9028 OR AT PROFESSIONAL@MEGHENGROUP.COM

At The Legal Panel we focus on recruiting experienced solicitors from newly qualified to partner level and pride ourselves on our confidential and personal approach. We listen carefully to your requirements and tailor our search to your skill set and career aspirations. All applications are strictly confidential. We are currently recruiting for a number of opportunities for experienced solicitors, both in house and in private practice.

In-house

Compliance Advisor
Ref: 5601 0979 to €55k
Working for an expanding financial services company you will report to the legal manager and have responsibility for working with legislation, data protection, anti money laundering policy and other ad-hoc legal issues as they arise. The ideal candidate will have 2-5 years' pqe and a strong academic background. This is an excellent opportunity to join a fast growing in-house team.

Company Lawyer
Ref: 5601 0998 to €55k
Working for a leading financial services company your role will cover corporate governance, drafting of documentation, compliance and contracts pertaining to all areas of the business. You will be an Irish qualified solicitor with 0-2 years' pqe. Ideally you will have a good knowledge of corporate governance issues and strong corporate law experience. This is an excellent opportunity to join this rapidly expanding company.

Legal Manager
Ref: 5610525 to €95k
Due to continued expansion a leading investment company dealing primarily in Hedge funds is looking to recruit a number two to the Head of Legal & Compliance. Your main responsibilities will be to advise on both national and international domiciled hedge funds and oversee product initiatives, review and negotiate counterparty documentation and compliance with legal & group requirements. You will have at least 8 years pqe and a strong knowledge of investment funds.

Assistant to General Counsel
Ref: 5601 0953 to €70k
Working for a leading financial services company in the IFSC you will draft ISDA agreements, advise on the execution, liaise with clearing bodies, advise on regulatory and compliance issues and assist in the launch of new products. The ideal candidate will have 1-3 years' pqe and a strong banking and corporate background.

Private Practice

Senior Solicitor, Employment
Ref: 5610513 to €70k
Top tier Dublin practice is seeking to appoint lawyers to their employment department. This practice has a strong reputation for providing dispute resolution services to a variety of national and international clients and overseas firms. Due to expansion they are seeking employment lawyers with at least 3 years' post qualification experience. Excellent prospects for progression.

Corporate Solicitor
Ref: 5601 0954 to €75k
Excellent opportunity to join a top tier firm in their highly respected corporate department. Working on a variety of areas, you will have at least 3 years' pqe and experience in at least two or more of the following areas: M&A, IPO's, venture capital, corporate governance and fundraising. You will also have strong communication skills and excellent all round corporate experience. This is a chance to join a high profile team in a dynamic and progressive firm.

Funds Solicitor, Top tier firm
Ref: 5610517 to €tbc
Our client is a top tier firm with a strong reputation for advising on the complete set up and operation of all types of funds both nationally and internationally. Their clients include a wide variety of financial services companies from international banks and fund administration organisations to global investment banks, prime brokers and investment managers. You will have 1-2 years' pqe or at the more senior level 3-5 years' pqe and will come from either an in-house or practice background.

Banking Solicitor
Ref: 5601 0741 to €95k
Excellent opportunity to join a highly respected mid tier firm in their banking and financial services team. Joining the firm at senior level you will have a clear route to partnership. Candidates must have at least 4 years' pqe and an established client base. You will also have a strong background in loans, ISDA, financial services regulation and asset finance.

Technology Solicitor Ref: 5601 0735 to €70k
Leading Dublin practice is seeking an experienced solicitor to join their well reputed IT department. The successful candidate will have at least 4 years' pqe and ideally be working in practice although strong in-house candidates will also be considered. This is an excellent opportunity to join a firm at this calibre.

For more information on these roles or to arrange a confidential discussion, please call Sarah Randall on (01) 6377092 or email sarah@thepanel.com

the Legal panel
putting you in great company

Wealth Management Consultant

Dublin — **€ Excellent + Bonus**

Astons Wealth Management

A Career with a difference!

As a qualified Lawyer, do you ever feel frustrated by the constraints of your working environment? If so, can you imagine a career where you are encouraged to partner your clients to create innovative legal and tax solutions for their specific circumstances? Then Astons Wealth Management could be the right choice for your next career move.

The Company:

Astons Wealth Management is an innovative consultancy firm which works with its clients and their advisers to provide a comprehensive wealth management strategy. By pooling the talents of a variety of legal, taxation and financial professionals, Astons can devise a strategic plan to help its clients use their wealth wisely.

The Role:

- Working with clients as part of a team of select professionals to advise on and implement legal and tax strategies.
- Managing a portfolio of clients and maintaining profitable relationships.
- Assisting with the generation of new business opportunities.
- Project managing specific investment schemes.

The Person:

- A qualified Lawyer from either a general practice or a large firm background.
- Tax experience with a commitment to develop this interest further.
- 1st class interpersonal, written communication & analytical skills.
- The ability to develop and maintain long term business relationships.

If you are self-motivated with the potential and desire to develop your career in a highly professional and entrepreneurial environment then this could be the right challenge for you.

Interested candidates should call Mike Shoebridge in the strictest confidence on 01 662 1000 or alternatively email him at m.shoebridge@brightwater.ie

BWS BrightWater Selection
Recruitment Specialists

BrightWater Selection
36 Merrion Square, Dublin 2
Tel: 01 662 1000 Fax: 01 662 3900
Email: m.shoebridge@brightwater.ie
Web: www.brightwater.ie