Gazette LawSociety

Regulars

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Cover Story

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RETIREMENT TRUST SCHEME
Unit prices: 1 April 2004
Managed fund: 437.398c
All-equity fund: 102.839c
Cash fund: 254.544c
Long-bond fund: 114.896c

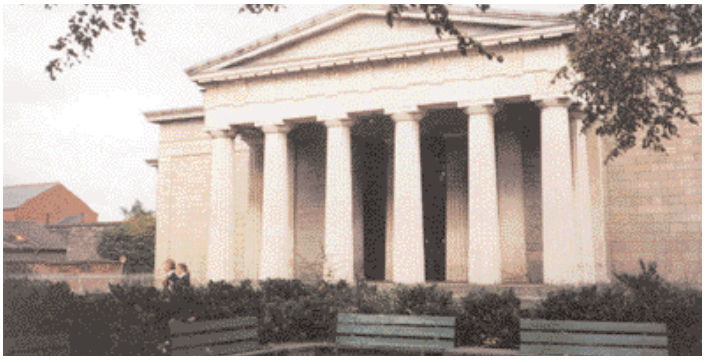
COMPENSATION FUND PAYOUT
The following claim amount was admitted by the Law Society's Compensation Fund Committee and approved for payment by the Law Society Council at its meeting in March: Joseph Quirke, Church Mews, Church Lane, Midleton, Co Cork – €200,000.

NEW CIRCUIT COURT JUDGE
Barrister Alice Doyle has been appointed to the Circuit Court bench. The new judge made her declaration before the chief justice and the Supreme Court on Friday 30 April.

ANNUAL CONFERENCE TO HEAD EAST?
Following the success of the Law Society's annual conference in Sicily this year, next year's conference looks likely to be held in Krakow in Poland. The society's Conference Committee has promised further details as soon as they become available.

Dundalk courthouse to host next Council meeting

The Council of the Law Society is decamping to Dundalk for a meeting on Friday 28 May. This follows the success of the Council meeting held in Sligo last year. As with Sligo, the Courts Service has done an excellent job refurbishing the courthouse in Dundalk. The courthouse will be the venue for a meeting that president Gerard Griffin and director general Ken Murphy will hold at 5.30pm on Thursday 27 May, with president James Murphy and the other members of the Louth Bar Association. All issues currently facing the profession can be discussed at the meeting, which will be followed by a reception to which the leaders of the bar associations in surrounding counties will also be invited.



The newly refurbished courthouse in Dundalk

Survey of solicitors' support needs

The Law Society recognises the need to review support services for its members to ensure that they are relevant to their needs. It also wants to explore what other support services solicitors would like to see made available. A task force, chaired by Olive Braiden, has devised a detailed questionnaire, which will be distributed to all solicitors by post shortly.

Braiden explains: 'Before embarking on improving support services, it is important that the Law Society has a clear and complete picture of the situation on the ground. In all practice situations, only solicitors can advise the task force what services will meet their particular professional and personal needs. We are relying on all members to take this opportunity of making their views known to their society and are looking forward to a really good response'.

ONE TO WATCH: NEW LEGISLATION

The Solicitors Acts, 1954 to 2002 *(professional indemnity insurance) (amendment) regulations 2004*

The system for professional indemnity insurance (PII) is mainly set out in SI 312 of 1995, and the latest regulations (SI 115/04) make adjustments to this system but do not radically change it. They come into effect on 1 June 2004.

Required PII cover
Solicitors in private practice are required to have PII cover in order to obtain their practising certificates. The minimum level of PII cover is currently set at €1.3m for each and every claim, with the insured's own legal costs up to €130,000. The self-insured excess will be €10,000 per solicitor in the practice from 1 June 2004.

Assigned risks pool
Qualified insurers are designated by the PII Committee and, in order to qualify, they sign an assigned risks pool participation agreement. The assigned risks pool (ARP) is an insurance pool in which insurance is provided proportionately by each qualified insurer to give insurance cover or run-off cover to solicitors who cannot get it otherwise. Membership of the pool cannot continue longer than two years. The intention is to give a breathing space to solicitors who have been refused cover, or quoted unacceptably high terms, to re-organise their work in such a way as to get cover in the future, or to wind up their practices.

The PII Committee appoints the assigned risks pool manager. The committee has nine members, six being Council members, two representatives of the qualified insurers and the ARP manager. It has a quorum of three, one of whom must be the pool manager or a representative.

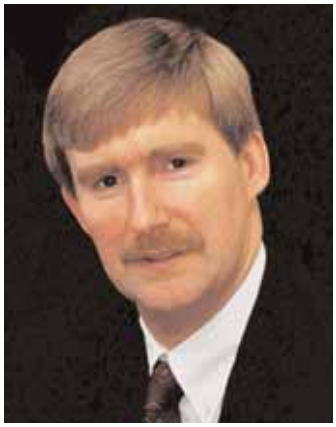
Admission to the ARP
In order to be eligible for admission to the ARP, a solicitor must show that he has been refused cover (or constructively refused, if the terms are too high) by three insurers, including the Solicitors' Mutual Defence Fund, and has not been in the ARP within the previous six years.

The PII Committee may admit the applicant to the ARP on an interim basis. Within 21 days he must submit a proposal form, pay a premium deposit up to 300% of the previous year's premium and undertake to submit to and pay for a risk-management audit (costing up to €7,500 per solicitor in the practice, plus VAT). As soon as practicable, the PII Committee must decide whether a risk-management audit should be conducted and whether the ARP should provide cover, at what premium and on what other conditions. If a risk-management audit is required, the committee can decide that cover should be provided on an interim basis, subject to payment of a premium and compliance with other conditions as it may decide, being appropriate and reasonable. If the

Curtin case 'highlights need for judicial accountability'

The recent controversy involving Judge Brian Curtin has highlighted the urgent need for measures to deal with problems arising from judges' conduct, Law Society director general Ken Murphy has said.

Speaking on RTÉ radio's *Morning Ireland* programme, he noted that such measures had been successfully introduced in Canada, Australia and New Zealand without compromising judicial independence. 'In any democracy', said Murphy, 'there has to be a system for dealing with controversies arising from the conduct of judges'. The Irish people were extremely fortunate to have been served by a judiciary of great integrity and ability. Problems with judicial conduct have been very rare, but he continued: 'Judges are human, and from time to time the conduct of some judges has fallen short of the very high standards that are expected'.



Murphy: 'There has to be a system for dealing with controversies arising from the conduct of judges'

A distinction had to be made between judicial decisions and judicial conduct, he said. The independence of judicial decisions was constitutionally protected, but judicial conduct was a different issue. A system for reviewing such conduct was necessary. For separation of powers reasons, it must be dominated by current or former members of the judiciary. Murphy also said that any such system should involve representatives of the legal profession and that in other jurisdictions there were often non-lawyers of the highest ability and integrity involved to help guarantee public confidence.

And he concluded: 'Transparency and accountability are great watchwords of our age, and it is difficult to reconcile accountability in particular with the role of judges. It's a cornerstone of a democratic society that the judiciary be completely independent in its judicial function. But in other jurisdictions, systems have been put in place. It's five years since the Sheedy affair. The judiciary supports this reform. Everyone knows what needs to be done. It is very disappointing that nothing has been put in place'.

HUMAN RIGHTS CONFERENCE

The International Centre for Human Rights is holding a residential summer school on the International Criminal Court, which will be followed by a two-day conference on international accountability and justice on 15 and 16 July. A number of prosecutors and judges will be speaking, including those involved in tribunals and courts in Sierra Leone, the former Yugoslavia, Rwanda, and the International Criminal Court. Further information is available from humanrights@nuigalway.ie.

ROAD TRAFFIC OFFENCES SEMINAR

DSBA young members are to hold a CPD seminar on road traffic offences in the District Court in Dublin's Shelbourne Hotel on 19 May at 6pm. Speakers are Vincent Deane, a solicitor with the DPP's office, and solicitor Peter Connolly. The seminar costs €35 for members and €100 for non-members (€25 for trainees). To book, contact Karen on 1850 752575 or e-mail: youngmembers@dsba.ie.

conditions are not complied with, the solicitor may (after notice) be discharged from the ARP, or the registrar may comply with outstanding conditions on the solicitor's behalf and recoup the cost. If the solicitor does not comply with the risk-management audit, he may be discharged from the ARP. The audit report must be furnished to the solicitor, who can respond, and then the committee may (a) require the solicitor to take measures to avoid the risk of claims, (b) instruct a risk auditor to assist and supervise the solicitor in the taking of the measures, or (c) decide that the solicitor should not be provided with insurance cover and discharge him from the ARP. Failure to comply with the required measures can result in discharge from the pool, suspension of the practising certificate and an allegation of misconduct to the Disciplinary Tribunal. An appeal against discharge from the pool lies to the president of the High Court.

Run-off cover from the ARP

Solicitors are required to ensure their insurance cover is maintained when circumstances change, such as departure from a practice or change of partnership. If a sole practitioner ceases practice, he is obliged to maintain run-off cover for at least two years, and at least six years is recommended. If he wishes to apply to the assigned risks pool for such cover (which arises if he is refused cover elsewhere), the PII Committee can require information on his practice and then decide whether run-off cover should be provided and what the premium and other conditions should be.

Main changes

The new regulations make adjustments to monetary amounts and other minor changes. More significant changes include:

- The requirement on qualified insurers to give quotations of premiums as soon as practicable after being requested to do so, and to give at least 21 days' written notice of the cost of renewal of an existing policy before it expires. This is to avoid the situation where too little time is allowed for solicitors to seek alternative quotations, in the event that quoted premiums are higher than expected (regulation 3)
- If a solicitor fails to co-operate with his insurer, the insurer may, after giving him notice, notify the Law Society and seek its help in ensuring compliance with his obligations. The society may treat such a notification as a complaint of misconduct (regulation 10)
- Regulation 12 requires the PII Committee to facilitate the *Lawyers establishment directive* insofar as it relates to ensuring that an applicant lawyer has an acceptable level of PII cover. G

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

NATIONWIDE

News from around the country

CARLOW

Local District Court clerk, Billy F Dunphy, retires in early May after some 30 years in office. Originally from Clonmel, Co Tipperary, his role has been central to the work of practitioners in the district since the early 1970s. 'A good District Court clerk can make life a lot easier for practitioners, and Billy was always very helpful. We are sorry to see him retire and wish him well in retirement', according to John O'Sullivan, honorary secretary of the Carlow Bar Association.

He said that solicitors in Carlow, as around the country, were awaiting developments with the Personal Injuries Assessment Board. Of course, they had their fears and reservations. They had held bar association meetings locally to try to best see the way forward. Further meetings are planned. They had found the Law Society very helpful and had attended the recent meeting in Blackhall Place. But, for now, they feel that they must simply await developments and see what happens.

DUBLIN

Solicitors' helpline

All solicitors throughout the country who feel that they need help or advice are welcome to use the solicitors' helpline of the Dublin Solicitors' Bar Association, according to Kevin O'Higgins, honorary secretary of the DSBA. 'It is important for colleagues in difficulty, whether personal or professional, to be aware that we have a panel of some 60 practising solicitors who can offer confidential advice and help', he said. Both he and colleague Orla Coyne are currently conducting an assessment of the helpline with a view to increasing its effectiveness, he added.

Kings of Cong

Pictured at the Mayo Solicitors' Bar Association annual dress dinner in December 2003 at Ashford Castle, Cong, are *(seated, from left)* Judge Mary Devins, John Pinkerton, president of the Northern Ireland Law Society, MSBA president Jacqueline Durcan and Judge Mary Fahey; *(standing, from left)* MSBA treasurer Caroline Barry, retired judge John Garavan, MSBA vice-president Fiona McAllister, Law Society president Gerard Griffin, MSBA committee member Mary O'Brien and Brian Lynch, then president of the Galway Bar Association

Getting old gracefully

In what seems to be an increasingly young profession, it is appropriate to acknowledge colleagues who have been in practice since the middle of the last century. Later this month, DSBA president John O'Connor will co-host (with AIB chairman Dermot Gleeson SC) a dinner for solicitors in practice for more than 50 years. There will also be a special presentation to mark the 60 years of practice of former association president Edmund Shiel.

Forthcoming seminars

This month, seminars will be hosted for solicitors by the DSBA on the risks involved in the drafting of wills; on drafting co-ownership agreements; and on the *Freedom of Information Act*. John P O'Malley, who practises at Percy Place in Dublin 4, organises these seminars, which are a big success for the voluntary Dublin solicitors' association.

GALWAY

The age-old irritant to solicitors of inadequate courtroom accommodation is also causing grief and general disgruntlement to solicitors in Galway city. There, even some of the chairs in the courtroom where justice is administered are broken and left unrepaired, according to Ann Jennings, honorary secretary of the Galway Bar Association.

They do not have proper waiting facilities outside the courtroom. It can be hard even for the judge to be heard in court with the noise, including children crying, coming in to the courtroom. This is not the way that things should be ordered. Simply put, the facilities have not kept pace with demands, she said. The situation is unfair on judges, practitioners, litigants and defendants.

MEATH

At least there were smiling faces in Meath, with the opening of Navan courthouse. Having previously been located in an old converted community hall, it was pleasant for the District Court now to have proper accommodation, according to Kevin Martin, honorary secretary of the Meath Bar Association. It was important that the administration of justice take place in circumstances befitting its importance.

Last month, the minister for justice Michael McDowell opened the new building in the town. Also present were the president of the District Court, Judge Peter Smithwick, local District Court Judge John Brophy and local dignitaries.

WATERFORD

There is a dreadful backlog in cases before the courts in Waterford, according to John Purcell, president of the Waterford Law Society. The workload facing local District Court Judge Bill Harnett is huge. The expected appointment of a second judge and the splitting of the current Kilkenny-Waterford district into two districts must be given urgent priority. These delays are an application in real people's lives of the old legal maxim that 'justice delayed is justice denied'.

Purcell complained that in criminal and road traffic cases the return date is now up to six months after issue of a summons, which in turn can be up to six months following the relevant incident. Then it can take a further three months to get a hearing. This is not good enough, he said. The delays are clearly not the fault of the local judge. The expected second judge must be appointed without delay. G

HUMAN RIGHTS WATCH

The positive obligation to protect life

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

'The first sentence of article 2(1) enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It has not been suggested that the respondent state intentionally sought to deprive the applicant of her life. The court's task is, therefore, to determine whether, given the circumstances of the case, the state did all that could have been required of it to prevent the applicant's life from being avoidably put at risk', *LCB v UK*, 9 June 1998 (27 EHRR 212), para 36.

The applicant's father was present on Christmas Island during nuclear tests in 1957 and 1958. Born eight years later, she developed leukaemia at four years of age. She failed on the issue of jurisdiction and on the facts. On the issue of whether information in the state's possession should have been given to her, the court held that the state could only have been required of its own motion to inform and provide advice to her parents if it had appeared likely at that time that any such exposure of her father to radiation might have engendered a real risk to her health.

On the comparable facts arising from the contaminated blood products scandal, or where faulty medical tests are discovered, there is a legal as well as moral obligation on the state to inform and advise and take appropriate steps to safeguard lives.

The facts of *Osman v UK*, 28 October 1998 ([1999] 27 EHRR 212) were sensational. A teacher became obsessed with a teenage student and after incidences of erratic behaviour that finally led him to lose his job, and attacks on the Osman's house (of which, however, there was no evidence at the time that he was the perpetrator), he shot and seriously wounded the boy and killed his father.

The court held that the state's obligation under article 2(1) extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. Article 2 may also imply, in certain well-defined circumstances, a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.

On the facts, the court found no violation of article 2, and emphasised that policing involved the making of professional judgements and the allocation of limited resources. Failure to perceive a risk to life or to take preventive measures did not amount to gross negligence or a wilful disregard of the duty to protect life. The applicant would have to show that the authorities did not do all that could be reasonably expected of them to avoid *a real and immediate risk to life* (emphasis added) of which they have or ought to have knowledge.

Some instances of domestic violence and harassment doubtless fit these criteria, as reports of domestic murders show, but this decision is unlikely to change policing practice as it affords the gardaí considerable latitude in the exercise of their professional judgement. 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.*

USEFUL RESOURCES

Recently published books:

- *ECHR and Irish law*, edited by Dr Ursula Kilkelly, was published in March 2004 by Jordan Publishing Ltd, price: €75. Different contributors examine the likely effect of the new act on different areas of Irish law
- A new edition of *Human rights and practice*, edited by Lester and Pannick, was also published in March by LexisNexis UK, price: stg£150. It is a comprehensive reference book that covers decisions of the European Court of Human Rights and also decisions under the UK *Human Rights Act 1998*.

PLEADING THE ECHR: NEW PRACTICE DIRECTION

Pending the making of Circuit and superior court rules, the president of the High Court has issued a practice direction which will enable the Courts Service to collect statistics on pleading of the ECHR.

Practice direction HC 32
European Convention on Human Rights Act, 2003 (no 20 of 2003)

Contravention claims
In every claim for damages for injury, loss or damage[1] 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)*

Declaration of incompatibility
2.1: If any issue as to the making of a declaration of incompatibility within the meaning of section 1(1) of the *European Convention on Human Rights Act, 2003* shall arise in any proceedings, the party having carriage of those proceedings shall forthwith serve notice on the attorney general and the Human Rights Commission.
2.2: 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.
2.3: A copy of the said notice shall be filed forthwith in the central office of the High Court.

Signed: Joseph Finnegan, president of the High Court, 25 March 2004.

Footnote
1. This echoes the wording of section 3. However, during the Dáil debate, the minister stated that the wording did not exclude other equitable reliefs such as injunctions or declarations and that a clear duty is imposed by section 3.

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 tea servers, 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.
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Letters

Frankly speaking

From: David Bergin, PRO, Dublin Solicitors' Bar Association

I write as public relations officer of the DSBA as regards a recent article in the March issue featuring Frank Daly, the new chairman of the Solicitors Disciplinary Tribunal. I should preface my comments by reiterating our view that Mr Daly is an excellent choice of chairman and is performing a very laudable service to the profession and the public.

In the article entitled *New Disciplinary Tribunal chairman lays down the law* (page 4), Mr Daly is quoted as appealing to 'errant' solicitors to mend their ways and avoid the trauma and ignominy of an appearance before the Disciplinary Tribunal.

The DSBA wholeheartedly endorses Mr Daly's sentiments. However, several of our colleagues were somewhat taken aback at what appeared to be the stark and robust manner in which these views were presented, containing the chilling words 'Don't come before us. You're not going to like it'.

In an era when the profession is being hit on all sides, the manner in which the article was presented gives rise to concern among our members.

The DSBA, which represents over 50% of the solicitors' profession in Ireland, is concerned that Mr Daly's remarks as quoted might lead to an interpretation by some solicitors of a predetermined bias on the part of the tribunal. Doubtless this was not the intention and, if given the opportunity to say so, Mr Daly would confirm that every case dealt with by the tribunal is judged on its own merits.

Mastery of the facts

From: Justin Sadleir, Solicitors, Gort, Co Galway

We refer to the December 2003 issue of the *Gazette*, in particular the article by Edmond Honohan, master of the High Court, in relation to practising procedure seeking the discovery of documents (page 18).

We act on behalf of the plaintiff in the matter of John Flaherty (plaintiff) and Cannon Concrete Products Limited (defendants) [2002/2400P], the fourth decision mentioned, and we wish to point out the following:

1) The decision of the master was made on 9 October 2003 and appealed by us on 21 idem
2) On 24 November 2003, the decision of the master was reversed in its entirety and discovery was ordered by the High Court on the basis of the plaintiff's application
3) It seems wrong that a decision should be referred to in an article presented for publication and set out as authoritative when that decision was under appeal and indeed, before publication, reversed
4) Also, as can be seen from the article, an opinion was handed up to the master which he must have realised was done by error and we wonder if it was right for the master to appear to take advantage of this by emphasising this error and further by relying and quoting from this opinion to the disadvantage of the plaintiff.

Wheels within wheels

From: Mary Redmond, Arthur Cox, Earlsfort Terrace, Dublin 2

Some years ago, I and others sought and received a mandate from over 50 voluntary and community groups (as it happens, they met in Blackhall Place) to set up a movement called the Wheel (*www.wheel.ie*) to strengthen the voluntary and community sector in Ireland. Today, the Wheel's database comprises over 10,000 groups and/or individuals in this sector.

Not least because of the imminent amendment of Ireland's charity laws, the Wheel has a keen interest in the development and governance of charitable organisations.

Many people are not aware that the voluntary sector in Ireland accounts for over €1.5bn each year. It is also a significant employer and, critically, it provides direct services to hundreds of thousands of people every year. For these reasons alone, the performance of the sector – how it is governed, how it accounts for public monies and how effectively it delivers services to the community – is important to us all.

Planning is now underway to introduce an added dimension to improve the performance of the voluntary sector through a training, sourcing and orientation programme to be known as BoardMatch Ireland.

It is intended to run a pilot programme for two years. This programme will draw heavily on the experience and resources of BoardMatch (Canada). This is the main programme of the Toronto-based Altruvest organisation, whose mission is to build confidence and capacity in the voluntary sector. Its website, *www.boardmatch.org*, has considerable detail of the programmes and training on offer.

I am keen to establish whether fellow solicitors might be interested in becoming board directors of a charity or voluntary organisation of their choice. The BoardMatch programme would provide appropriate orientation and training to all candidates as well as to the recipient organisations.

By completing the brief questionnaire below you will greatly assist in the planning process. The questionnaire should be returned to Mary Redmond at Arthur Cox, Earlsfort Centre, Earlsfort Terrace, Dublin 2.

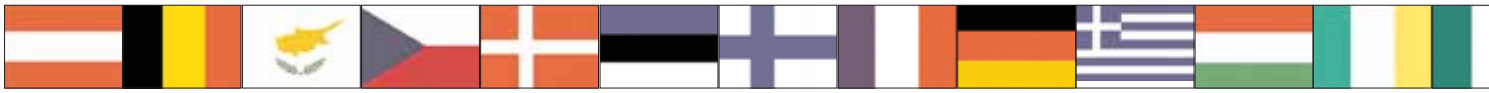
BoardMatch survey

Name: _____

Address: _____

Tel: _____ E-mail: _____

Are you currently a board or committee member of a charity or voluntary organisation?	YES ☐	NO ☐
Would you be interested in serving on the board or management committee of a charity or voluntary organisation in your area?	YES ☐	NO ☐
Would you avail of specialist (classroom) training to assist you in your role as a board or committee member?	YES ☐	NO ☐
Would you avail of specialist web-based training to assist you in your role as a board or committee member?	YES ☐	NO ☐
Do you feel that existing board members of charities or voluntary organisations would avail of specialist training?	YES ☐	NO ☐
Do you feel there is a need for a mentoring service for board members of charities or voluntary organisations?	YES ☐	NO ☐



All toge

On 1 May, membership of the European Union almost doubled, creating a much larger internal market and a range of new issues for lawyers to deal with. From free movement of legal services to advising clients on trade with new member states, Wendy Hederman maps the changes

As of 1 May, there are 25 member states in the European Union. The entry of eight central and eastern European countries, together with Cyprus and Malta, into the EU is a historic achievement, resulting in a single market providing economic benefits for its 450 million citizens.

There is plenty that Irish lawyers need to consider, beyond being able to name the ten new member states and their capital cities. Will Irish representation at EU level be affected? Are there special laws that apply only to the accession states? And what about lawyers from the accession states?

The European Union has come a long way since the original six member states joined forces to create the European Coal and Steel Community in 1951 and the European Economic Community (EEC) in 1957. The *Treaty of Rome* was signed by Belgium, France, Germany, Italy, Luxembourg and the Netherlands in 1957, calling upon the peoples of Europe 'who share their ideas to join their efforts'.

Six became nine in 1973, with the addition of Denmark, Ireland and the UK, and by 1995 had grown to 15 with the inclusion of Greece, Spain, Portugal, Austria, Finland and Sweden. During that time, the EEC evolved into the European Union, created a single market and a single currency, and added foreign and security policy to its economic and social agenda.

This month's enlargement (the Czech Republic, Slovakia, Hungary, Poland, Slovenia, Estonia, Latvia, Lithuania, Cyprus and Malta) has its roots in the collapse of communism, symbolised by the fall of the Berlin Wall in 1989. The central European countries turned their attentions towards the market economies of western Europe. Negotiations opened in 1998 with six countries – the Czech Republic, Estonia, Hungary, Poland, Slovenia and Cyprus. In February 2000, another six countries were brought into the negotiations: Bulgaria, Latvia, Lithuania, Slovakia, Romania and Malta. Of these, Bulgaria, Romania and Turkey are deemed not yet ready for membership, but are scheduled to accede by the end of the decade.

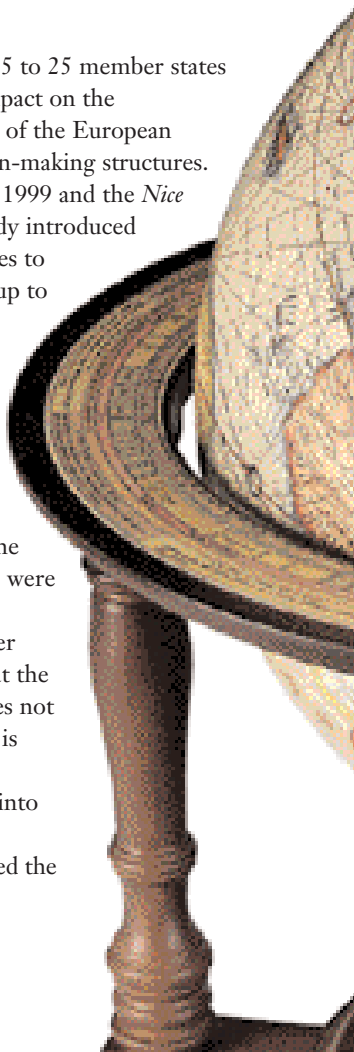
MAIN POINTS

- Free movement of lawyers
- *Acquis communautaire*
- Competition law

Balance of power

The enlargement from 15 to 25 member states will have a significant impact on the institutional architecture of the European Union and on its decision-making structures. The *Amsterdam treaty* of 1999 and the *Nice treaty* of 2003 have already introduced some institutional changes to make the integration of up to 12 new member states into the EU's decision-making processes possible. These changes are outlined below. However, most observers believe that a more radical reform of the union's structures, which were conceived for the initial community of six member states, is necessary so that the enlarged union of 25 does not grind to a halt. And that is where the proposed constitutional treaty fits into the picture.

The *Nice treaty* prepared the



ether now

ground for enlargement by agreeing the numbers of seats in the European Parliament and the number of votes per country for qualified majority voting (QMV) at council (articles 2 and 3 respectively of the protocol to the *Nice treaty*). As a result, the number of MEPs for existing member states will be reduced in next month's election from 626 to 535. (Ireland's representation will reduce from 15 to 13.) The new member states will have 147 MEPs, bringing the total in parliament to 682 representatives.

As for QMV, the *Nice treaty* increased the absolute number of votes for each existing member state. Proportionately more QMV votes now attach to the more populous states and the total number of QMV votes will increase with enlargement from 237 to 345. The areas subject to QMV were extended, though contentious areas such as taxation and immigration still require unanimous voting. The only other significant institutional changes were to the European Court of Justice and the Court of First Instance in order to streamline and speed up the functioning of the courts.

In addition, to prepare pragmatically for enlargement, the ten accession states sent observers to the EU institutions, notably to council meetings and to the European Parliament. In May 2003, the parliament welcomed 162 parliamentary observers, who have been taking part in the parliament's proceedings. At the start of this month, these observers became, or were replaced by, fully-fledged MEPs appointed by their national parliaments, who will represent the peoples of the accession states until the elections held across Europe on 10 to 13 June.

The commission intends to employ nearly 4,000 staff from the ten new member states over the next seven years. Around 300 officials from the ten new members have already been recruited to non-permanent posts, designed to prepare the ground for enlargement. Recruitment targets have been set for each country according to population size, the weighting of votes in council and the number of seats each country has in the European Parliament. The number of EU officials will increase by only 14%, while the union's population will rise by 20% with the enlargement.

Most of the new recruits are expected to be translators and interpreters because of the increase in official EU languages from 11 to 20.

Joining the club

In very broad terms, the requirements for a country to join the EU are:

- A stable democracy, respecting human rights, the rule of law, and the protection of minorities

LAWYERS IN THE ENLARGED EU

Article 39 of the *EC treaty* provides for free movement of workers, article 43 for freedom of establishment and article 49 for free movement of services. There are currently three directives of relevance to lawyers. These apply to European lawyers who wish to work in Ireland and to Irish lawyers who wish to work in other member states.

The *Lawyers' establishment directive* (directive 98/5/EC) provides that an individual may register as a foreign qualified lawyer, without having to undertake any training or examinations in the host state, if he is:

- A national of a member state of the European Union, and
- Qualified to practise as a lawyer in his home member state.

It also provides that a lawyer (defined as a national of a member state who is authorised to pursue professional activities under specified titles) who has effectively and regularly pursued professional activity under his own professional title for a period of at least three years may obtain entry into the profession of the host member state.

This directive has recently been transposed into Irish law by the *European Communities (Lawyers' Establishment) Regulations 2003* (SI 732 of 2003). In Ireland, the Law Society and the Bar Council are required to maintain a register of European lawyers. The *Establishment directive* provides for the exclusion of certain areas of practice during the three-year period practising under a home country title. In Ireland, exclusions operate in relation to the administration of estates and conveyancing.

The *Mutual recognition of diplomas directive* (directive 89/48/EEC) provides for a general system for the recognition of certain qualifications, including the recognition of lawyers' qualifications. The directive provides for an adaptation mechanism for migrating professionals. The mechanism may be either an aptitude test or an adaptation period. In Ireland, to be admitted as a solicitor under this system, most European lawyers are required to sit the qualified lawyers transfer test (QLTT), although a solicitor whose first place of qualification is Northern Ireland, England or Wales may be exempt from this requirement. There are two sittings of the QLTT each year, in June and November.

This directive continues to be relevant after the implementation of the *Establishment directive*. The advantage of the mutual recognition route is that, on fulfilment of the adaptation mechanism, a lawyer may immediately practise in the host country without being subject to the exclusions of areas of practice under the *Establishment directive*. In 2003, a total of 54 EU lawyers were admitted as Irish solicitors by virtue of either the *Establishment directive* or the *Mutual recognition of diplomas directive*.

The *Lawyers' services directive* (directive 77/249/EEC) provides for the temporary provision of cross-border lawyers' services in the community. A lawyer providing services will operate under his home country title. The directive was transposed in Ireland by the *European Communities (Freedom to Provide Services) (Lawyers) Regulation 1979* (SI 58 of 1979). The Irish implementing measure exercises the option to require a visiting lawyer pursuing activities in the state relating to the representation of a client in legal proceedings to work in conjunction with a lawyer entitled to practise before the judicial authority in question.

These directives will now apply between the existing member states and the ten new member states unless there are transitional measures.

- Implementation of the existing body of EU legislation, and
- A functioning market economy.

For lawyers, our focus is on the second of the above – the implementation of what is known as the *acquis communautaire*. The *acquis* consists of 85,000 pages of EU law, far more than when Ireland joined the European Community.

The new member states must not only transpose the *acquis* into national law and implement it, but must also 'have the capacity to implement it'. In the

STATE SUBSIDIES AND COMPETITION LAW

Competition law and, in particular, state aid to industry is one area of EU law that may concern our clients in Ireland. The EU's regime for state aid – with which Ryanair is all too familiar – aims to prevent member states from protecting or promoting companies to the detriment of competitors within the EU and to guarantee an undistorted single market.

All the former communist economies of the central and eastern European countries (known as CEECs) had centrally-controlled state economies, with industries heavily subsidised by the state. From the start of the enlargement process, the EU guarded against the CEEC governments attracting foreign investment by generous state aid by including restrictions in the bilateral Europe agreements. From 1 May, the ten new member states have to comply with the existing EU laws (the *acquis*) on state aid, but some transition periods have been agreed during the negotiations.

From 1 May, the transitional arrangements apply to existing state aid, while the full rigours of EU rules apply to any new aid. Existing aid is admissible, but the commission can suggest appropriate measures for its future amendment. Up to 1 May, the new member states were obliged to notify the commission of all aid measures still in force and had to provide assessments from their respective competition authorities on these measures' compatibility with the *acquis*. The notified and approved measures are included in an annex to the *Accession treaty* entitled *Existing aid*.

Further, certain categories of aid are permitted in some states, such as fiscal aid schemes to attract foreign investment and measures to restructure the ailing steel industries of these countries, for a limited period of time.

If your clients encounter problems with competitor businesses in the CEECs being subsidised or supported by the state, you will have to establish the timing and type of the aid granted, and check the annexes to the *Accession treaty* in order to determine if it is permissible.

ENLARGEMENT AND THE EURO

All members of the European Union are eligible to join the European single currency in accordance with the provisions of the *Maastricht treaty*. All ten new countries have expressed an interest in joining the eurozone at the earliest possible time. However, monetary integration may take longer for some new members, notably Poland and Hungary, whose budget deficits are deteriorating while unemployment is soaring. The new members will also have to make further efforts toward catching up to EU levels of income per capita, which requires hard work in the area of labour markets and fiscal policy reform. At the same time, cuts in public spending will be needed over the next few years, as several of the accession countries currently exceed the 3% of GDP deficit ceiling.

From 1 May, the new members are participating in the European Monetary Union (EMU) with the status of member states with a derogation from adopting the euro. This means treating their exchange rate policy as a matter of common concern and they are expected to join the exchange rate mechanism, the ERM II.

Once the new member states reach a high degree of sustainable nominal convergence, which means fulfilling all the *Maastricht treaty* convergence criteria, including at least two-year participation in the ERM II, they can adopt the euro. Lithuania plans to adopt the euro as early as 1 January 2007, Hungary by 1 January 2008 and Slovakia by 1 January 2009.

years between 2000 and 2003, when I worked extensively in central Europe, transposing EU legislation into national law was a priority for all governmental bodies. New statutes and regulations in banking, financial services, telecommunications, consumer protection, competition law and every other aspect of the economy and society were produced by the month.

What is less clear is whether the national administrations have been sufficiently modernised and have sufficient expertise to implement the new laws, whether the judicial system gives adequate remedy to enforce the new laws, and indeed whether the judges have sufficient familiarity with EU law. Then again, these shortcomings could be said to apply to some existing member states.

The *Accession treaty*

Advising clients in the new internal market of 25 countries requires the lawyer to be familiar with the *Treaty of accession*. This was signed in Athens on 16 April 2003 by the ten accession states and the 15 existing member states.

The treaty itself has only three articles, the detail being in the attachments, specifically the *Act of accession*, its annexes and a series of protocols. The *Act of accession* has five parts:

- Principles
- Adjustments to the existing EU treaties
- Permanent provisions
- Temporary provisions, and
- Implementing provisions.

Part 2 is mostly adjustments to the institutional aspects of the EU treaties, as discussed above. Part 3 makes permanent changes to the secondary legislation of the EU, for example, by adding the legal professions of the ten new member states to the list in the *Lawyers' services directive* (directive 77/249/EEC) or by adding geographical areas within the new member states as eligible for structural funds up to 2006.

The temporary provisions are set out in article 24 and its annexes along with other transitional measures and safeguard clauses. The annexes (one per member state) contain measures such as temporary restrictions on EU nationals buying agricultural land in Poland and temporary restrictions on the free movement of workers to certain existing member states.

On this issue, Ireland and the UK were until recently prepared to allow workers from the accession states full rights of access to the employment market from 1 May. The UK pulled back on this commitment and, finally, Ireland has felt itself obliged to deny social welfare benefits to those – including those from the accession states – who have not regularly resided here for more than two years. Those coming here for *bona fide* economic activity will be welcome and (subject to a possible reintroduction of work permit requirements) will not be required to possess a permit or authorisation.

In an interesting quirk of fate, asylum-seekers from the accession states were apparently told to leave the state's refugee reception centres by 1 May. The change in status from asylum-seeker to EU citizen has given them an absolute entitlement to work in this country, but a reduction in benefits in other ways.

For any lawyer advising clients on any issues of EU law relevant to the ten new member states over the next few years, the *Accession treaty* is a mandatory reference tool. The full text is available at *http://www.europa.eu.int/comm/enlargement/negotiations/treaty_of_acccession_2003/index.htm* G

Wendy Hederman is chairman of the Law Society's EU and International Affairs Committee.

Access

MAIN POINTS

- Law Society access programme
- Socio-economic disadvantage and education
- Securing training contracts

The Law Society's access programme supports students who, for financial reasons, could not otherwise consider becoming a solicitor. But as the first access students get ready to begin training contracts, could solicitors be the weakest link? asks Kathy Burke

Like any postgraduate study, training to become a solicitor is expensive: from law school and examination fees to living expenses while studying and training, it clearly presents a daunting financial obstacle to anyone who is not particularly well off.

In autumn 2001, the Law Society's Education Committee introduced the access scholarship programme, with the stated objective of including students who would not consider becoming solicitors because of financial barriers and social and cultural influences. Under its terms, a student who completes a degree with the support of the university access system can apply (see **panel,** page 15).

The programme was in place in time to receive the first university access graduates. The society's first scholarship student – let's call her 'JJ' – started university in 1997. She is currently the first and only such student ready to begin the professional practice course.

Education Committee chairman Donald Binchy says that 'since the universities introduced access programmes some years ago, it behoves us to provide a similar programme so that students who studied under access won't find themselves stumped by fees at Blackhall Place. We have a duty to provide a link between the universities and qualification'. For years, the law clerk system under the *Solicitors Acts* provided a means of access to the profession for people who had not studied at third level. The access scholarship programme, he adds, is a step further.

'I always wanted to enter law', says JJ. 'I was politically aware in school and always had an interest in the justice system. I always wanted to represent people'. She was student representative for her secondary school council for six years and served as its secretary and president. She was the first person in her family to go to college and, with amusement, reflects that she was naïve: 'I didn't know what freshers' week was; my parents didn't either. And I thought that "first class honours" was a subject you took'.

Walk this way

From its inception, the access system recognised that the barriers to higher education for children of low-income or long-term unemployed families were more than simply financial, and the Education Committee recognises this responsibility in promoting its programme. 'I thought that I had missed some big social event', JJ says, explaining that the others on her college course seemed to know each other and be much more 'aware' than her. 'I didn't even know about the J1 visa or the top ten legal firms until final year'. She describes something of a social gulf in her class: 'You had the dress code, the credit cards, the shops and the clubs. It was hard to penetrate, but I was pig-headed and ploughed on'.

She remarks dryly: 'I was being called posh at home, while in college there were jokes about my accent'.

After graduating in 2001, she applied for the final entrance examinations (FE1s) in Blackhall Place. At the time, she didn't realise the fees were over €6,000 a year, but emphasises: 'I would have found a way, although it would have been hard. I would have done anything because this is my ambition'. Luckily, shortly after her graduation, the head of her university department approached her to say that the

TRAINING CONTRACTS

The Education Committee wants to create a panel of solicitors that will be available to provide training contracts for access scholarship students. For more information, or to discuss the opportunity of providing a training contract for an access student, please contact the society's student welfare executive Antoinette Moriarty.

While the ultimate responsibility for securing a training contract lies with the law student, solicitors and students should know about the Law Society's pre-apprenticeship register. The training executive, Fiona Fox, receives student CVs and responds to calls from solicitors looking for trainees. The idea is to match solicitors and students on the basis of criteria such as geographical location or specialisation.

all areas

DSBA BURSARY

The Dublin Solicitors' Bar Association has a bursary fund for students from disadvantaged backgrounds. Over ten years ago, former DSBA president David Walley developed a software program for requisitions on title and decided that a portion of the proceeds should contribute to such a fund. Today that fund stands at over €100,000.

The fund's purpose is to provide financial support to students who have studied under a third-level access programme, not necessarily in law, and would like to train as a solicitor but can't afford to. The bursary will pay fees where they are not paid by a local authority grant and will provide maintenance funding, depending on the individual student's circumstances.

One of the fund's trustees, Michael D Murphy, says that the DSBA will also help with securing training contracts where an access student is having difficulty.

The fund was reviewed last year. A formal trust deed was drawn up and three trustees were appointed to administer the fund. For information, or to apply for the bursary, students should write to DSBA president John O'Connor at John O'Connor, Solicitor, 168 Pembroke Street, Ballsbridge, Dublin 4.

'We would be delighted to receive applications', Murphy continues. 'People can be put off training to be a solicitor on the basis that it is expensive to study and impossible to break into unless you have family or friends in the profession'. This perception could cost the profession a lot of talented members.

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UNIVERSITY ACCESS

It is long established that students from disadvantaged communities do not have the same supports for getting high-point leaving certificate results as those coming from private schools and professional families. During the mid-1990s, schools that had been designated 'disadvantaged' during the 1980s were linked to third-level institutions under a Higher Education Authority initiative.

Around the same time, staff at Trinity College's law school had decided to be proactive about the fact that students from fee-paying schools were being fed into the law school while those from low-income families were underrepresented. Professor Ivana Bacik describes the genesis of what became the first law school access project: 'We wanted to provide three extra places a year that were ex-quota and not at the expense of CAO candidates', she says. The point was to accommodate bright students who would not have been admitted through the standard channels.

'We provided a certain amount of funding to top up the local authority grant, for which the staff fundraised for several years with the generous help of the Law Alumni Association', Bacik explains. 'But the main issue was getting past the CAO system'.

The faculty ran a competition among the designated schools, offering scholarship places on the undergraduate law course to students with the highest points. 'When we brought in the law programme, we were anxious that the professional bodies would take it up', Bacik says. 'We were delighted when the Law Society gave a place to our first graduate'.

Bacik acknowledges that people have different views on positive discrimination, but she points out that the access programme is addressing an inequality that already exists in the education system. The Law Society's director of education, TP Kennedy, agrees. He points out that a law firm may receive hundreds of CVs from bright students seeking training contracts but, because of their financial and social circumstances, it is more difficult for access students to distinguish themselves through travel or extra-curricular experiences during university.

TCD access officer Cliodhna Hannon points out that while the university access programmes get funding from both the Higher Education Authority and the Department of Education, corporate sponsors provide much of the student support in the form of work experience. Sometimes potential employers contact her for references and ask for leaving certificate results. But, she says, there is an enormous disparity in the quality of schooling and you can have access students that might come to university with low points leaving with an excellent degree in medicine or law. It would be a mistake to connect social class with IQ. 'These are incredibly intelligent and motivated people, often more so than people with connections. It is an extraordinary achievement to be so ambitious when it is not expected of you', she says.

Antoinette Moriarty: 'The legal profession has a duty to draw from all parts of the community'

Law Society had just established an access programme and that her name had been put forward as a candidate. JJ has since passed all eight law subjects in the FE1s and has secured a training contract.

A matter of perspective

Another access candidate is in the process of doing her FE1 exams. She graduated in 2003 with a degree in business and law. Her first ambition was to be a chef and this lasted throughout secondary school. When it came to applying for third level, though, she opted for business and law instead.

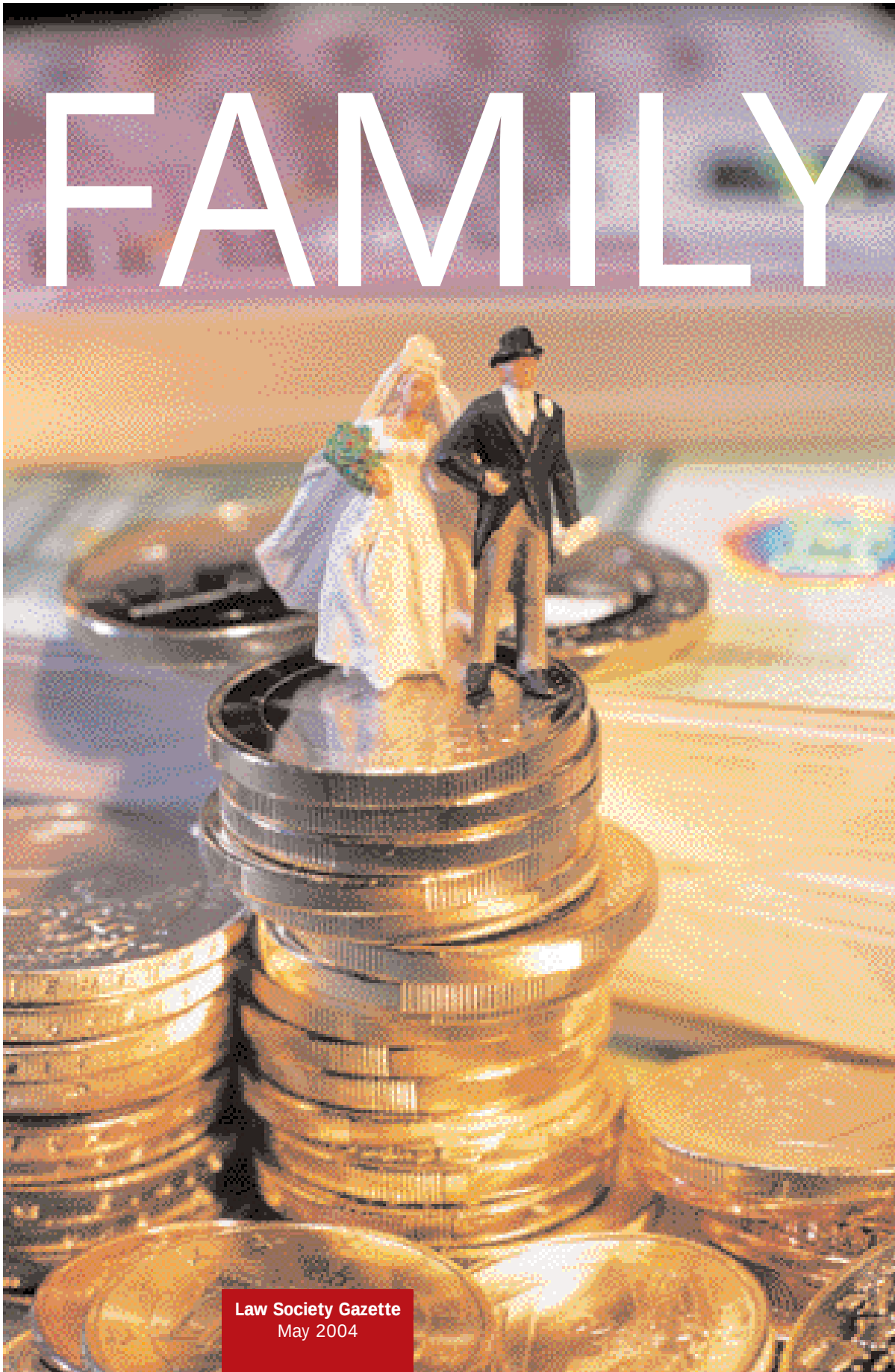
'I enjoyed business in school and always had an interest in law and politics. I enjoy looking at how the interpretation of law can vary from one judge to another and how an act or a judgment can have a lot of different interpretations', she says.

The society's student welfare executive, Antoinette Moriarty, develops this point. 'We all view the world through our own experience', she says. 'We are legislating for a multi-dimensional society, so the legal profession has a duty, like any other profession, to draw from all parts of the community'.

While the society's access programme is still in its infancy and only one graduate is ready to begin a training contract, Moriarty hopes that these students will be facilitated in starting their professional practice courses through the availability of training contracts.

Given the financial circumstances of these students and their families, she explains, any lost earning potential caused by a delay in qualification would be more critical than for other students. Every other link in the process from secondary education onward has done a great job, she says. It is now up to solicitors to provide training contracts. G

FAMILY



Pension issues, valuing ancillary reliefs, emergency applications and the financial expertise available to solicitors from accountants were some of the issues dealt with in this year's *Jordan's family law in Ireland conference*. Keith Walsh reports

MAIN POINTS

- Drafting pension adjustment orders
- Earning capacity of the wife
- Case law after *T v T*

values

In her introduction to this year's *Jordan's family law in Ireland conference*, Judge Elizabeth Dunne emphasised the significance of family law in the work of the Circuit Court and noted the importance of family law practitioners keeping up to date with the 'nuts and bolts' of their trade.

This article focuses on three areas of particular importance to family law solicitors: overcoming problems when dealing with pensions, addressed by Muriel Walls of McCann FitzGerald; factors taken into account by the courts in assessing maintenance and valuing assets, by Mary O'Toole SC; and observations by Gerard Durcan SC on the case law following *T v T* and *K v K*.

The legislative provisions in relation to pension adjustment orders (PAOs) in the context of judicial separation and divorce are almost identical, said solicitor Muriel Walls. The principal difference is that those seeking judicial separation have the option of preserving pension entitlements under section 13 of the *Family Law Act, 1995*; a PAO is not available on divorce because the parties will no longer be spouses.

Under section 13 of the *Family Law Act, 1995*, the court may *'on granting a decree of judicial separation or at any time thereafter, make an order directing the trustees of the pension scheme not to regard the separation of the spouses resulting from the decree as a ground for disqualifying the other spouse for the receipt of a benefit under the scheme, a condition for the receipt of which is that the spouses should be residing together at the time the benefit becomes payable'*.

Walls pointed out that solicitors should carefully review the trust deed to see if it contains a condition that the spouses must be residing together at the time the benefit becomes payable. The benefit of the PAO is that it protects the spouse of the pension scheme member in a situation where it is likely that no other person would be entitled to benefit. A huge disadvantage for the member spouse is that by preserving the non-member spouse's rights in the pension scheme, the preservation order sets the bar high for the pension entitlements expected on divorce. This may not be the member spouse's intention, and it should be made clear that the preservation order is only being made because the spouse is the only one who could benefit and that this will be re-examined on divorce.

Pension adjustment orders

A pension adjustment order made under the 1995 act following the grant of a decree of judicial separation or under the *Family Law (Divorce) Act, 1996* following the grant of a decree of divorce adjusts the pension entitlements of one or both spouses. Walls explained that pensions can have two elements, retirement benefits or contingent benefits, and the court's power differs in relation to each.

The court can make an order providing for the payment of part of the retirement benefit (the retirement pension payable on retirement to the member or to the widow(er) on death after retirement) that has accrued for a member spouse under a pension scheme up to the date of separation or divorce to either the other spouse (or, if predeceased, their personal representative) or to a person on behalf of a dependent member of the family. To calculate the part of the benefit to be paid to the spouse, the order itself must specify two things:

- The period of reckonable service to be taken into account (from when to when), and
- The percentage of the retirement benefit accrued to be paid to the spouse.

COVER PIC: ACTION PRESS/REX FEATURES

PENSION PROBLEMS IN PRACTICE

Getting the information

While it is essential that solicitors ascertain the value of the pension benefit, there is no streamlined system of getting information on the value of the pension benefit. Muriel Walls counsels that the earlier that pension information is obtained the better, and questions on pensions and life assurance should form part of the initial consultation with the client as it flags them as issues and allows the solicitor to request the necessary information – the benefits statement – from the client.

When the pension information is obtained, expert assistance will be needed to ascertain the nature and value of the entitlements of the member spouse in the scheme. At this point, a decision can be made as to whether a pension adjustment order should be sought or whether it is better to seek adjustment of the non-pension assets.

Understanding that information

The pension expert or consultant will help the solicitor in, first, obtaining all the relevant details of the available benefits, evaluating the alternatives and assisting in ascertaining what is achievable and, second, if agreement can be reached with the member spouse, to draft an appropriate form of consent order. The pension expert will usually furnish a report on the value of the benefits which is purely factual and may set out the options open to the court, such as the effect of a 50/50, 60/40, or 70/30 split in the pension. Walls recommends that, in addition to his report, the expert should, in a covering letter (for solicitor and client eyes only) explain clearly the contents of the report and set out his comments and possibly detail a pensions strategy. The expert will also be available to give evidence in court and to assist the client in deciding what to do once the PAO has been made. The pension expert should be briefed as soon as possible in the case. Walls notes that judges are well informed on PAOs and solicitors should help the court to give them the outcome they wish to achieve for their clients.

Another problem identified by Walls is guiding clients on what to seek from the court or from the other side in the area of pensions. Some clients believe they have an automatic entitlement to 50% of the pension. The courts may be willing to look at a weighted split in favour of a dependent spouse if the value of any pension benefit is modest and the other spouse has many years in which to make up the value lost.

Settlement of pension issues is not easy, even where the principle of a PAO is accepted by both sides and the information exchanged on a voluntary basis. Walls indicates that sometimes a meeting between the pension experts on each side can agree the facts and figures from which negotiations can be progressed. It is important to remember that the court must give priority to adjusting non-pension assets. The advantages of a negotiated solution are: full advice and due consideration for your client, the opportunity and time to ensure careful drafting of the PAO, and the chance to get the approval of the terms from the pension trustees prior to the making of the order.

According to Muriel Walls, the period of reckonable service does not have to be the entire duration of the member spouse's years with the employer but may commence at the beginning of the relationship or date of marriage and may end at the date of separation or the date of the hearing. The court also has flexibility in relation to the percentage of the retirement benefit to be paid to the spouse; it is not necessarily divided 50/50, but may depend on other factors, such as the length of the relationship. A PAO in respect of a retirement benefit may be made either to the spouse or to a dependent member of the family, but not to both.

Contingent benefits

The other element to most pensions is the contingent benefit, a common form of which is a death-in-service lump sum payable if an employee dies while in employment. Usually, the trustees of the pension scheme will pay the death-in-service benefit to the estate of the deceased member if, during his or her lifetime, the member has indicated in a letter of wishes or in a nomination form a particular person that they would like to receive the benefit. The trustees have discretion to pay it to that person.

Sections 12(3) of the 1995 act and 17(3) of the 1996 act give the court power, where a decree of separation or divorce has been granted, but not more than one year after the making of the decree, to order the whole or part of the contingent benefit to be given to:

- The other spouse
- A person on behalf of a dependent member of the family, or
- To both, in such proportions as the court decides.

The advantages of a contingent benefit PAO are, according to Walls, that it may be made in addition to an order for retirement benefits and it is often part of an overall employment package. It does not have to be paid for separately in the way that life assurance does. However, the order will not be effective if the member spouse leaves that employment and Walls pointed out that, if this were likely, alternative cover by life assurance might be preferable. The contingency benefit only comes into effect if the member spouse dies while in service. Remarriage and/or death of the benefiting party automatically terminates the order. The PAO order in respect of a contingent benefit is not an ancillary relief order that is capable of variation.

Assessing maintenance

Ancillary relief is the 'meat' of judicial separation or divorce and it is the job of the family lawyer to look at the assets and liabilities of the parties and to try to devise a scheme for the clients that would ensure their continued financial security, said Mary O'Toole SC.

The factors that influence the court to decide on how much, if any, maintenance to grant or how to divide capital assets or the family home are contained in section 16 of the 1995 act for judicial separation or section 20 of the 1996 act for divorce.

Mary O'Toole sees the starting point for the assessment of maintenance by the court as the

present level of income and assets of the parties and their outgoings. The affidavit of means often sets out a level of expenditure that is not sustainable when the parties are living in two separate households. In this case, the court will usually divide expenditure into fixed overheads, such as accommodation, loans and revenue liabilities, and discretionary expenditure, which is much more fluid. The court usually bases its decision on fixed overheads rather than the needs of the parties in relation to their discretionary expenditure.


Muriel Walls


Mary O'Toole SC

Earning capacity

The earning capacity of both spouses is considered by the court and, in cases of long marriages with several children and where the wife has spent many years in the family home, there would appear to be a general acceptance that the wife's earning capacity is negligible, O'Toole said.

While this is borne out by the case of *JD v DD* ([1997] 3 IR), O'Sullivan J in the more recent case of *CF v CF* (unreported, 11 June 2002) examined very closely the evidence in relation to the wife's earning capacity.

This case seems to be more reflective of the current judicial attitude towards the earning capacity of the wife. In *CF v CF*, the wife was 53 years of age, had qualified as an architect in 1974 and practised until 1979. She practised as an architect again between 1981 and 1984 (stopping on the birth of her daughter), from 1991 to 1993, and from 1997 to the date of the hearing, at which time she was employed on a part-time basis as a conservation architect paid on an hourly rate. She usually worked around 20 hours a week and earned about €13,000 in 2001. In an innovative move, the husband called evidence in relation to the level of remuneration and job opportunities available to architects. Having heard this evidence, the court held as follows:

'Now that M has grown up, the applicant would be free, if she wishes, to work a full week. I think the demand for her work exists. I accept that because of her family commitments, her early career was interrupted and it is probably over-optimistic, as her counsel insists it is, to regard her as having a full ten years' experience. Moreover, her age in her young 50s is to some extent a limiting factor. In my view, she would be able to command an income of £30,000 per annum (€38,100) if she elected to work on a full-time basis'.

The court held that in assessing any maintenance payable to the wife, it would first have to identify her likely available income and found that it would be around €38,000. As O'Toole pointed out, this effectively attributed an income to the wife, making it probably the only reported decision where the court set out in detail its view as to the earning capacity of the wife. It seems a good idea (when acting for the husband) if the wife has a qualification or profession to call appropriate evidence to give the court a basis on which to attribute an earning figure to her.

Valuing the assets

The amount of maintenance a spouse may be granted is also dependent on the level of capital provision the court makes for that spouse. If the court believes the capital provision made is not only sufficient to enable the spouse to re-house him or herself but also leaves a sum of money, then it is likely the income from this money will be taken into account in determining the maintenance award.

Where there is no agreement on the valuation of the assets, a huge amount of court time can be taken up in ascertaining their value, said O'Toole. It is essential that the court takes a view as to what is the correct valuation of an asset. The usual settlement of a dispute over the value of property is that each valuer is called to give evidence and cross-examined

DRAFTING A PENSION ADJUSTMENT ORDER

Huge problems arise in practice if PAOs are not correctly drafted. Muriel Walls notes the lack of any standardised or published PAOs, but points to sections 79 and 80 of the guidance notes produced by the Pensions Board which set out exactly the information that must be contained in the PAO.

Section 79 states that PAOs in respect of *retirement benefit* should contain the following information:

- Name of the scheme (or other appropriate identification)
- Name of the member spouse
- Name and address of the person in whose favour the order is made
- Name of the dependent member of the family (if relevant)
- Type of order (PAO in relation to retirement benefit made under section 12(2) of the *Family Law Act, 1995* or section 17(2) of the *Family Law Divorce Act, 1996*)
- Date of commencement of period of reckonable service of member spouse to be taken into account
- Date of ending of period of reckonable service of member spouse to be taken into account (but no later than date of granting of decree)
- Percentage of the retirement benefit accrued during the period between date of commencement and date of ending of reckonable service to be paid to the person in whose favour the order is to be made
- Directions (if any) to the trustees of the scheme as the court considers appropriate for the purposes of the order, including directions compliance with which occasions non-compliance with the rules of the scheme or the *Pensions Act, 1990*.

Section 80 states that PAOs for *contingent benefits* must contain:

- Name of the scheme (or other appropriate identification)
- Name of the member spouse
- Name and address of the person in whose favour the order is made
- Name of the dependent member of the family (if relevant)
- Type of order (PAO in relation to contingent benefit made under section 12(3) of the *Family Law Act, 1995* or section 17(3) of the *Family Law (Divorce) Act, 1996*
- Identification of the contingent benefit to which the order applies (identified by reference to appropriate scheme rules or policy or contract number)
- Percentage of the contingent benefit as specified above to be paid to each of the people in whose favour the order was being made
- Such directions (if any) to the trustees of the scheme as the court considers appropriate for the purposes of the order, including direct compliance with which occasions non-compliance with the rules of the scheme or the *Pensions Acts* of 1990.

Where possible, agree the draft PAO in advance with the other side and have the trustees confirm that the draft order could be implemented by them. Walls recommends the order be served by the solicitors directly on the trustees of the pension scheme.

Draft the PAO separately to the main body of the order so that trustees are only made aware of the minimum level of personal detail required.

on his or her report to discover the basis on which they arrived at their valuation and with what properties they have compared the property in question. This can be a time-consuming process and O'Toole believes it is advisable – in order to save time and costs – to have the valuers talk to each other prior to the hearing to see if they can agree the valuations between themselves, or at least narrow the issues on valuation.

In *CF v CF*, there was a huge difference in the valuation of the family home by the valuers, but the court held that it must put a value on the family home. In this case, O'Sullivan J did not split the difference between the two valuations, but analysed the evidence of both valuers and held for the valuer who was actively engaged in the market in the area of the family home. O'Toole noted that the trial judge made a genuine attempt to arrive at a figure which, adjudicating between the evidence of the two valuers, was a reasonable valuation for the property.

O'Toole viewed the valuation of private companies as time-intensive and dependent on both sides examining, in evidence, the basis on which the other side carried out the valuation of the company,

WHAT THE COURT CONSIDERS

The court may make a pension adjustment order in addition to or in substitution for orders for maintenance, property adjustment and financial compensation. But the court must examine at first instance the possibility of making proper provision for the applicant spouse by way of maintenance, for instance, before considering whether a PAO is appropriate. This means that the court should give priority to adjusting non-pension assets.

Even if a PAO is not appropriate, it is essential that the pension rights are valued so that non-pension assets are fairly divided. Family law solicitor Muriel Walls points out that while the court must have regard to the general criteria set out in section 16 of the 1995 act and section 20 of the 1996 act, the following are of specific relevance to pensions:

- The age of the spouses and the duration of the marriage. A dependent wife who has not worked outside the home for many years and has no pension entitlement and little possibility of getting into pensionable employment will be more in need of protection than an independent wife with a career and a pension of her own
- The contributions that the spouses have made to the family. Making provision for a pension is a family decision and if, during the course of the marriage, the husband and wife agreed that a pension was necessary and placed this as a priority over other family needs, this is something the court should take into account
- The value of any benefit that will be forfeit by granting the decree. If a PAO is not made, the readjustment of non-pension assets must be done bearing in mind the value of the pension entitlements retained by the member spouse. In some cases, it may not be worthwhile to make a PAO, for example, where the benefit in a particular fund is valued at €2,000

for instance, the methodology involved and factors considered.

Valuing the business

In the case of *BD v JD* (unreported, 5 December 2003), McKechnie J was presented with two valuations of a private company, one for €12 million and the other for €5.9 million. The wife's accountants said that although they valued the company at €12 million, if a buyer could not be found at that amount they would advise the husband not to accept less than €10.5 million. McKechnie J considered the overall picture in placing a value on the company. He took into account and was impressed by the husband's ability as a businessman, his determination to keep the business afloat and his ability to attract new investors, as well as the solid financial position of the company. He also believed the company's fortunes would improve, though in decline for the previous 18 months, and did not agree with the suggestion of witnesses for the husband that the outlook was as bleak.

McKechnie J also noted the experience of the staff, the caution and prudence of the board in its accumulation of cash, the absence of borrowings in the company and its reluctance to pay dividends as further evidence of its ability to work through what he described as 'this upheaval'. McKechnie J valued the company at €10 million and did not simply split the difference between the two valuations but engaged in the valuation process and clearly believed that the husband would guide the business through its difficulties.

The accountants for the wife in cases similar to this one are often 'out of the loop', as they are given historic accounts that are only updated when the accountant for the husband is in the witness box. So, in some cases, it is necessary to run the case in the High Court with inevitable cost implications, before the information in relation to the company is forthcoming. O'Toole also observed that huge disparities between company valuations meant that it was difficult to settle these types of cases.

Case law since *T v T*

In analysing the decision in *BD v JD*, Gerard Durcan SC noted that McKechnie J's approach suggested that in a long-standing marriage with substantial assets, even where the wife could not prove a substantial input into her husband's business affairs, by virtue of her general contribution to the family she would still be entitled to a substantial share of the assets. Durcan pointed out the subjective nature of the exercise being carried out by the trial judge and observed that a different trial judge having regard to the same circumstances could have awarded very different amounts to the wife.

Uncertainty is certain

At last year's conference, Gerard Durcan SC had expressed his dissatisfaction at the fact that, in spite of the considered judgments in *T v T* and *K v K*, family law practitioners had not been greatly assisted by them in terms of advising their clients and in trying to predict the possible outcome of their cases. One year later, he reiterated this point. Recent case law, he believed, essentially highlighted the hugely subjective nature of each case and it was difficult to see how greater certainty could be achieved. One way of achieving certainty, he suggested, would be if the courts indicated the weight they were attaching to the factors set out in section 16 of the 1995 act.

The decisions in *SN v FN* (Abbot J, 18 December 2003) and *BD v JD* (unreported, McKechnie J, 5 December 2003), which apply the general principles set out in *T v T*, have both been appealed to the Supreme Court. Durcan wondered at these appeals, given the breadth of discretion allowed to the trial judge in deciding ancillary reliefs, which is a clear theme of the judgments in *T v T*. However, these two decisions have shown that the Irish courts are much less dependent on English case law, especially since *T v T*.

Durcan expected that the court will soon be asked to decide the principles applicable and the weight to be given to full and final settlement clauses where one of the parties seeks further ancillary reliefs on divorce. This will be particularly interesting when the judicial separation is only recently settled. He noted the importance of this issue for clients, as they might be unwilling to settle judicial separation proceedings if they were aware that the whole settlement would be reviewed based on proper provision in subsequent divorce proceedings, even if such divorce proceedings took place soon after the judicial separation.

Hopefully, we will have a judgment on this issue before next year's conference. G

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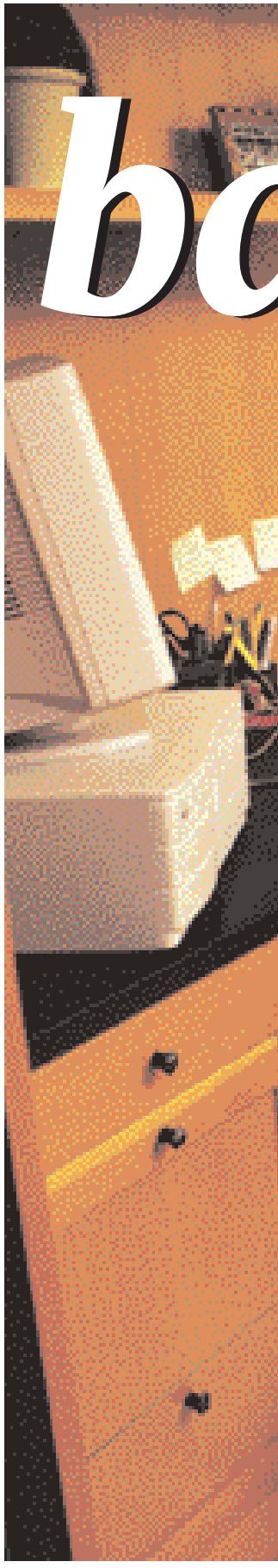
GETTING THE *bo*



Technological change is continuing to transform the traditional workplace, and employees no longer need to come into their office to do their jobs. Colleen Cleary and Wendy Doyle consider the issues involved in 'e-working'

Research indicates that 10% of Irish businesses have one or more employees using e-work practices. With proper safeguards, employees can access new ways of working and benefit from the possibilities associated with e-working, such as more control over their working day (including working hours), reductions in commuting time, and a better balance between working and home life.

The UK recently introduced the *Flexible working (procedural requirements) regulations 2002*, which provide a new statutory right to request to work on a flexible basis, including the right to work from home. Ireland does not have similar legislation and there are no plans to follow suit. However, there is a *Code of practice on e-working*, introduced in 1999. The code encourages the introduction of a formal e-working policy in organisations as a means of avoiding potential problems or difficulties that may arise with the introduction of this method of working.

Risky business

Employers are advised against agreeing to *ad hoc* requests from employees to work from home and should instead draft a clear policy that specifies the parameters of e-working. The e-working policy should be drafted with sufficient flexibility and there should be provisions for amending, suspending or terminating the e-working arrangement and returning to conventional office working, subject to business requirements.

The risk in allowing an employee to work from home without the back-up of an explicit e-working policy or letter that provides that the arrangement is subject to change can be illustrated by a recent High Court decision in *Carey v Independent Newspapers*. In this case, former *Evening Herald* political correspondent Mairead Carey sued her former employer for breach of contract and negligent misstatement. Carey alleged that it was agreed with the editor that she could work from home in the mornings to facilitate her childcare arrangements. When the editor left, Carey was told she could not work from home and was required to attend the office at 7am. She subsequently left her employment and sued her former employer for breach of contract, wrongful dismissal and negligent misstatement. The High Court awarded her €52,226 in damages and held that that the editor had made a negligent misstatement by saying she could work from home but failing to tell her that senior management had serious reservations about this.

Allowing an employee to work from home can constitute a fundamental term and condition of employment, which cannot be changed without the employee's consent. It is therefore imperative that the employer has an explicit agreement or a clear e-working policy that has the built-in flexibility for the employer to change any home-working arrangements subject to business requirements.

All the right moves

The e-working policy should specifically envisage how this arrangement will operate in order to avoid any problems that may arise. When drafting the policy, employers should be aware of any potential equality or industrial relations issues that may arise from excluding certain workers from e-working. To avoid such a challenge, objective criteria should be used to identify jobs or roles that are suitable for e-working, with a general overriding reservation to allow the employer to decline the request for

RIGHT

operational reasons. Requests to work from home should be considered fairly, and the implications of e-working for the employee and employer should be fully considered before agreeing to the request.

Employers may also need to consider how the operation of company policies might be affected by the e-working arrangement and how certain benefits may apply, such as the reimbursement of the cost of the business use of a telephone land-line at home. The e-working policy should also include a procedure for regular monitoring and review of the e-worker's performance.

Where the introduction of e-working gives rise to any changes to normal work practices or to an employee's terms and conditions, these should be set out in an additional written letter to the employee. Consequently, the e-working policy will set out the general terms and conditions of working from home and the letter will set out the specific e-working arrangements for the particular employee.

The firm

There is sometimes an assumption that because an employee works from home, he is responsible for his own working conditions. This is not correct. Employees who work from home are still the responsibility of their employer.

This means that they are still protected by the array of employment legislation relating to such issues as working time, health and safety, equality and unfair dismissal.

Employers have a legal duty to ensure, as far as reasonably practicable, the safety, health and welfare of their employees. They should also be aware of the importance of undertaking a health-and-safety risk assessment to ensure that the e-worker's working conditions comply with all health and safety legislation. It is important to be aware that carrying out a risk assessment of the home work-station is the responsibility of the employer and may involve, by prior agreement, a home visit. The risk assessment should cover issues such as electrical safety, fire safety, lighting levels, provision

An Ewok: not the same as e-work

of heating and ventilation, VDU requirements, information on ergonomic posture for prolonged use of computer work stations and portable computers, and the importance of eye tests for all regular VDU users.

E-workers are also subject to the protection afforded to them by the *Organisation of Working Time Act, 1997*. This act specifies that an employee cannot work on average in excess of 48 hours a week, all employees are entitled to 11 hours' consecutive rest in each 24-hour period, and an employee is entitled to rest breaks of 15 minutes per four-and-a-half hours and 30 minutes where six hours have been worked. The e-working policy should make it clear that the employee is obliged to comply with the provisions of the act and that appropriate breaks should be taken during the working day.

E-workers are also covered by the *Employment Equality Act, 1998*, which prohibits discrimination in respect of access to and terms and conditions of employment on nine grounds: gender, marital status, family status, sexual orientation, religion, age, disability, race and membership of the travelling community. It is probable that women will constitute a significant group of e-workers, as they will often seek to combine a working life with childcare. It will be important that e-workers are treated equally to other employees who are based in the workplace, to avoid any contention that e-workers are being discriminated against on the ground of gender. So e-workers should be treated equally to work-based employees in relation to access to terms and conditions such as promotion or access to bonuses, and so on.

It is likely that the trend towards e-working will increase. There is no doubt that e-workers have the potential to be a major impetus for sustained economic growth, but employers should have a clear, written policy in place to enable companies to react readily with a degree of flexibility to such requests to work from home. G

Colleen Cleary and Wendy Doyle are lawyers in the Employment and Human Resources Law Unit of the Dublin law firm Landwell Solicitors.

With the country's first Commercial Court up-and-running, Paul Jacobs and Tim Roulston explain how its new rules will change the role of expert witnesses, which could save time and money

In the know

MAIN POINTS

- Commercial Court
- New rules for expert witnesses
- Reducing cost of proceedings

In January, the country's first specialist Commercial Court was established to deal with a wide range of commercial disputes generally involving sums exceeding €1 million. The new rules of the court will change the role of expert witnesses, in that experts are likely to be involved earlier in the commercial litigation process and required to attend meetings of experts and prepare a joint memorandum. Experts will, unless the judge orders otherwise, be required to issue a written statement in advance of trial outlining the essential elements of their evidence, and will possibly also be directed to exchange their expert reports with the opposing expert. The new rules raise practical issues that experts and legal practitioners alike will need to deal with as they navigate these uncharted waters.

Earlier involvement of experts

The initial directions hearing and the case-management processes are likely to mean that, where expert evidence is required for a case, the experts will be instructed earlier. Experts may be required by the solicitor to help identify key issues, the need for other witnesses, documentary and computer evidence that ought to be discovered or inspected, and areas where interrogatories are needed on technical matters.

Meetings of experts

At the initial directions hearing, or at any other time, the judge may direct the experts to consult with each other for the purposes of:

- Identifying the issues on which they intend to give evidence
- Where possible, reaching agreement on the evidence that they intend to give in respect of those issues, and
- Recording in a non-binding jointly-prepared memorandum the outcome of their consultations.

If agreement is to be a realistic objective, then the participants in the proceedings will need to release themselves from the shackles of the 'trial by ambush' approach and be prepared to share more information about the basis of their arguments with the opposing party.

Meetings of experts may be valuable at an early stage in the case to identify issues, but agreement is most likely to occur at a later stage, after the expert has reviewed the relevant evidence. In a particularly complex case, the experts may need to meet on a number of occasions, and the status of these meetings could be conveyed through the solicitors to the judge at the case-management conference.

A format for the memorandum that has been particularly useful in England, and may be helpful in Ireland, is for the experts to separately list each issue, record if agreement has been reached or not, record what the agreement is, and, where there is no agreement, to summarise their position and the areas of difference.

Written statements

Another key provision in the new rules is the serving upon the other party, in advance of the trial, of a written statement outlining the 'essential elements of that evidence', signed and dated by the expert or witness. This exchange is likely to provide another

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opportunity for narrowing the issues. In the case of the plaintiff, the statement must be served not later than one month prior to the date of the trial, and in the case of the defendant not later than seven days prior to that date. Under this timetable, it seems possible for the defendant's expert to comment on matters raised in the statements of the plaintiff's expert and/or other witnesses.

The meaning of 'essential elements' of the expert's evidence is not defined. It seems that there could be difficulties in its interpretation (and perhaps even penalties imposed) if it is later alleged that an expert omitted to disclose an 'essential element'. The judge may, in exceptional circumstances, make an order directing that the expert's written statement be treated as the expert's evidence-in-chief. Although the rules contemplate that this may occur in exceptional circumstances, it highlights the need for experts to draft their statements using clear and unambiguous language.

Exchange of expert reports

The judge's powers under rule 5 are wide, and it seems open to the judge in appropriate cases to direct that experts exchange their full reports. The experience in England suggests that a process for exchanging expert reports and allowing the experts to respond to each other's reports provides significant help to the court in narrowing the issues and can lead to earlier settlement of the action.

'The new rules raise practical issues that experts and legal practitioners alike will need to deal with'

The expert could potentially have a supporting role to the solicitor at other stages of the proceedings, including performing an initial assessment of loss for a plaintiff with a view to establishing whether an application could be made for the case to be heard in the Commercial Court, and assisting in the preparation of the case booklet and the case summary in relation to explaining difficult technical issues or evidence.

In those commercial cases where experts are needed, the expert will potentially have an important role in identifying and narrowing the issues in dispute, possibly reducing the costs of such proceedings.

Given the focus on case management and the imposition of penalties for non-adherence to the judge's directions, it will be important for solicitors, their clients, counsel and the experts to have open lines of communication and clarity over their respective responsibilities. G

Paul Jacobs is director and Tim Roulston is manager of Ernst and Young's Litigation and Forensic Accountancy Services.

Finding the m

Like its century-old counterpart in England, Ireland's first Commercial Court strongly encourages 'voluntary' mediation. William Aylmer looks at how the English system works and the lessons we could learn from it

MAIN POINTS

- ***Civil procedure rules* in England and Wales**
- **Alternative dispute resolution**
- ***Rules of the Superior Courts***

Over the past decade, there has been a marked divergence between civil procedure in England and Wales and that in Ireland. That divergence accelerated when the *Civil procedure rules* (CPR) came into force in England and Wales in April 1999, but even before then, the requirement for parties to exchange pre-trial witness statements had effectively brought an end to 'trial-by-ambush'. Also, since 1994, the admiralty and commercial courts in London had, by practice direction, required parties to employ alternative dispute resolution (ADR) procedures in appropriate cases.

The introduction of the CPR in England and Wales brought about the most comprehensive reform of civil procedure in that jurisdiction in over a century. The main thrust of the rules was to impose stricter control on the parties in preparation and exchange of pleadings and to introduce the concept of active case management by the court, all designed to make commercial litigation more efficient, cost effective and fairer (see **panel** overleaf).

Encouraging ADR

There has been a dramatic increase in the use of mediation in commercial dispute resolution since the advent of the CPR. Being a voluntary process, mediation has always been available to parties in commercial disputes, but it has taken the CPR to cause a shift in the practice of commercial litigation in England and Wales. An examination of some of the important decisions of the English courts since their introduction gives an indication of how the relevant parts of the CPR have been interpreted so as to cause parties in dispute to resort increasingly to mediation.

The case law falls into various categories, including:

- Costs sanctions
- Case management and the requirement to mediate
- Enforceability of settlement agreements arrived at through mediation

- UK government pledge to mediate, and
- Contractual dispute resolution provisions.

Costs sanctions

In *Dunnett v Railtrack* ([2002] 2 All ER 850), the plaintiff made a claim for damages against the defendant after some of her horses had been allowed to escape from her property onto the railway, where they were killed. The plaintiff's claim was dismissed at trial and she appealed the decision. When the court gave leave to appeal, the judge advised the plaintiff to explore mediation. The plaintiff proposed mediation to the defendant before the appeal came up for hearing, but the defendant turned down the proposal. The plaintiff lost again on appeal, but the appeal court declined to award costs to the successful respondent.

iddle ground

In exercising its discretion under part 44 of the CPR and taking into account the overriding objective outlined in part 1 of the CPR, the court's refusal to award costs was based solely on the respondent's refusal to engage in mediation before costs started to accrue in the appeal process. In its judgment on costs, the Court of Appeal interpreted part 1 of the CPR as imposing a duty to further the overriding objective, not only on the courts but on the parties also. That duty required the respondent to engage in mediation with the appellant, even though it had won the legal argument at first instance and had a realistic expectation that it would win again on appeal. Unless it could justify its refusal to mediate, it would be penalised on costs.

The decision in *Dunnett* did not make mediation mandatory before proceeding to trial, but it did announce that the courts were now prepared to impose a severe sanction on parties who unreasonably refused to mediate. The judgment cast the CPR in an altogether different light, particularly among legal practitioners, who would see a surge in commercial mediations in the immediate aftermath.

Hearst v Leeming ([2001] EWHC 1051 Ch) was a professional negligence action taken by a solicitor against his barrister. When the case came up for hearing, the plaintiff withdrew his claim, having been persuaded by the trial judge that he did not have a case. However, the plaintiff argued that because the defendant had unreasonably refused to mediate the dispute, he should not be liable to pay the successful defendant's costs. While the solicitor failed in his argument, Lightman J held that the critical factor to be considered in assessing whether a party has unreasonably refused to mediate is whether the mediation has any real prospect of success, when judged objectively.

The decision appears to imply that while mediation is not mandatory, where there is an unjustified failure to give proper consideration to mediation, particularly when it offers a realistic prospect of success, adverse costs consequences must be anticipated.

SITA v Watson and Wyatt; Maxwell Batley ([2002] EWHC 2025 Ch) was another professional negligence action in which the plaintiff sued its legal advisors, who had failed to identify a significant social welfare liability for the plaintiff in France. The defendant joined Maxwell Batley as a third party.

Maxwell Batley successfully defended the claim, but Watson and Wyatt argued that they should not be awarded their costs on the basis that they unreasonably refused to mediate. The argument was rejected on the basis that it would have been unjust for Maxwell Batley not to recover any part of their costs because of the manner in which Watson Wyatt had 'demanded' that they enter into mediation.

So as a result of this decision, a party must exercise care in the manner in which it proposes mediation if it is to benefit from the judicial approach evidenced in *Dunnett v Railtrack* and *Hearst v Leeming*.

In *Corenso (UK) Limited v The Burnden Group Plc* ([2003] EWHC 1805 QB), the defendant had made a part 36 offer (tender), which the plaintiff had

THE *CIVIL PROCEDURE RULES* IN THE UK

Part 1 of the CPR sets out the 'overriding objective' of enabling the court to deal with cases justly. Dealing with the cases justly includes saving expense and dealing with cases in ways that are proportionate to their value and importance, the complexity of the issues and the financial position of each party.

Part 26 of the CPR provides for proceedings to be stayed, on the application of one of the parties, or of the courts' own motion, for a period of one month to allow the parties to try to settle the case by ADR or other means. Part 26 did not impose mandatory ADR on commercial litigants. It did, however, reflect public policy, informed by the *Woolf report*, that in order to achieve efficiencies, many disputes needlessly clogging up the court lists would have to be resolved through ADR.

Part 44 of the CPR sets out the courts' discretion in relation to awarding costs at the conclusion of proceedings, the implication being that costs will not always follow the event.

failed to accept within the time provided by the CPR, necessitating an application to the court to allow the plaintiff to accept the offer. The court allowed the plaintiff to accept the offer. The defendant argued that it should not be required to pay the costs of the action to date because of the plaintiff's failure to accept the part 36 offer within the time prescribed. However, the court declined to give any costs relief to the defendant who had proposed mediation.

This decision shows how difficult it is for parties to either propose or refuse to mediate and to then accurately predict how the court will deal with costs. However, the decision does make clear that the parties will be required to effectively engage in ADR and not just go through the motions, if they are to avoid adverse costs sanctions.

'A party must exercise care in the manner in which it proposes mediation'

Case management

In a dispute between various tenants in a building in central London (in which the Saatchi Gallery is housed), the defendant was sued by various parties for alleged unauthorised use of part of the building not within its take.

In this case, *Shirayama Shokusan v Danovo Limited* ([2003] EWHC 3006 Ch), the defendant proposed mediation in advance of the hearing of an interlocutory application for injunctive relief restraining the defendant from continuing the unauthorised use. Delivering its decision on 5 December 2003, the court made an order requiring the various parties to engage in the mediation proposed by the defendant, notwithstanding their refusal to accept the proposal.

Blackburn J found that the case-management powers conferred on the court by part 1.4 of the CPR entitled it to order ADR even against the wishes of one party and that nothing confined such power to circumstances in which both parties wanted to mediate. This was yet another unexpected departure for the court.

While this is a very recent decision, and may yet be overturned, it demonstrates a clear intention of the English High Court to strengthen the role of ADR on the commercial dispute resolution landscape by making what may appear to be harsh demands of commercial litigants.

Enforcing mediation settlements

In *Thakrar v Ciro Citterio Menswear plc (in administration)* (EWHC Ch 1, October 2002), Narritt VC reversed a Court of Appeal decision to refuse to approve a settlement that had been arrived at following a mediation of a dispute in an insolvency case. While the decision deals with technical issues relating to insolvency practice, it makes clear that the English High Court is prepared to recognise and enforce settlement agreements arrived at through mediation.

UK government pledge

On 23 March 2001, the UK Lord Chancellor's Department issued a press release about Lord Irvine's announcement of 'a major new initiative made by the government to promote alternative dispute resolution in the case of litigation'. The Lord Chancellor had given a commitment on behalf of all government departments and agencies that ADR would be considered and used in all suitable cases, where the other party accepts it. A commitment was also given that appropriate clauses would be provided in standard procurement contracts on the use of ADR techniques to settle disputes.

The commitment stated that: '*Where the other agrees, the government is now formally pledged to resolve legal disputes through ADR whenever possible*'. The enforceability of the pledge came before the English High Court in *Royal Bank of Canada Trust Corporation Limited v The Secretary of State for Defence* ([2003] EWHC 1479 Ch).

The High Court judgment was delivered on 14 May 2003. Again, the case involved a landlord and tenant dispute where a government department was a tenant of commercial premises. The defendant government department won the legal point in the proceedings dealing with an entitlement to give notice. However, the court refused to grant the tenant an order for its costs on the application of the plaintiff landlord on the basis that the landlord had, on more than one occasion prior to the issue of proceedings but after the pledge had been given, offered to refer the dispute to ADR, but the tenant had refused, citing the fact that the dispute concerned a point of law as its only reason for the refusal. The court was not prepared to allow a party to avoid an implied condition affecting its commercial relationships that it had imposed upon itself.

Contractual agreement

Perhaps the most important decision of the English courts since April 1999 on the subject of ADR in commercial disputes is the one that gives strong

judicial approval to the enforceability of contractual dispute resolution clauses.

In *Cable and Wireless v IBM* ([2002] EWHC 2059 Ch), the plaintiff and defendant had entered into an agreement for the supply by the defendant of worldwide information technology services for 12 years. The contract contained a tiered dispute-resolution clause. When a dispute arose between the parties regarding benchmarking provisions in the contract, the plaintiff refused to try mediation to resolve the dispute as proposed by the defendant.

The question arose for the court as to whether the parties' agreement to mediate could be enforced by one against the other. Coleman J held that there was a contractual commitment to mediation. The judgment appears to confirm that, as part of a judge's active case-management role under the overriding objectives set out in part 1 of the CPR, judges have a duty to encourage parties to use ADR procedures where appropriate.

Coleman J stated that: '*For the courts now to decline to enforce contractual reference to ADR on the grounds of intrinsic uncertainty would be to fly in the face of public policy as expressed in the CPR and as reflected in the judgment of the Court of Appeal in* Dunnett v Railtrack'.

These judicial decisions have signalled a clear interpretation of the CPR, under several different categories, which supports the public policy objectives that led to the English reforms in the first place. In order to achieve the overriding objective of the CPR, the English courts are in no doubt that ADR and mediation in particular will play an important and ever-increasing role in the resolution of commercial disputes.

Bringing it home

The case for reform of civil procedure in commercial litigation has been recognised here in recent years (*The new Commercial Court*, Mr Justice Peter Kelly, 10 March 2004). We have experienced an unprecedented expansion of our economy over the past decade, with particular emphasis on the new economies of financial services, pharmaceuticals, telecommunications and software development. These are industries in which high-value disputes often arise but which, nonetheless, require access to a fast and efficient system of dispute resolution. The civil justice system here has struggled to cope with the dramatic increase in the volume of business transactions and the disputes arising from them.

Our *Rules of the Superior Courts* have now been amended by the insertion of order 63A by the *Rules of the Superior Courts (Commercial Proceedings) 2004*, which came into effect on 12 January 2004. Of course, it is unsurprising that we had not established a commercial list (for certain high-value commercial proceedings) until the 111th anniversary of the establishment of the equivalent list in England. We are, after all, a country whose population is less than half that of Greater London and our economy did not justify such a list in the High Court until now.

The introduction of a commercial list in the High Court is nonetheless a significant step forward, not only for the conduct of litigation of commercial disputes of significant value, but also for the conduct of commercial dispute resolution in general.

The thrust of the new rules is similar to those governing the procedure in the admiralty and commercial courts in London and share common features, including:

- Assignment of judges with established commercial expertise
- Less formal pleadings
- Preliminary directions as to pleadings
- Regular case management by the court
- Pre-trial conference with the parties
- Statements of evidence to be signed and dated by the parties in advance
- Powers to award costs against a party who has been responsible for delaying proceedings
- Power to stay proceedings for one month to allow parties to attempt mediation, conciliation or arbitration.

Perhaps the most dramatic and welcome provision in the new order 63A is the power to stay proceedings on the application of one or other of the parties, or of the court's own motion, for a defined period to allow the parties to attempt ADR. It remains to be seen how the court will exercise its new powers.

The order 63A rules, while clearly not as far-reaching as the CPR, contain echoes of the 'overriding objective' outlined above. Order 63A, rule 5, introduces the power to stay proceedings to allow the parties to attempt ADR. It is anticipated that in the first months of the application of the new rules, parties will apply for stays where their opponents are less inclined to mediate. There is no reason to expect that these applications will be refused, not least because of growing awareness among litigation practitioners and their clients of developments in England and Wales and the increased availability of competent commercial mediators in this country.

It is likely to take somewhat longer before commercial practitioners start writing tiered dispute-resolution clauses into their commercial agreements, but an Irish *Cable & Wireless* may not be so far away. G

William Aylmer is an associate at the Dublin law firm Eugene F Collins. He is a CEDR-accredited mediator and founding secretary of the Irish Commercial Mediation Association. *A version of this article was first published by Thomson Round Hall in* The commerical law practitioner, *January 2004.*

Agnew: 'Politics and organised crime inextricably linked'

Galvin: 'It took years off my life'

TAKING CARE

Sicily was the location for this year's annual conference. Conal O'Boyle reports on the business session, but can't say too much about it because of his friend Mr O'Merta

MAIN POINTS

- Criminal Assets Bureau
- Foreign journalist's perspective
- Insurance market

There was no vow of silence when the Murfia came to town for the Law Society's annual conference in Sicily last month. The theme of the business session was *Render unto Caesar: money laundering and the law*, and everyone's favourite gangbuster, Cork solicitor Barry Galvin, was the supergrass for the day.

Galvin's presentation on his life and times in the Criminal Assets Bureau earned him a standing ovation from delegates at the end. He began by rehearsing the events that led to the establishment of CAB in late 1996, noting that there had been 18 gangland murders in the preceding 12 months, climaxing with the murders of detective Gerry McCabe and journalist Veronica Guerin in June of that year. The government's response, said Galvin, was to take the profit out of crime by introducing a stream of new legislation targeted at criminals, including the *Proceeds of Crime Act*, the *Criminal Assets Bureau Act*, the *Disclosure of Certain Information for Taxation and Other Purposes Act*, and amendments to the *Social Welfare Acts*.

He noted wryly that the *Proceeds of Crime Act*, the brainchild of the late Eamon Leahy SC, ran to just 24 pages while its later UK equivalent lumbered in at 330 pages.

The main effect of the new legislation was to shift the burden of proof onto the suspect, who was obliged to explain to the court where his money mysteriously came from. But in the early days, things did not run entirely smoothly for CAB or its chief legal officer. 'We headed off into a raft of litigation', said Galvin. 'You have no idea of the kind of litigation that we had. It took years off my life!'

Tony Soprano

The bureau, he explained, was 'formed to seek out the proceeds of crime and to take it from those who shouldn't have it in the first place'. It wasn't formed to prosecute people. He told delegates that CAB's independence of action was one of the most important factors in its subsequent success. That, and the fact that the government gave it almost unlimited resources.

Another factor was the co-operation it received from every sector in society, from the gardaí, the Revenue and Customs and Excise, but especially from the legal profession. 'I want to acknowledge that publicly', declared Galvin. 'I know there were abrasive moments when CAB officers arrived outside solicitors' offices, but it was a necessary evil because of the way things were. By and large, the legal profession supported the work of the bureau. The legal profession, individually and collectively, did not want to be working for drug traffickers and organised crime bosses and, with one or two exceptions, were hugely helpful to the work of the bureau'.

And he continued: 'I know that there are a number of people in this room whose offices were searched. They didn't like it, but they got the "think of Ireland" speech when they rang up! … The very fact that you were searched by CAB didn't mean that you were acting for a bad lad; it just meant that somewhere in your office there was an essential link in the chain of evidence'.

Pavarotti and friends

Whether they had been raided or not, there was no hint of a vendetta among delegates. Quite the opposite, in fact. The warmth of the applause that

greeted Galvin's presentation was ample testament to the profession's pride in his achievements and the affection in which he is held by his colleagues.

Earlier, the *Irish Times*'s Rome correspondent Paddy Agnew, gave the conference a foreign journalist's perspective on Italian money laundering. And inevitably that meant discussing the Mafia. 'The history of Sicily in the last 150 years has been very much marked by the Mafia and by organised crime', said Agnew, casting a nervous glance at the hotel staff.

Agnew explained how politics and organised crime had become inextricably linked in Italian life. Bar-room lawyers and denizens of Dublin Castle may drone on and on about corruption in Irish politics, but after listening to Paddy Agnew, the delegates realised that Ireland was only in the ha'penny place in that regard. The Italian prime minister Silvio Berlusconi had numerous friends and associates who had been indicted over their Mafia connections, said Agnew, who added that: 'The Mafia appear to have chosen Berlusconi as their political point of reference'.

He pointed out that in the last elections, all 61 seats in Sicily had gone Berlusconi's way, which meant that the Mafia had decided to vote *en masse* for his party *Forza Italia*. At this point, everyone was looking nervously at the hotel staff.

Agnew calculated that Mafia activity was costing Italy €7.5bn a year in terms of damage to the economy, around 9.5% of the country's GDP. That's about equivalent to the annual profit made by an Irish insurance company. And, coincidentally, a representative of that particular crime cartel was present to review the insurance market for delegates.

Fat lady sings

Patrick Howett of Jardine Lloyd Thompson spoke about the dramatic turnabout in the fortunes of insurance companies in the last 12 months. There had been 'a period of fragile stability', he declared, and the industry's 'capacity to write business had been reduced'. At this point, his audience was busy preparing a pair of concrete boots for him. Luckily, he won them back with a breezy assertion that 'Dorothea Dowling has had no effect on the reduction in claims we've seen to date'.

However, his prediction that premiums would fall this year and next but that 'the cycle will reverse quickly if premiums fall too far' left delegates wheeling out the cement mixer again.

Professor Mario Centorrino of the Department of Political Economy at Messina University delivered a paper on the mechanics of money laundering in heavily-accented English. It was probably really erudite, but we'll never know because, just like an Irish Godfather, he made delegates an offer they couldn't understand.

He could have been talking about popping a cap in someone's ass and we'd have been none the wiser. Well, maybe none the wiser, but at least we'd have been better informed. Italians? Fuggedaboudid. G

OF BUSINESS

Wiseguys: delegates at the Law Society's annual conference in Sicily

President Gerard Griffin

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Irish Companies Acts

By Lyndon MacCann SC, BA (Mod), MLitt, Barrister-at-law (General Editor);
Eugene Regan MA (Econ), LLM, Dip (Finance), Barrister-at-law and Gary McCarthy LLB, Barrister-at-law

The Irish Companies Acts is major new looseleaf work based upon Butterworths Ireland Companies Acts 1963–1990 (published 1993). This key title has been greatly expanded to include more detailed annotations, making sure you have all the detail you need. The annotations explain the amendments, cross-refer to the definition sections, give the corresponding UK provision, and provide detailed notes on relevant case law etc.

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Book reviews

JM Kelly: The Irish constitution (fourth edition)

Gerard Hogan and Gerry Whyte. LexisNexis Butterworths (2003), 26 Upper Ormond Quay, Dublin 7. ISBN: 1-85475-8950. Price: €202.50.

In his preface to the first edition (1980), Professor JM Kelly noted that the more informal, more general title of *The Irish constitution* was intended to reflect the fact that the general characteristics of the state were substantially formed by 1937. While all branches of the state's laws depended for their formal validity on the 1937 constitution, that constitution 'was very largely a rebottling of wine, most of which was by then quite old and of familiar vintages'.

That may have been so, but many readers know that the judges have infused the 1937 constitution with contemporary conceptions of justice. There is the thesis that not only is the quest in the Four Courts for what the constitution does mean, but increasingly (in a subtle sense) as to what the constitution should mean.

Thomas Jefferson, who exerted a profound influence on the US Supreme Court and the course of American constitutional development, wrote that some men look at constitutions with sanctimonious reverence and deem them like the Ark of the Covenant, too sacred to be touched. This was so in Ireland (in the main) up to the 1960s, but we know that, in general, laws must go hand-in-hand with the progress of the human mind. This book is the fruit of the progress of the human mind, the intellects of the judiciary, scholarly commentators and the learned authors.

The authors are well known: Dr Gerard Hogan is a senior counsel and fellow of Trinity College, Dublin, and Gerry Whyte is a professor at TCD's law school and is also a fellow. There are 2,461 pages in the book, a cornucopia of knowledge. A welcome feature is the reinstatement of the system of marginal notes, which were a significant feature of the first and second editions. Another feature of the book is its division into chapters, but the authors retained what is rightly considered a key organisational strength, the treatment of the various topics on an article-by-article basis. There are also appropriate chapters introducing the main aspects of the constitution, such as constitutional interpretation and fundamental rights.

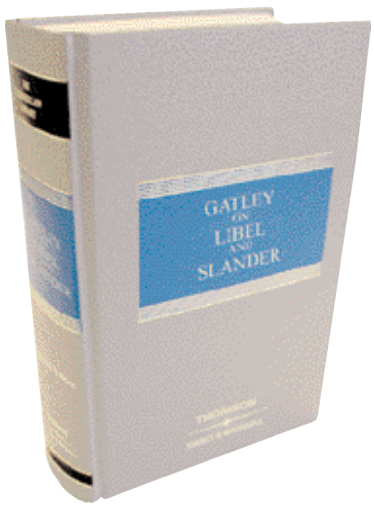
This book is a masterpiece in terms of its exposition of the fundamental law of Ireland. The authors have written a thoughtful, exceedingly fair-minded and elegant book on a subject matter that affects the life of every citizen and every human being in Ireland. It is a classic that will be a rewarding addition to the library of any serious Irish lawyer and any lawyer interested in constitutional law. G

Dr Eamonn Hall is the company solicitor of Eircom plc.

Gatley on libel and slander (tenth edition)

Patrick Milmo QC and WVH Rogers. Sweet and Maxwell (2003), 100 Avenue Road, London NW3 3PF. ISBN: 0-421-80030-5. Price: stg£255.

Defamation: law, procedure and practice (third edition)



David Price and Korieh Duodu. Sweet and Maxwell (2003), 100 Avenue Road, London NW3 3PF. ISBN: 0-421-8379-0X. Price: stg£90.

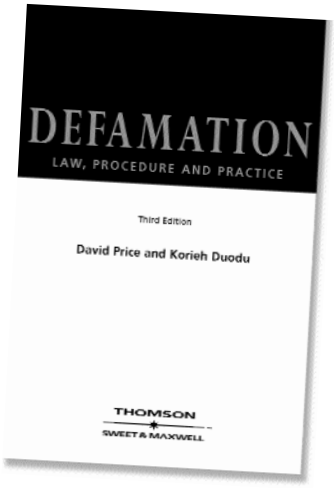
Gatley has long been recognised as the leading text on defamation in the UK. Both the law and the media have changed radically since it first appeared in 1924, but the recent tenth edition maintains its predecessors' high standards.

The book includes, for the first time, material on the practical application of the *Defamation Act 1996* and of the *Human Rights Act 1998*, which integrated the *European convention on human rights* into English law. The impact of the convention is reflected in the inclusion of a chapter detailing the jurisprudence of the European Court of Human Rights on the often-conflicting rights of freedom of expression, good name and privacy. The tenth edition also contains an extended analysis of breach of privacy and breach of confidence claims, which are

increasingly intertwined with defamation actions and whose development is driven, at least in part, by the ECHR.

The *Woolf report* gave rise to radical change in civil procedures in the UK. The authors of *Gatley*, Patrick Milmo QC and academic Horton Rogers, analyse the increasing use of interlocutory applications in defamation cases and the greater scope for formal offers of settlement by either party (both having decisive effects on costs), which the Woolf reforms introduced.

These changes are something of a mixed blessing for Irish lawyers. The government's failure to introduce long-promised legislative and procedural reform has meant that each new edition of *Gatley* reflects even greater divergences between English and Irish libel law and practice. Offers of amends, pre-action protocols, summary disposal and the law on distributors and



printers will all be alien to practitioners here.

However, there are significant advantages to the new edition. With Ireland recently incorporating the ECHR into Irish law, material on the UK's application of article 10 on freedom of expression and on the jurisprudence of the European court will be of great, and increasing, use here. Similarly, the development of a form of media qualified privilege, following the House of Lords decision in *Reynolds v Times Newspapers* ([2001] 2AC 127), approved by Judge O'Caoimh in *Hunter & Callaghan v Duckworth & Company* (unreported), is of potentially enormous significance on both sides of the Irish Sea. *Gatley*'s detailed analysis of the *Reynolds* decision and of a number of subsequent UK cases will be invaluable to solicitors acting for or against media defendants.

There is an international dimension to the book, with an emphasis on other common-law jurisdictions. Decisions of the High Court of Australia feature heavily, including the leading case on internet publication, *Dow Jones v Gutnick*. A number of Irish cases make the cut, ranging from the Supreme Court decisions in *Berry v Irish Times* ([1973] IR 368) and *Barrett v Independent Newspapers* ([1986] ILRM 601) to the European Commission's declarations in *Young and O'Faolain v Ireland* ([1996] EHRLR 326).

While *Gatley* is aimed squarely at the practitioner, the book by solicitor-advocates David Price and Korieh Duodu aims for a broader audience. The book seeks to clarify and demystify the law, with an emphasis as much on the tactics of proceedings and the 'tricks of the trade' as on the underlying legal principles. It does not have the gravitas of *Gatley*, and the authors are unlikely to disagree with an assertion that their book is less likely to be quoted authoritatively in the higher courts. That is not likely to worry them. The book's strength is its clarity of explanation and the insights it gives, particularly on tackling large media defendants. G

Michael Kealey is a partner in the Dublin law firm William Fry.

Planning and development law

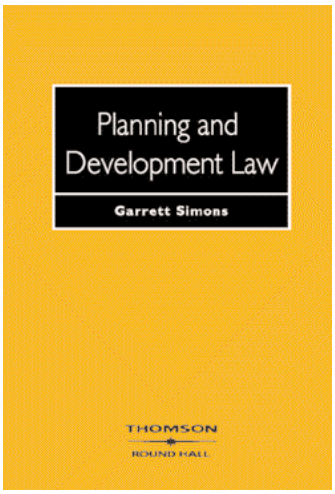
Garrett Simons. Thomson Round Hall (2003), 43 Fitzwilliam place, Dublin 2. ISBN: 1-85800-373-3. Price: €199.

Planning and development law by Garrett Simons is an essential textbook for anyone who has to deal with the ever-increasing complexities of our planning code. The chapters are laid out in a logical and sequential way, which makes it easy for the reader to find exactly what he or she is looking for without necessarily having to read the entire work at one sitting.

In dealing with development plans and local area plans, the author gives us a general overview of many of the essential ingredients that comprise 'planning law', including such issues as enforcement, compensation, exempted development, housing strategy, social and affordable housing, material contravention, public rights of way, local area plans and the vexed and topical question of development contribution schemes. Even for the browser, a reading of chapter 1 is a valuable introduction to this work.

The meaning of 'development' is clearly set out with reference to such concepts as works, material change of use, intensification of works and of use, abandonment and extinguishment. The concept of exempted development is dealt with, but to get to grips with this awkward topic it will be necessary to have the *Planning and development regulations 2001* in the left hand and Mr Simons's book in the right.

The planning process is laid out step-by-step in the following chapters. We see an explanation of the application,



the decision on the application and the grant of permission. Compensation, or more particularly the myriad reasons why, in the interest of 'the common good', compensation is seriously reduced or not paid at all, is dealt with concisely in chapter 6. Schedule 4 of the *Planning and Development Act, 2000*, comprising the reasons for refusal of permission that exclude compensation, should not be placed too far away as you read this chapter. Mr Simons questions whether payment to a landowner by a local authority under the terms of a social and affordable planning condition is genuine 'compensation', in cases where the land was acquired after 25 August 1999, allowing for the fact that the valuation is on the basis of 'existing use' without any possibility of conceding 'hope' value. A small paragraph with the title *Potential loophole?* is well worth reading.

Perhaps the subject on which solicitors are most frequently consulted is enforcement. A recent *PrimeTime* insight investigation was critical of the record of

local authorities in pursuing enforcement actions. Many of us will have experienced refusals on the part of the planning authority to issue warning letters in circumstances where such letters should have issued. Mr Simons concludes that the legal effect of a warning letter is close to zero and, in those circumstances, one cannot help wondering if the courts would act too harshly against a planning authority that had not issued a warning letter in circumstances where such a warning letter should have issued! One of the cherished aims of the Department of the Environment in introducing the *Planning and Development Act, 2000* was to 'streamline' enforcement procedures. Mr Simons correctly points out that it is certainly possible that a planning authority cannot be compelled to enforce by means of judicial review. If he is correct in this suggestion, and I think that he is, allowing for the fact that it is still open to Seán or Sinéad Citizen to apply to the High Court or to the Circuit Court for an injunction, the aspirations of the department have failed utterly. Mr Simons has given us 89 paragraphs on the planning injunction and the information imparted, when taken together with the cited case law, will be of invaluable assistance to solicitors in making a decision as to whether or not an injunction is an available remedy.

Chapter 8 is entitled *Special controls*. Without naming them all, this chapter deals with such things as protected structures, special amenity area orders, tree preservation orders, control of quarries (note: as of the date of writing this review, section 261 – dealing with the control of quarries – has not been introduced), strategic development zones, local authority developments, state developments and a host of other control topics that increasingly impinge on our daily routine as solicitors. The information in this chapter is precise and helpful.

Chapters 9 and 10 deal respectively with planning appeals and other appeals and referrals. The information in these chapters is reasonably economical, but perhaps the author was saving his energy for the final chapter, which deals with special judicial review procedure under the 2000 act. This complex area of planning law has been well researched and is dealt with in a thorough and comprehensive manner. Judicial review is clearly an area that is close to the author's heart. Having read this chapter twice, I can only say that I would be very much inclined to brief this author if a judicial review case should land on my desk.

In summary, *Planning and development law* is both a thoughtful and a thought-provoking work. Garrett Simons is not afraid to voice his opinions and, at times, to disagree with so-called conventional wisdom. His case-law research and references are exemplary. The text is intelligently written, to such an extent that to miss a single word is a mistake. If you have not already done so, I would strongly recommend that you make sure a copy finds its way to your library bookshelves immediately. G

John Gore-Grimes is partner in the Dublin law firm Gore & Grimes and is the author of Key issues in planning and environmental law.

In briefing this month...

Report of Law Society Council meeting held on 13 February 2004

Motion: Council regulations and procedures

'That this Council approves the Report of the task force on Council regulations and procedures'.

Proposed: Anthony Ensor
Seconded: Patrick Dorgan

Anthony Ensor outlined the background to the task force and noted that its terms of reference were 'to consider and make recommendations in relation to all existing or potential regulations, rules, bye-laws and procedures that affect the performance and/or business of the Council and its effectiveness as the governing and representative body of the solicitors' profession'.

The task force had invited submissions from all Council members and had also reviewed the manner in which the councils of the neighbouring law societies conducted their business. The most significant task undertaken by the task force was an examination of the powers conferred on the Council by statute and their delegation to the society's standing committees.

Another significant matter considered by the task force was the 'ten-year rule'. Concerns had been raised about the impact of the rule on the Council in 2007 and 2008, as had questions about its validity.

The task force had concluded that, by the forced removal of a significant number of experienced members of the Council in 2007 and 2008, the ten-year rule was likely to have a significant and detrimental effect on the business and efficiency of the Council. In addition, the task force believed that, if the society maintained in force a rule that was potentially unlawful, the society could be open to judicial review when the rule was enforced.

The task force recommended that the Council should seek to amend the bye-laws of the society to remove the ten-year rule.

Patrick Dorgan outlined the results of the task force's examination of the 100 statutory powers and functions vested in the Council. He noted that the task force had agreed on three fundamental principles. Firstly, the delegation of functions by the Council should be designed to ensure a balance between the accountability of the Council as an elected body charged with the performance of statutory functions and the most effective means of performing those functions.

Secondly, where the Council delegated functions to a committee, there should be a reasonable and corresponding level of accountability to the Council by means of reporting from the committee within specified parameters to be set out in the regulations.

Thirdly, the regulatory and education committees should have complete control and decision-making powers in relation to the performance of the functions delegated to them under the regulations. While this delegation would be subject to the right of the Council to resume the powers delegated at any time, the law required that any such resumption must not be for the purpose of rescinding or varying a decision already made by a committee in the exercise of a validly delegated function.

John O'Connor expressed doubts about raising questions in relation to the validity of the ten-year rule so many years after its introduction. He felt that it would be better if the society did not seek to rely on legal opinion, but sought purely to debate the issue on the merits.

Gerard Doherty said that the proposed new regulations would ensure that committees would know with certainty the exact extent of the functions that had been delegated to them by the Council. In relation to the ten-year rule, he had always believed that it was anti-democratic. Its implementation could seriously jeopardise the effective operation of the Council in 2007 and 2008. Stuart Gilhooly said that, while the society might be criticised for raising the matter after the passage of a number of years, it was required to act on the information before it. James MacGuill said that he did not perceive any problem with the proposed amendment to the rule. Its objective had been to introduce competition into the process of election of president. This had not occurred and the society should be clear with its members and admit that it had not worked.

Moya Quinlan said that she had originally voted against the ten-year rule and did not believe that the period of service on Council prior to presidency was as long as it appeared. During that time, a future president gained invaluable experience. She also noted that each Council member had to be re-elected by the membership in the interim.

Kevin O'Higgins said that the membership would be required to approve the amendment of the rule at an annual general meeting. He noted that there was no great reservoir of candidates seeking election each year and, if the rule was to remain in force, it might prove impossible to secure sufficient numbers of candidates for the Council.

Personal Injuries Assessment Board

Ward McEllin said that it appeared that the Personal Injuries Assessment Board would not be established until May or June 2004, with the possibility that it would commence to deal both with employers' liability and road traffic claims. He noted also that the *Civil Liability and Courts Bill, 2004* was to be introduced

in the Seanad on that morning. As soon as the society received copies of the bill, it would be circulated to Council members.

The director general said that it was disturbing that the bill was due to be considered in the Seanad that day, while a draft had still not been made available. This was reminiscent of emergency legislation. He noted also that, while many elements of the bill arose from proposals made by the Law Society, others had not. The most significant amendment related to the reduction in the *Statute of limitations* for personal injury actions, to which the society was totally opposed.

Competition Authority study of the professions

The Council considered a letter from Dermot Nolan of the Competition Authority, which contained a series of questions to which the authority required responses from the society in the context of its study. The authority was due to meet with the society at Blackhall Place on 26 February.

The director general noted that the concept of examination of competition within the profession was not new. The process had been commenced in the 1970s and had been followed in the early 1990s by a comprehensive study and report of the Fair Trade Commission. The current study formed part of a study of eight professions, each of which had been invited to make submissions to the Competition Authority. Informally, the society had been complimented on its submission, which was regarded as the best of those received. Similar reviews of competition within the liberal professions were being conducted in the UK and at European level.

Registrar of solicitors

The Council approved the appointment of John Elliot as registrar of solicitors, with effect from 3 April 2004.

Representatives on other bodies

The Council approved the appointment of Geraldine Clarke to the Institution of Engineers of Ireland's ethics board and the appointment of Patrick Groarke for a further five-year term as a representative of the society on the Superior Courts Rules Committee. G

Practice notes

Rules of the Superior Courts (order 27): new rules re default of pleading / delay in delivery of statement of claim or defence

Practitioners should note the introduction of SI 63/2004 (signed by the minister on 17 February 2004), which amends rules 1, 8, 9 and 14 of order 27 regarding delay in delivery of statement of claim and delay in delivery of defence.

The new **rule 1** deals with, *inter alia*, the orders that the court may make regarding extension of time limits, award of costs, and so on, when adjudicating upon applications for dismissal for want of prosecution.

The new rule 1 provides, *inter alia*, that where a plaintiff does not deliver a statement of claim within the time allowed, the defendant may apply to the court to dismiss the action with costs for want of prosecution. The rule then provides that on the hearing of the **first** such application, the court has the power to order that the action be dismissed or it may make such further order on such terms as the court shall think just. On the hearing of any **further** similar application, the court shall order the action to be dismissed unless the court is satisfied that special circumstances (to be recited in the order) exist that explain and justify the failure. Where such circumstances are held to exist, the court shall then make an order extending the time for the delivery of the statement of claim and adjourn the motion to enable that to be done. On any such adjourned hearing, if the statement of claim has been delivered, then the court will strike out the motion with costs (which may be measured by the court) to the defendant. If the statement of claim is not delivered within the extended period for so doing, then on the adjourned hearing the court shall order the action to be dismissed, with costs, for want of prosecution.

Rule 1A (as inserted) provides that no notice of motion to dismiss the action for want of prosecution may be served unless the defendant has, at least 21 days prior to service of such notice, written to the plaintiff advising of the intention to serve the notice and consenting to late delivery of a statement of claim within 21 days of the date of the letter. The rule also sets out the relevant procedure and time limits to be followed. Rule 1A(3) provides that if the plaintiff delivers a statement of claim within seven days of the service of such a motion and lodges a certified copy thereof in the Central Office not later than six days before the return date, then the motion will not be entered in the judge's list but shall stand struck out and the plaintiff shall pay to the defendant the sum of €750 in costs.

The new **rule 8** deals with, *inter alia*, the similar orders which the court may make when adjudicating upon motions for judgment in default of defence.

Rule 9(1) provides that no notice of motion for judgment in actions claiming unliquidated damages in tort or contract may be served unless the plaintiff has, at least 21 days prior to service of such notice, written to the defendant giving notice of the intention to serve the notice and consenting to late delivery of a defence within 21 days of the date of the letter. The rule also sets out the relevant procedure and time limits to be followed. Rule 9(3) provides that if the defendant delivers a defence within seven days of the service of such a motion and lodges a certified copy thereof in the Central Office not later than six days before the return date, then the motion will not be entered in the judge's list but shall stand struck out and the defendant shall pay to the plaintiff the sum of €750 in costs.

The new **rule 14** provides, *inter alia*, that any order, either dismissing the plaintiff's action for want of prosecution or giving judgment by default, may be set aside by the court on such terms as to costs or otherwise as the court thinks fit if it appears to the court that there were special circumstances (to be recited in the order) existing at the time of the default to explain and justify the failure complained of.

Litigation Committee

New practice direction from Dublin county registrar

The attention of practitioners is drawn to the practice direction that issued from the county registrar, Susan Ryan, on 15 January 2004. Copies of the practice direction can be obtained from the Circuit Court Office and, at time of printing, we are advised that it only applies in the Dublin Circuit. However, the issues raised in the practice direction are important in the overall context of case management, no matter which circuit the case is taken in. The practice direction appears in full on the society's website.

Family Law and Civil Legal Aid Committee

Undertaking to furnish discharge: Land Registry certificate of charge

When a vendor's solicitor gives an undertaking on the closing of a sale to furnish a discharge of a charge or other burden on the vendor's folio or a vacated mortgage/charge, it is the view of this committee that this undertaking by implication extends to and includes the certificate of charge, if one has issued in respect of any such charge, and any other document necessary for the removal of the charge or burden from the folio.

Conveyancing Committee

New form for family law Circuit Court proceedings in Dublin

As and from 5 June 2004, family law practitioners in the Dublin circuit area must, at the same time as issuing Circuit Court family law proceedings, complete a relatively simple additional form. This form will list the names, addresses, ages and occupations of the parties, information relating to children, and the various reliefs sought.

The gathering of statistical information in relation to family law applications is essential for all practitioners, and the completion of the form in every case will facilitate the gathering of useful statistics. It is hoped that this scheme will be extended to the rest of the country in the relatively near future.

Copies of the form are available in the Dublin Circuit Family Law Office in Phoenix House or may be downloaded directly from the society's website.

Family Law and Civil Legal Aid Committee

Solicitors' Benevolent Association

RECEIPTS AND PAYMENTS ACCOUNT
YEAR ENDED 30 NOVEMBER 2003

	2003	2002
RECEIPTS	€	€
Subscriptions	296,042	256,029
Donations	30,559	39,416
Net investment income	37,692	31,416
Bank interest	2,778	4,301
Repayment of grants	3,174	16,380
	370,245	**347,542**
PAYMENTS		
Grants	(375,339)	(359,302)
Bank charges	(1,165)	(1,048)
Administration expenses	(17,194)	(17,582)
	(393,698)	**(377,932)**
DEFICIT FOR THE YEAR BEFORE SPECIAL EVENTS	(23,453)	(30,390)
Lawyers' diaries and Christmas cards	20,630	22,554
Royalties from *The Law Society of Ireland, 1852-2002*	1,364	–
Royalties from *Irish conveyancing precedents*	1,007	983
Proceeds of sale of library books	828	–
DEFICIT FOR THE YEAR BEFORE LEGACIES	**376**	**(6,853)**
Legacies	6,080	27,324
SURPLUS FOR THE YEAR	**6,456**	**20,471**

New CAT offices

On Monday 29 March 2004, Capital Acquisitions Tax (gift/inheritance tax and probate tax) moved out from the Stamping Building in Dublin Castle. As part of the restructuring of Revenue as a whole and to provide a better service, CAT will be administered by CAT teams located in the new Revenue regions. The address of the disponer will determine which CAT team will deal with the case; this includes all Inland Revenue affidavits, returns, payments, certificates of discharge, correspondence, and so forth.

The following table shows the new CAT offices and which cases they will deal with:

Region	Address	Phone	Fax	E-mail and DX number	Deals with cases where the disponer's address is in these counties
National service	CAT Taxpayer Information Unit, Stamping Building, Dublin Castle, Dublin 2	LoCall: 1890 20 11 04	01 679 0049	captax@revenue.ie DX 192	LoCall phone service for general CAT queries
Large cases division	CAT, Setanta Centre, Nassau Street, Dublin 2	01 647 0710	01 647 0951	bfleming@revenue.ie	Certain high-wealth individuals from throughout Ireland
Dublin region	CAT, Stamping Building, Dublin Castle, Dublin 2	01 647 5000	01 679 4115	catdr@revenue.ie DX 192	Dublin
East and south-east region	CAT, St John's House, High Road, Tallaght, Dublin 24	01 414 9791 to 414 9797	01 414 9732	catser@revenue.ie	Tipperary, Kilkenny, Carlow, Laois, Waterford, Wexford, Kildare, Meath, Wicklow
South-west region	CAT, Government Offices, Sullivan's Quay, Cork	021 432 5000	021 432 5488	swregoffice@revenue.ie DX 2021	Cork, Kerry
	CAT, River House, Charlotte's Quay, Limerick	061 212 700	061 212 796	limerickdistrict@revenue.ie	Limerick, Clare
Border, midlands, west region	CAT, Hibernian House, Eyre Square, Galway	091 536 000	091 563 987	galwayroscommon@revenue.ie DX 4531	Galway city, Roscommon
	CAT, Custom House, Flood Street, Galway	091 536 300	091 563 987	galwaycounty@revenue.ie DX 4531	Galway county
	CAT, Davitt House, Castlebar, Co Mayo	094 903 7000	094 902 4221	mayo@revenue.ie DX 209002 Castlebar 2	Mayo
	CAT, Government Offices, Cranmore Road, Sligo	071 914 8600	071 914 3987	sligo@revenue.ie DX 5038	Sligo, Leitrim, Longford
	CAT, Government Offices, High Road, Letterkenny, Co Donegal	074 916 9400	074 912 7775	donegal@revenue.ie DX28023	Donegal
	CAT, Government Offices, Pearse Street, Athlone, Co Westmeath	0906 421 800	0906 492 699	westmeathoffaly@revenue.ie DX 12015	Westmeath, Offaly
	CAT, Government Offices, Millennium Centre, Dundalk, Co Louth	042 935 3700	042 935 3882	louth@revenue.ie DX 24035	Louth
	CAT, Government Offices, Millennium Centre, Dundalk, Co Louth	042 935 3700	042 935 3386	cavanmonaghan@revenue.ie DX 24035	Cavan, Monaghan

- **Audit:** CAT Audit, 85-93 Lower Mount Street, Dublin 2, will deal with all CAT audit cases countrywide. Tel: 01 647 4055, 01 647 4032, 01 647 4542; fax: 01 647 4677; e-mail: dublincaudacs@revenue.ie
- **Discretionary trust tax:** the Large Cases Division will deal with its cases, and the east and south-east region office will deal with all other cases.
- **Estate duty and non-residents:** the Dublin region will deal with all cases.
- **High-level interpretation:** Maurice O'Donoghue, Direct Taxes International and Interpretation Division, Dublin Castle, tel: 01 647 5000, will deal with all high-level issues of CAT legislative interpretation.

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LEGISLATION UPDATE: 16 MARCH – 19 APRIL 2004

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

ACTS PASSED

Aer Lingus Act, 2004
Number: 10/2004
Contents note: Provides an enabling legal framework to facilitate a sale of all or part of the state's shareholding in Aer Lingus; gives effect to an employee share ownership plan; includes an enabling provision for the establishment of new pension schemes by Aer Lingus; amends the *Air Companies Act, 1966* and the *Worker Participation (State Enterprises) Acts, 1977 to 2001*. Repeals the *Air Companies Act, 1966* and the *Air Companies (Amendment) Acts, 1969 to 1993* in so far as they have not already been repealed. Repeals to come into operation on days to be appointed by regulation (per s13(2) of the act)
Date enacted: 7/4/2004
Commencement date: Commencement order(s) to be made (per s13(2) of the act)

Air Navigation and Transport (International Conventions) Act, 2004
Number: 11/2004
Contents note: Gives effect to the *Montreal convention for the unification of certain rules for international carriage by air* (1999). Repeals part III of, and the first schedule to, the *Air Navigation and Transport Act, 1936* and restates the existing law relating to the 'Warsaw system' – the *Warsaw convention for the unification of certain rules relating to international carriage by air* (1929) and the amendments made in it by the *Hague protocol* (1955) and *Protocol no 4 of Montreal* (1975)
Date enacted: 13/4/2004
Commencement date: 13/4/2004

Finance Act, 2004
Number: 8/2004
Contents note: Provides for the imposition, repeal, remission, alteration and regulation of taxation, of stamp duties and of duties relating to excise, and otherwise makes further provision in connection with finance, including the regulation of customs
Date enacted: 25/3/2004
Commencement date: Various, see ss94(8), 94(9), 94(10) of the act, and 1/4/2004 for s74 (per SI 140/2004)

Public Health (Tobacco) (Amendment) Act, 2004
Number: 6/2004
Contents note: Amends the *Public Health (Tobacco) Act, 2002*. Prohibits tobacco advertising (with limited exceptions) and all forms of sponsorship by the tobacco industry. Substitutes a new section 47 in the *Public Health (Tobacco) (Amendment) Act, 2002* to prohibit the smoking of tobacco products in a place of work (with certain exceptions)
Date enacted: 11/3/2004
Commencement date: Commencement order(s) to be made (per s20(2) of the act): 29/3/2004 for ss2, 3, 15, 16 (ban on smoking in the workplace), 17, 18, 19, 20 (per SI 111/2004)

Public Service Superannuation (Miscellaneous Provisions) Act, 2004
Number: 7/2004
Contents note: Removes the compulsory retirement age for certain categories of new entrants to the public service on or after 1/4/2004; increases the pensionable age for certain categories of new entrants into the public service from that date, including members of either house of the Oireachtas and certain office holders and provides for related matters
Date enacted: 25/3/2004
Commencement date: 25/3/2004

SELECTED STATUTORY INSTRUMENTS

Companies (Auditing and Accounting) Act, 2003 *(commencement) order 2004*
Number: SI 132/2004
Contents note: Appoints 6/4/2004 as the commencement date for the following sections of the act: part 1; ss52, 53(a), 53(c), 53(d), 53(e), 54, 55, 56 and 57; sched 2 (other than the amendments at item 1 to sections 115(6) and 128(4) of the *Companies Act, 1963* and the amendments at item 9 to the *Companies Act, 1990*). Appoints 1/7/2004 as the commencement date for s53(b) in relation to a company as respects any financial year of the company beginning on or after that day. Appoints 17/5/2004 as the commencement date for: s46, s47 insofar as it substitutes for sub-section (6) of section 128 of the *Companies Act, 1963*, sub-sections 6 and 6A, sub-section 6B other than paragraph (b) of that sub-section, and sub-section 6C

Companies (forms) order 2004
Number: 133/2004
Contents note: Amends the form prescribed for the purposes of s125 of the *Companies Act, 1963* by introducing a new form B1. This form updates the form to be completed when furnishing an annual return to the registrar of companies. Provides that the form B1 previously in use (form B1 version 2) set out in schedule 2 to this order) may continue to be used to deliver an annual return to the registrar of companies until 31/10/2004, and that with effect from 1/11/2004, only the version of the form B1 set out in schedule 1 to this order may be completed when furnishing an annual return to the registrar of companies
Commencement date: 17/5/2004

European Communities (random roadside vehicle inspection) (amendment) regulations 2004
Number: SI 98/2004
Contents note: Amend SI 227/2003 in order to implement directive 2003/26/EC amending directive 2000/30/EC on random roadside vehicle inspections
Commencement date: 18/3/2004

Finance Act, 2001 *(commencement of section 52) order 2004*
Number: SI 124/2004
Contents note: Appoints 24/3/2004 as the commencement date for section 52 of the *Finance Act, 2001*. Section 52 provides for a three-year extension, to 3/9/2004, of the scheme of capital allowances in respect of capital expenditure incurred on whitefish fishing boats

Housing (floor area compliance certificate inspection) regulations 2004
Number: SI 128/2004
Contents note: Provide for the manner of measurement of floor area and the quality standards to be applied to new housing for eligibility for stamp duty concessions under the *Stamp Duties Consolidation Act, 1999*
Commencement date: 31/3/2004

Immigration Act, 2004 *(registration certificate) regulations 2004*
Number: SI 95/2004
Contents note: Specify the form of a registration certificate and the particulars that shall be contained therein for the purposes of the *Immigration Act, 2004*
Commencement date: 8/3/2004

Industrial Relations Act, 1990 *(code of practice on victimisation) (declaration) order 2004*
Number: SI 139/2004
Contents note: Declares that the

code of practice set out in the schedule to this order is a code of practice for the purposes of the *Industrial Relations Act, 1990*
Commencement date: 6/4/2004

Industrial Relations Act, 1990 *(enhanced code of practice on voluntary dispute resolution) (declaration) order 2004*
Number: SI 76/2004
Contents note: Provides that the enhanced code of practice on voluntary dispute resolution set out in the schedule to this order shall be a code of practice for the purposes of the *Industrial Relations Act, 1990*
Commencement date: 13/1/2004

Industrial Relations (Miscellaneous Provisions) Act, 2004 *(commencement) order 2004*
Number: SI 138/2004
Contents note: Appoints 6/4/2004 as the commencement date for the act

Light railway (regulation of travel and use) bye-laws 2004
Number: SI 100/2004
Contents note: Prescribe bye-laws for the regulation of travel on, and the use of, a light railway (the Luas) within the meaning of the *Transport (Railway Infrastructure) Act, 2001*
Commencement date: 18/3/2004

Light railway (regulation of works) bye-laws 2004
Number: SI 101/2004
Contents note: Prescribe bye-laws for the regulation of works affecting a light railway (the Luas) within the meaning of the *Transport (Railway Infrastructure) Act, 2001*
Commencement date: 18/3/2004

Pensions (Amendment) Act, 2002 [*section 3 (insofar as it relates to the insertion of section 124(2) into the* Pensions Act, 1990)] *(commencement) order 2003*
Number: SI 739/2003
Contents note: Appoints 18/12/2003 as the commencement date for s124(2) of the *Pensions Act, 1990* as inserted by the *Pensions (Amendment) Act, 2002*. Section 124(2) provides, in accordance with such conditions as may be prescribed, for the transfer of PRSA assets into any arrangement for the provision of retirement benefits established outside the state to the same extent that transfers are permitted from a scheme

Planning and Development Act, 2000 *(commencement) order 2004*
Number: SI 152/2004
Contents note: Appoints 28/4/2004 as the commencement date for s261 of the *Planning and Development Act, 2000*. Section 261 relates to the control of quarries

Public Health (Tobacco) Act, 2002 *(commencement) order 2004*
Number: SI 110/2004
Contents note: Appoints 29/3/2004 as the commencement date for the following sections of the *Public Health (Tobacco) Act, 2002*: s5 (amended by s3 of the *Public Health (Tobacco) (Amendment) Act, 2004*) insofar as it is not already in operation; section 46 (inserted by s15 of *the Public Health (Tobacco) (Amendment) Act, 2004*); s48 (amended by s17 of the *Public Health (Tobacco) (Amendment) Act, 2004*); s49; s50 (inserted by s18 of the *Public Health (Tobacco) (Amendment) Act, 2004*), and ss51, 52 and 53

Rules of the Superior Courts *(order 27 [amendment] rules) 2004*
Number: SI 63/2004
Contents note: Amend order 27 (default of pleading) of the *Rules of the Superior Courts* by the substitution of new rules 1, 1A, 8, 9 and 14
Commencement date: 17/2/2004

Solicitors Acts, 1954 to 2002 *(professional indemnity insurance) (amendment) regulations 2004*
Number: SI 115/2004
Contents note: Make a number of amendments to the Solicitors Acts, 1954 to 1994 *(professional indemnity insurance) regulations 1995* (SI 312/1995), including the following: the insertion of a new regulation 5A requiring the giving of notice of the premium renewal by a qualified insurer; and the insertion of a new regulation 14A providing that where a solicitor fails to co-operate with his or her qualified insurer, the Law Society may be notified and the society may treat such notification as a complaint made to the society alleging misconduct by the solicitor. Also extend the Solicitors Acts, 1954 to 1994 *(professional indemnity insurance) regulations 1995 to 2001* to take account of the *Lawyers' establishment directive* (98/5/EC)
Commencement date: 1/6/2004

Personal Injuries Assessment Board Act, 2003 *(commencement) order 2004*
Number: SI 155/2004
Contents note: Appoints 13/4/2004 as the commencement date for the following provisions of the act: part 1 (ss1 to 8) other than s3 but only in so far as part 1 relates to part 3 and the following sections of the act: ss22, 46, 48; part 3 (52 to 78); ss79, 80, 81, 83, 84 and 85

Personal Injuries Assessment Board Act, 2003 *(establishment day) order 2004*
Number: SI 156/2004
Contents note: Appoints 13/4/2004 as the establishment day for the Personal Injuries Assessment Board under the act. G

Prepared by the Law Society Library

SOLICITORS DISCIPLINARY TRIBUNAL

This report of the outcome of a Solicitors Disciplinary Tribunal inquiry is 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 Patrick J Mulryan, solicitor, and in the matter of the *Solicitors Acts, 1954 to 2002* [2003 no 29SA]
Law Society of Ireland (applicant)
Patrick J Mulryan (respondent solicitor)

On 30 September 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 abide by the conditions on which his practising certificate was issued, whereby his accountant's authority was required before funds could be withdrawn from the client account. The solicitor deceived his accountant into co-signing three client-account cheques made payable to Bank of Ireland but did not disclose the purpose for which these monies were withdrawn from the client account
b) Failed to comply with regulation 3 of the *Solicitors' accounts regulations* when he lodged client monies to the Bank of Ireland, Rathcoole, Co Dublin
c) Failed to comply with an order of the High Court issued on 30 September 1998 by withdrawing monies from the Bank of Ireland, Rathcoole, on 1 October 1998
d) Failed to account to the Law Society for all files in his possession in compliance with a High Court order and in contravention of the notice served on him pursuant to section 19 of the *Solicitors Act, 1960* as substituted by section 27 of the *Solicitors (Amendment) Act, 1994*
e) Failed to account to the persons set out in paragraphs 22(a) to (r) of the affidavit of Patrick Joseph Connolly sworn on 28 February 2001 for monies owed
f) Failed to comply with section 68(6) of the *Solicitors (Amendment) Act*
g) Placed misleading documentation on file
h) Failed to comply with regulation 8 of the *Solicitors' accounts regulations* by withdrawing fees from the client accounts by way of cheques payable to the Bank of Ireland
i) Failed to keep proper books of account to show all dealings with clients' monies received, held or paid as required by regulation 10(1) of the *Solicitors' accounts regulations*
j) Failed to effect professional indemnity insurance run-off cover in breach of the professional indemnity insurance statutory instrument 312 of 1995.

The tribunal reported to the High Court under section 7(3)(b)(ii) of the *Solicitors (Amendment) Act, 1960* as substituted by section 17 of the *Solicitors (Amendment) Act, 1994* and amended by section 9 of the *Solicitors (Amendment) Act, 2002* and recommended that:

i) The respondent solicitor be censured
ii) The respondent solicitor not be permitted to practise as a sole practitioner; that he be permitted only to practise as an assistant solicitor under the direct control and supervision of another solicitor of at least ten years' standing, to be approved in advance by the Law Society
iii) The respondent solicitor pay a sum of €8,000 to the compensation fund
iv) The respondent solicitor 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.

On Monday 15 December 2003, the president of the High Court ordered, pursuant to section 8 of the *Solicitors (Amendment) Act, 1960*, as substituted by section 18 of the *Solicitors (Amendment) Act, 1994* and amended by section 9 of the *Solicitors (Amendment) Act, 2002*:

1) That the respondent solicitor do stand censured regarding his conduct as a solicitor
2) That the respondent solicitor be prohibited from practising on his own account as a sole practitioner and that he be permitted only to practise as an assistant solicitor under the direct control and supervision of another solicitor of at least ten years' standing, to be approved in advance by the Law Society
3) That the respondent solicitor do pay for a fine the sum of €8,000 payable to the Compensation Fund Committee
4) That the respondent solicitor do pay to the applicant the costs of the proceedings before the Disciplinary Tribunal and also the costs of, and incidental to, this application before the High Court and order and that the costs be taxed in default of agreement. G

Personal injury judgment

Road traffic accident in the course of employment – assessment of damages – whether employee guilty of contributory negligence on the basis of failing to mitigate his losses by seeking lighter duties rather than proceeding with retirement on grounds of ill-health – issue also of 'walking wounded'

CASE

***Derek Curley v Dublin Corporation*, High Court, judgment of Gilligan J delivered on 9 July 2003.**

THE FACTS

Derek Curley was a fire fighter by occupation. Born on 6 May 1960, he was married with three children. He was employed by Dublin Corporation and had 18 years of service when he was involved in an accident on 16 January 1998. Mr Curley was a passenger on a bench seat immediately behind the driver in a fire tender. The fire tender was responding to an emergency and was involved in a collision with two parked cars at traffic lights at the junction of the Naas Road and Killeen Road, Clondalkin, Dublin 22.

Dublin Corporation conceded liability, so the case proceeded on assessment of damages only, subject to a plea of contributory negligence that Mr Curley did not mitigate his losses by reason of his failure to seek light duties within the fire service and his decision to terminate his employment with Dublin Corporation without taking appropriate steps to remain in its employment.

Mr Curley claimed that he suffered injuries consisting of shock, stress and an injury to the left side of his neck and left shoulder area. Mr Curley noticed stiffness of his neck and left shoulder after the accident and was taken by ambulance to St James's Hospital. No x-rays were taken and he was in hospital for approximately four hours. Despite being offered a lift home, he decided he would drive his own car and went home. The following morning his neck was stiff and painful and he went to see his local doctor. He was referred to a clinic and began physiotherapy. Mr Curley was out of work for some periods of time undergoing extensive physiotherapy and became depressed, irritable and withdrawn. He claimed his neck and shoulder pain were exacerbated by lifting, prolonged sitting, and driving, and was relieved by changing position. Mr Curley was out of work for various periods between 1998 and 2001. On 10 December 2001, he was retired on the grounds of permanent ill health from the fire-fighting service. At the trial of the action, evidence was presented by several medical witnesses.

JUDGMENT OF THE HIGH COURT

Gilligan J set out the facts. The judge considered that Mr Curley suffered a relatively mild whiplash injury, superimposed on pre-existing degenerative changes, and that he suffered a degree of 'nerve route irritation'. The judge held that Mr Curley also suffered a post-traumatic stress reaction to the circumstances of the accident from which he recovered within a few months. Although Mr Curley was left with a mild degree of depression, most of which was related to his perceived inability to carry out his duties as a fire fighter, the judge stated that the combination of the physical and psychological injuries appears to have brought about a situation where Mr Curley had difficulty in carrying out his full duties.

There had been a considerable dispute in relation to the issue of future loss of earnings. Dublin Corporation argued in the context of future loss of earnings that Mr Curley had failed to mitigate his loss. Gilligan J found it very difficult to comprehend against the background of the 'reasonable man principle' as to why Mr Curley embarked in March or April 2001 on a path that was inevitably going to lead to him being retired from the fire service. The judge speculated that it may be that Mr Curley took the view that if he was retired from work, he would recover a full loss of earnings into the future together with any loss of pension rights and gratuity entitlements. Alternatively, it may have been that he felt that he was a burden on his colleagues and he preferred simply not to continue at work. The judge noted that the onus of proof was on Mr Curley to satisfy the court on the balance of probabilities that his injuries suffered in the accident were a principal factor in him losing his job. The onus of proof on Dublin Corporation, insofar as the corporation alleged contributory negligence, was to satisfy the court on the balance of probability that Mr Curley failed to mitigate his loss by taking the appropriate steps to protect his position and keep his job.

A crucial issue for the judge was whether or not he took the view that Mr Curley had satisfied the court that he was unfit for full fire-fighting duties; on balance, Gilligan J accepted it as a matter of probability that Mr Curley was not fit for the full rigours of everyday fire-fighting duties. However, he took the view that Mr Curley was fit for most forms of work save those that involved very heavy physical activity and that Mr Curley was fit to remain on at work if he could get some degree of cover from his colleagues. He was fit for light duties. The judge was satisfied that there was a lack of communication between management and the fire fighters. There appeared to be an *ad hoc* scenario whereby a number of people would be allowed to remain on as fire fighters, described as 'walking wounded'. There was also a provision for people to remain on doing light duties. How one went about getting these jobs was far from clear.

The judge was satisfied that Mr Curley did not act in a manner expected of a reasonable man and fell short of the standard of care as a matter of law in the context of minimising his loss.

At its simplest, the judge faulted Mr Curley for not using the means at his disposal to keep himself in the employment of Dublin Corporation: he should have furthered his enquiries about staying on either as part of the 'walking wounded' or in performing light duties. The judge stated that he should at least have visited the human resources department of Dublin Corporation to try and protect his position or at least have ascertained what was available to him by way of work on an ongoing basis. He could and should have sought the advice and help of his trade union to intervene on his behalf to protect his position. On the other side, Dublin Corporation did little to assist Mr Curley and it does appear that there were certain procedures in place which, if presented, may have assisted Mr Curley in securing light duties. Because of a breakdown in communication, nothing was done to assist Mr Curley and, according to the judge, Dublin Corporation appeared to have been only too willing to co-operate fully with Mr Curley's intended plan of action, which was to secure his retirement from the fire-fighting service on the grounds of ill-health towards the end of 2001.

Gilligan J found Mr Curley guilty of 40% contributory negligence in failing to mitigate his losses.

In relation to the claim for future loss of earnings, bearing in mind that Mr Curley was aged 43 at that time, could retire at 55 years and would have 12 years of service left, for the first three years of the 12 years of service that were left, the judge considered Mr Curley could have remained on in the employment of Dublin Corporation and he would allow Mr Curley a loss for this period taking into account his capacity to take up employment and gain remuneration from an alternative source.

The judge took into consideration for this three-year period contributory negligence of 40% on the part of Mr Curley in bringing about his own retirement from Dublin Corporation's employment and failing to mitigate his loss. However, beyond the three-year period, the judge did not penalise Mr Curley with any reduction for contributory negligence because he took the view that, as a probability, Mr Curley would have been retired.

The judge did not accept that Mr Curley was in any way significantly handicapped from taking up alternative employment other than employment that involved very heavy physical activity. He did not accept that Mr Curley was making sufficient effort to get himself back into employment and he took the view that the probability was that he would take up employment once the case had finished. G

THE AWARD

- General damages to date of trial – €75,000
- Special damages to date (miscellaneous medical hospital expenses) – €21,000.72
- Loss of earnings to date of trial – €22,000
- Loss of earnings from date of retirement to date of trial – €25,000
- Future loss of earnings – €142,500
- Future loss of pension entitlement – €47,285
- Future loss of gratuity entitlement – €17,676

Total: €350,461.72

This judgment was summarised by solicitor Dr Eamonn Hall.

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Compiled by Karen Holmes for FirstLaw

ARBITRATION

Property, compulsory acquisition

Consultative case stated – arbitration – compulsory acquisition – compensation – injurious affection – section 63 of the Lands Clauses Consolidation Act 1845 – *whether the claimant was entitled to compensation covering the full depreciation in the value of his retained lands or whether he was confined to such loss as was caused by the user of the lands actually taken from him*

The claimants were owners of property on the north side of the Malahide estuary, which comprised a substantial three-storey 18th century house on approximately 18 acres of land, together with farm buildings and a gate lodge. For the purpose of carrying out a motorway scheme from the existing M1 at the airport to the Balbriggan bypass (the 1995 scheme), the respondent compulsorily acquired from the claimants approximately 0.116 acres of land. That land was comprised in two plots, being plot 47 and 47A. No part of the land taken under the scheme formed part of the carriageway of the new motorway. Plot 47 was used as part of the embankment leading up to the bridge which spanned the Malahide estuary. No part of the works was constructed on plot 47A, which formed part of an existing roadway. The claimants contended that the value of their property would be depreciated by its proximity to the new motorway and in their claim for compensation under section 63 of the *Land Clauses Consolidation Act 1845* they claimed to be entitled to recover the entire depreciation in value of their property as 'injurious affection' of their retained lands, caused by the exercise by the respondent of its relevant statutory powers in carrying out the motorway scheme. Consequently, the property arbitrator submitted the following question, by way of consultative case stated for the opinion of the High Court: 'Am I correct in holding that upon the true constructive of section 63 of the *Lands Clauses Consolidation Act 1845*, the compensation for injurious affection to the lands retained by the claimants, caused by the carrying out of the works and subsequent use of the motorway, is limited to injurious affection caused by such works on and such use of, the land actually acquired from the claimants?'

In answering the question in the affirmative, O'Neill J held:

1) The real question for determination was whether the original principle as enunciated by case law – namely, that compensation should be paid only in relation to injury resulting from what would have been an actionable wrong but for the prevention by parliament – was consistent with the correct interpretation of section 63 of the 1845 act
2) The fundamental objective of statutory interpretation is to give effect to the intention of parliament, that intention, of course, to be discerned from the language of the statute in question save where ambiguity or absurdity exists so as to cloud the real intention of parliament. The principle that no compensation should be paid where the injury would not otherwise attract damages is, of course, not expressly included in section 63 or in any other provision of the 1845 act. The proposition stated in this principle appears to be so obvious as to hardly require express statement
3) It is clear from the entirety of the 1845 act that for those whose land was not taken there is no right to compensation except under section 68, where injury to property is caused by execution of the works. Those limitations on access to compensation under the statutory scheme support the proposition that compensation is provided only where, but for the act of parliament, the injury complained of would be actionable
4) The compensation sought by the claimants for the full depreciation of the value of the property caused by the motorway scheme was a loss which was never a compensatable loss. Accordingly, their rights as provided for in article 43 of the constitution were not infringed
5) The rule that limits compensation for injurious affection of retained land to works and user on the taken lands, and thereby excluding injury due to user on other lands, was in conformity with the constitution and was sound in principle.

***Representative of Terence Chadwick (Deceased) v Fingal County Council*, High Court, Mr Justice O'Neill, 17/10/2003** [FL8809]

DAMAGES

Personal injuries, tort

Litigation – loss of earnings – pain and suffering – negligence – damages – quantum – *expert evidence – whether damages awarded for loss of earnings excessive*

The plaintiff had been involved in an accident when she fell from a vehicle. She suffered quite serious injuries to her shoulder which required surgery. Liability was conceded by the defendants. The defendants appealed the *quantum* of damages awarded to the Supreme Court. In particular, they contested the extent of the plaintiff's loss of earnings and the damages awarded for pain and suffering. On behalf of the defendant, it was contended that the plaintiff had made little or no effort to return to work.

The Supreme Court (McGuinness J delivering judgment, Fennelly J and McCracken J agreeing) reduced the damages awarded. The trial judge had evidence before him which entitled him to make the award of damages with regard to loss of earnings. However, the award of £70,000 for pain and suffering into the future was excessive and this would be reduced to £50,000.

***O'Connell v McCormaic*, Supreme Court, 20/1/2004** [FL8800]

DISCOVERY

Practice and procedure

Appeal – whether sufficient precision in categories of documents sought – whether master had no jurisdiction to make order because of non-compliance with rules – Rules of the Superior Courts, *o31, r12*

The plaintiff appealed against the order of the High Court refusing his application for an order for discovery of documents. The plaintiff's action was for personal injuries arising out of alleged exposure to noxious substances in the course of his

employment. The plaintiff sought documentation relating to the system of work. His application was refused both on a finding that there was insufficient precision in the categories of documents sought and that the master had no jurisdiction to order discovery because of non-compliance with the rules.

The Supreme Court (Hardiman, Geoghegan and Fennelly JJ) allowed the appeal and ordered the discovery sought, holding that the categories of documents sought were stated with sufficient precision to comply with the rule. The master had full power to waive any technical breach in the rules if the object of the rule has in reality been achieved.

***Taylor v Clonmel Healthcare Ltd*, Supreme Court, 11/2/2004** [FL8766]

EMPLOYMENT

Discrimination

Equality – plaintiff found to have discriminated against defendant by Labour Court – whether Labour Court erred in law in so finding on basis of insufficient evidence – whether Labour Court erred in interpretation of time limit applicable to a claim for gender discrimination – Employment Equality Act, 1977, *section 19*

The plaintiff had appointed a male candidate to the post of locum director of nursing which it had advertised. The defendant then invoked the provisions of section 2 of the *Employment Equality Act, 1997*, claiming that she had been discriminated against on the grounds of her gender in filling the post. The Labour Court found that in advertising for the post and appointing the other candidate as locum director of nursing the plaintiff had usurped the role and functions of the job that the defendant already held, which fact was sufficient to raise a presumption of discrimination. It further held that the plaintiff had not discharged the onus of rebutting the presumption of discrimination that the defendant had thus established. The plaintiff applied by way of special summons to the High Court seeking to overturn the decision of the Labour Court on the grounds that the defendant had not lodged her claim within the six-month time limit set out in the *Employment Equality Act, 1977* and that there was no evidence that would have allowed the Labour Court to reach the conclusions it had.

Mr Justice Butler dismissed the plaintiff's claim, holding that:

1) The appointment of the other candidate constituted the first occurrence of the act alleged to constitute discrimination and, accordingly, the defendant's reference had been lodged within the six-month time limit set out in section 19 of the 1977 act
2) The findings of fact by the Labour Court that the creation of the new post effectively usurped the role and functions of the job the defendant already held was a finding peculiarly within the confidence of the Labour Court and there were no grounds justifying an interference with those findings
3) The Labour Court determination that the defendant had failed to discharge the onus of rebutting the presumption of discrimination was based on sustainable findings of fact. It was not the function of the High Court to substitute its view of the facts.

***Mid-Western Health Board v Fitzgerald*, High Court, Mr Justice Butler, 28/11/2003** [FL8752]

FAMILY

Judicial separation

Ancillary financial orders – proper provision – valuation of companies owned by husband – proper approach to be adopted in valuing private company – roles played by parties in establishment and development of business – what financial orders in respect of wife of marriage should be made in circumstances – Family Law Act, 1995, *section 16*

The applicant applied for and was granted a decree of judicial separation. She then claimed for various financial orders against the respondent in which she stated that she wanted, in cash, 50% of the assets of the company in which the respondent was involved and was a shareholder in, which represented the most significant assets in relation to the proceedings. She said that in effect both she and her husband were *de facto* partners and that she was entitled to an equivalence of return thereon, which contention was disputed by the respondent. She had become a director of the company in 1993. The resources of the parties in the litigation included not only the business conducted through the group of companies but also the family home, certain unit-linked funds, pension policies, quoted shares, bank accounts and other ancillary items. For all practical purposes, save for the pension policies and the company, the balance of the assets was and could be regarded as being in the joint ownership of the parties.

McKechnie J directed that the unit-linked funds, the quoted shares and all bank accounts, whether in joint names or in individual names, had to be terminated or otherwise so managed that the value of each of these assets would be divided equally between the parties and that that the pension arrangements in place would stand unaltered and, in placing a value of €10 million on the company, that the respondent pay to the applicant the sum of €2 million on or before 28 February 2004, the sum of €1 million on or before 28 February 2005, and a further sum of €1 million on or before 28 April 2006. He held that:

1) When deciding what provision to make between the spouses, neither spouse was discriminated against and was made in the context of judicial separation proceedings and with the court's inability to achieve asset finality between the parties in mind
2) The applicant's contribution to the company was not equal to that of her husband
3) The fact that the applicant had three children, which never had a serious impact on her ability to work outside the family home and into the future, given the parties' ages and her independence, was immaterial to her future work and working capacity
4) As the applicant's relationship with the business was beyond redemption, the court could not grant any relief that would involve her continuation either in practice or in paper with this company
5) There was no acceptable scientific way of approaching the task of valuing a private company and the undertaking could not be carried out as a matter of art.

***BD v JD*, High Court, Mr Justice McKechnie, 5/12/2003** [FL8851]

PERSONAL INJURIES

Practice and procedure, prejudice

Tender offer – settlement negotiations – purpose of tender offer – motion to strike out tender offer made by defendants after settlement negotiations – whether offer validly tendered when defendants entered negotiations without explicitly stating them to be without prejudice – whether prejudice to plaintiffs suffered thereby – whether action is one for personal injuries – whether tender offer validly made within time frame provided by rules of court – Courts Act, 1988, *section 1(1)* – Rules of the Superior Courts 1986, *order 22*

The plaintiffs by way of notice of motion sought an order striking out the notice of a tender offer made by the defendants. They contended that as the defendants, when they attended settlement negotiations, did not

reserve their position to put in a lodgment or make a tender, they could not do so after unsuccessful negotiations had taken place. They submitted that, as a matter of public policy, defendants ought not to be allowed to take advantage of the plaintiffs in this manner after unsuccessful settlement negotiations had occurred and that, in this particular case, significant prejudice had been caused to the plaintiffs because of the concessions that were openly made at the negotiations on their behalf concerning the value of the case and the reasons for that value. The plaintiffs also submitted that the offer was defective, as it had not been made in accordance with order 22, rule 1 of the *Superior Court Rules*, which governed non-personal injuries actions. The defendants disputed the plaintiffs' contention that once a party entered into without-prejudice negotiations with the other side, that party was precluded from thereafter making a lodgment or tender offer unless they specifically reserved their right to do so. The defendants submitted that since the introduction of SI 391/1998, being the so-called 'disclosure rules', under which parties are obliged in personal injury actions to make disclosure of their expert reports, this had changed the climate in which personal injury litigation was conducted. They submitted that if it was intended that a tender offer could not be made after a plaintiff had made concessions during settlement negotiations, the *Rules of the Superior Courts 1986* would have to say that specifically, and they had not done so.

Peart J refused the application, holding that:

1) The fact that the present case included claims other than personal injury claims or that only one of two plaintiffs in the action were so claiming did not take the case outside section 1(1) of the *Courts Act, 1988* and that, accordingly, the action came within order 22, rule 7 of the *Rules of the Superior Courts 1986* in the same way as the action was covered by the disclosure rules provided by SI 391/1998
2) The plaintiffs' submissions were predicated on the idea that if the defendant was kept unaware of the weaknesses of the plaintiffs' case it would be possible to obtain for the plaintiff an amount of damages which exceeded the true value of the case, were the plaintiffs' case – warts and all – to be disclosed to the other side
3) When the court was considering whether a tender offer that had been made should be allowed to remain in being or whether it should be struck out on the basis that it ought not to have been put in after unsuccessful without prejudice negotiations, the court could not look at the situation in the same way as the plaintiffs, who may have felt that some tactical advantage was lost to them, but had to consider the matter from the point of view of justice and from the point of view of the purpose of the lodgment and tender mechanism, including the public interest, and see whether any injustice could flow from the revelation of perhaps the real quality of the plaintiffs' case
4) There was nothing in the rules which said that a lodgment could not be made after such negotiations, subject if necessary to an application for leave being made. In the present case, the defendants believed that they did not require leave since they were doing so within four months of the date of service of the notice of trial, since in their view it was an action to which order 22, rule 1(7) applied
5) Therefore, the tender offer had been made in accordance with the *Rules of the Superior Courts 1986*.

***Kearney v Barrett and Others*, High Court, Mr Justice Peart, 17/12/2003** [FL8772]

PLANNING AND DEVELOPMENT

Environment

Planning law – permission – newspaper notice published by second respondent – whether defective – whether An Bord Pleanála has jurisdiction to consider matters relating to environmental pollution – whether matters in relation to visual impact of development relate to risk of environmental pollution – Local government (planning and development) regulations 1994, *article 15(2)* – Local Government (Planning and Development) Act, 1992, *section 14(1)* – Local Government (Planning and Development) Act, 1996, *sections 5, 54(3)*

The applicants had been granted leave to seek judicial review of the decision of the first respondent to refuse their appeal against the decision of the second respondent to grant to the first notice party permission to retain certain waste treatment facilities constructed on a site in Carrowbrowne, Co Galway. They submitted that the notice published by the first notice party with regard to its planning application failed to comply with the requirements of article 15(2) of the *Local government (planning and development) regulations 1994*. The respondents submitted that the grounds or objections raised by the applicants related to the risk of 'environmental pollution' in relation to the development in question as that was defined in section 5 of the 1996 act. The applicants further submitted that the change of law effected by the transfer of certain functions in relation to the assessment of risks of environmental pollution from the first respondent to the Environmental Protection Agency could not have been intended to have the result contended for by the first respondent, which was that it had no jurisdiction to consider the visual impact of the development which they also took issue with in their appeal to the first respondent.

Ó Caoimh J refused the relief sought, holding that:

1) In light of section 14(1)(b) of the *Local Government (Planning and Development) Act, 1992*, the first respondent was entitled to conclude that it should have dismissed the applicants' appeal as the matters at issue were matters to be addressed in the context of an application to the Environmental Protection Agency for an environmental licence for the facility in question and therefore the board could not have considered the matter without trespassing into an area excluded from it by section 54 of the 1996 act
2) The alleged failure to comply with article 15(2) of the 1994 regulations in relation to the publication of the notice was not such as to be so substantial as to deny the applicants any right, to which they were entitled, to advance any relevant ground of appeal to the board
3) With regard to the application of the *European Community (environmental impact assessment) regulations 1989* as amended, there had been compliance with same in the context of the landfill operation.

***Rooney, Curley and Coady v An Bord Pleanála and Galway County Council*, High Court, Mr Justice Ó Caoimh, 20/3/2003** [FL8838]

Traveller issues

Development – local authority development plan – traveller accommodation – injunction – provision of temporary halting site by county council – whether material contravention of development plan – whether respondents, in seeking to accommodate travellers, could do so without regard to consultation requirements in respondent's own traveller accommodation programme – whether plaintiff entitled to injunctive relief in relation to development of halting site – Local government (planning and development) regulations 1994 – Housing (Traveller Accommodation) Act, 1998, *section 13(2), 27(2)*

Section 19 of the *Local Government (Planning and Development) Act, 1963* requires every planning authority to make a development plan that provides for the 'provision of accommodation for travellers and the use of particular areas for that purpose'. Section 7 of the *Housing (Traveller Accommodation) Act, 1998* provides that '[a] relevant housing authority shall adopt as respects their functional area an accommodation programme … and shall specify in that accommodation programme the accommodation needs of travellers and the provision of accommodation required to address those needs'. Part X of the *Local government (planning and development) regulations 1994* provides that a local authority shall send notice of certain proposed developments to various relevant bodies such as An Taisce, which will indicate the location, nature and extent of the proposed development, be accompanied by a copy of the plans and particulars of the proposed development, and state that submissions may be made in writing to the local authority.

The defendant had adopted a traveller accommodation programme which provided that the council would engage in full and meaningful consultation with the public generally and any other interested persons or bodies as to its various operations under the programme. It then proposed to construct a permanent transient halting site at lands at Drumleck, Co Louth. The plaintiff sought various declaratory orders and injunctive relief against the defendant in relation to that development on the grounds that it was in breach of the consultation requirement under the 1998 act and its own traveller accommodation programme. It was submitted by the plaintiff that any such consultation, to be in any way meaningful, had to include consultation in relation to the proposed type, standard and location of a permanent halting facility and in relation to all options available to the defendant in that regard. It was further submitted that there was a breach of section 21 of the 1998 act, that there was a material contravention of the development plan and in particular a failure to specify the development, and that there was a material contravention of the development plan from the point of view of traffic and general safety. The plaintiff submitted that the defendant appeared to suggest that it had complied with its consultation obligations under its traveller accommodation programme by adopting the part X public consultation procedure. It was submitted by the plaintiff that that suggestion showed a complete failure on the part of the defendant to appreciate the nature and extent of the obligation to engage in full and meaningful consultation, pursuant to the terms of paragraph 2 of the traveller accommodation programme. The defendant submitted that there was a duty imposed upon it to create at least one transient halting site in the county area to cater for the needs of travelling families and that the development, being an implementation of its accommodation programme, could avail of the exception under section 27(2) of the 1988 act in relation to developments which would otherwise constitute a material contravention of its own development plan.

Gilligan J granted the plaintiff an injunction restraining the defendant from taking any further steps in relation to the procedure under part X of the *Local government (planning and development) regulations 1994* in respect of the provision of a halting site on the lands that were the subject matter of the proceedings and a declaration that the said development would amount to a material contravention of the provisions of the 1997 Louth county development plan and would thereby constitute a contravention of section 39(1) of the *Local Government (Planning and Development) Act, 1963*, as amended. He held that:

1) A planning authority enjoyed no statutory discretion in interpreting its development plan
2) A failure to fulfil public consultation requirements could constitute a material contravention of its development plan and, while the obligation might not be statutorily imposed, it was a self-imposed obligation on the housing authority to endeavour to ensure such full and meaningful consultation
3) The respondent did not comply with its own development plan in that it failed to undertake the commitment of engaging in the consultative process and, in the particular circumstances of the case, the proposed site entrance to the halting site at Drumleck was a material contravention of the 1997 Louth county development plan insofar as the proposed site entrance breached the defendant's own regulations and standards
4) In circumstances where the defendant had a list of 26 potential sites for a permanent transient halting site and no consideration was given to the other 25 sites other than the one chosen, the defendant had breached its own traveller accommodation programme because it did not consider all available options but simply stayed with the same site adopting a different procedure, under part X of the 1994 regulations, against a background where the plaintiff would, as a probability, have obtained the relief as sought by him because of a failure to consult beforehand with all interested parties. The defendant fell into error by changing its procedure in respect of the same site
5) Only an act carried out by a housing authority for the purpose of implementing an accommodation programme could be deemed not to contravene a development plan under the exception afforded to local authorities under section 27(2) of the 1988 act for developments that would have otherwise contravened its own development plan. Any act done by a local authority that failed to comply with consultation requirements under its accommodation programme was not one done for the purpose of implementing that accommodation programme and could not be included in the exception afforded under s27(2) of the 1998 act.

***Jeffers v Louth County Council*, High Court, 19/12/2003** [FL8804] G

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Eurlegal

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

Bayer/Adalat – a setback for parallel trade

Earlier this year, the European Court of Justice (ECJ) issued its judgment in joined cases C-2/01 P and C-3/01 *P Bayer AG v Commission of the European Communities*. This case clarifies what constitutes unilateral behaviour within the meaning of EC competition law.

Significance of parallel trade

The European Commission views parallel trade as an important aspect of the integration of national markets. Parallel trade occurs when an entrepreneur buys goods in one country with a view to reselling these products in another country where the prices are higher. This activity often takes place contrary to the wishes of the manufacturer.

In the pharmaceutical industry, prices tend to be state-controlled and thus may vary considerably from member state to member state. Pharmaceutical manufacturers have struggled to prevent their products being bought in a country where the prices are low (usually southern European countries) and re-sold in a country where the prices are higher (often northern European countries), while avoiding any infringement of EC competition rules. In order to stymie the efforts of pharmaceutical companies to limit parallel trade, the European Commission has adopted a broad interpretation of the concept of 'agreement' within the meaning of article 81. This approach has largely been supported by the European courts.

Bayer's quota scheme

Like all pharmaceutical manufacturers, the German-based Bayer has grappled with the difficulties caused by parallel trade. Accordingly, this company adopted a quota system by which it reduced supplies of Adalat, which is designed to treat cardiovascular disease, to its Spanish and French wholesalers. The purpose of this quota system was to provide wholesalers with sufficient supplies to satisfy domestic demand. Bayer wished to cease providing unlimited supplies of Adalat because any surplus was liable to be exported by the wholesalers. This practice had largely been responsible for Bayer's UK sales of Adalat dropping by almost 50% between 1989 and 1993.

Bayer openly admitted that the aim of its quota system was to reduce exports to the UK. However, its standard terms and conditions did not prohibit exports. Bayer's Spanish and French wholesalers, therefore, remained free to sell Adalat in their local markets or for export. Nevertheless, Bayer's policy still proved unpopular with its wholesalers, who submitted a complaint to DG Competition (the competition enforcement department of the commission).

Procedure

On 10 January 1996, the commission decided (decision 96/478/EC) that Bayer had imposed an export ban as part of its commercial relations with the Spanish and French wholesalers and held that Bayer had thus breached article 81 of the *EC treaty*. The commission fined Bayer three million ECU for this infringement. In March of the same year, Bayer brought an action for annulment of the commission's decision before the European Court of First Instance (CFI).

In a seminal judgment dated 26 October 2000, the CFI annulled the commission's decision. It held that the commission had failed to prove that Bayer and the wholesalers had agreed to limit exports. The court stated that in order for there to be an 'agreement' within the meaning of article 81, the commission must show a 'concurrence of wills' between companies. The commission appealed the CFI's decision to the ECJ.

The key aspect of the appeal was whether 'agreements' existed between Bayer and its Spanish and French wholesalers within the meaning of article 81. This is the first jurisdictional hurdle for the application of article 81. (Proof of a 'restriction of competition' and an 'effect on trade between member states' are the second and third hurdles.) The commission felt that the CFI had contradicted judicial precedent by adopting an over-restrictive interpretation of what constitutes an 'agreement'.

In his opinion dated 22 May 2003, advocate general Tizzano recommended that the ECJ should reject the commission's appeal. He stated that the commission had failed to show that the wholesalers had acquiesced in Bayer's efforts to limit exports.

The ECJ's judgment

In its reasoning, the ECJ focused on whether Bayer and its wholesalers had concluded anti-competitive agreements. The court stated that article 81 centres on the existence of a concurrence of wills between two or more undertakings. The form of this concurrence is irrelevant provided it is the faithful expression of the parties' intention. In other words, there is an 'agreement' within the meaning of article 81 provided that the parties have expressed their common intention to conduct themselves on the market in a specific way. The expression of a unilateral policy on the part of a contracting party, which can be put into effect without the assistance of the other contracting party, does not constitute an 'agreement'.

Bayer made no secret of the fact that the purpose of its quota scheme was to limit parallel imports. However, this is not necessarily illegal. In order for an 'agreement' to exist, the French and Spanish wholesalers had to have been invited to fulfill that goal jointly with Bayer, especially where the agreement was not *prima facie* in their interest.

Like its advocate general, the ECJ distinguished *Bayer/Adalat* from its judgment in case C-277/87 *Sandoz Prodotti Farmaceutici v Commission* ([1990] ECR I-45). In that case, the manufacturer sought the co-operation of its wholesalers in order to reduce parallel trade. Sandoz inserted the words 'export prohibited' onto its invoices. This amounted to demanding a particular line of conduct that, in the absence of any express objection, the wholesalers were seen to accept

by continuing to order products. However, in *Bayer/Adalat*, the court held that Bayer's wholesalers did not accept the ban on parallel imports. In fact, the wholesalers sought to change their ordering policies in an effort to obtain extra supplies of Adalat. This rebutted any allegation that the wholesalers acquiesced to Bayer's policy of restricting exports.

The ECJ also upheld the CFI's view that, although measures adopted by Bayer were part of the on-going business relationship between the parties, proof of the wholesalers' intention to align their conduct to the Bayer's export ban policy was still required. The mere fact that a measure adopted by a manufacturer, which has the object or effect of restricting competition, falls within the context of continuous business relations between the manufacturer and its wholesalers is not sufficient proof that such an 'agreement' exists. Accordingly, *Bayer/Adalat* should be distinguished from *Sandoz* because, in the latter case, the repeated orders by the customers constituted tacit acceptance of the 'export ban' stipulated on all Sandoz's invoices.

The ECJ dismissed the commission's appeal and upheld the CFI's judgment.

Victory for drug companies

The *Bayer/Adalat* judgment represents good news for the pharmaceutical industry. It means that stock-management systems are not necessarily prohibited under article 81(1), even if they have the object and/or effect of reducing parallel trade. However, this judgment does not mean that such systems are legal. Each scheme should be assessed on a case-by-case basis. Many pharmaceutical companies have implemented such quota schemes. Predictably, this has not proven popular with wholesalers, who have submitted complaints to the commission. Once it has digested the ECJ's findings in *Bayer/Adalat*, it will be interesting to see what action the commission takes in these cases.

The ECJ's decision is a significant setback for the commission's aim of facilitating parallel trade, a phenomenon that the Brussels-based executive sees as strengthening the internal market. Therefore, we can expect the commission to explore other ways of promoting inter-state trade in pharmaceuticals.

Alternative ways of promoting parallel trade

Article 82 provides one such alternative. This provision applies to unilateral conduct of dominant companies. In *Bayer/Adalat*, the ECJ did not address the question of whether the establishment of a stock-management system to products in which the supplier might be said to have a dominant position is abusive within the meaning of article 82.

In any article 82 case, it is necessary to establish whether the supplier has a dominant position. Market definition is crucial. Some wholesalers tend to argue that each pharmaceutical is in a product market of its own because pharmacies cannot change a doctor's prescription. In other words, once a doctor writes a prescription for a particular product, it no longer competes with other products used to treat similar symptoms. Although the commission has usually used a reasonably broad market definition in merger cases, it has begun to show some sympathy for the wholesalers' narrower approach to market analysis in anti-trust cases. (The commission has typically used Anatomical Therapeutic Chemical Level 3 classification to define the relevant market in merger cases. This system allows medicines to be grouped in terms of their therapeutic indications and is therefore used by the commission as an operational market definition.)

The ECJ will soon have the opportunity of addressing the legality of a stock-management scheme for drugs over which the supplier has a dominant position. In case C-53/03 *SIFAIT and Others v Glaxo SmithKline AEVE*, the Greek competition commission has a referred a number of questions to the ECJ regarding the application of article 82. In essence, the Greek authority has asked whether the refusal by a dominant undertaking to cease supplying wholesalers who wish to engage in parallel trade is abusive. The Greek wholesalers must establish dominance. They are thus likely to argue that the pharmaceutical, once prescribed, is in its own product market. This may not be straightforward. Arguably, a more appropriate starting point for the market definition analysis may be to consider the range of therapeutic options available to doctors, from which they prescribe a particular drug. An oral hearing in this case will take place in May this year. The ECJ's judgment should be handed down in 2005. It will be interesting to see whether this decision proves to be another setback for parallel trade. G

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Recent developments in European law

FREE MOVEMENT OF PERSONS

Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions*, 23 March 2004. The applicant holds dual US and Irish nationality. Under UK law, in order to receive a jobseeker's allowance, a claimant must be habitually resident in the UK or Ireland, or be a worker within the meaning of EC law. In 1980 and 1981, the applicant resided in the UK for ten months, during which time he did part-time and casual work in pubs and bars and in sales. He returned to the UK in 1998 to find work in the social services sector. His claim for the jobseekers' allowance was refused on the basis that he was not habitually resident in the UK. He appealed the refusal to the social security commissioner, who made a reference to the ECJ. The court held that the applicant's position was comparable to that of any national of a member state looking for his first job in another member state. A distinction is drawn between member state nationals seeking their first job in another member state and those who are working or who have worked there. Those seeking their first job benefit from the principle of equal treatment only as regards access to employment. Those who have already entered the employment market can claim the same social and tax advantages as national workers. Nationals of one member state have a right of residence in another member state while seeking employment, though this right may be limited in time. However, this right is limited to those who are already in employment in another member state. The applicant does not have a right to reside in the UK solely on the basis of this right. Finally, the court held that nationals of a member state seeking employment in another member state fall within the scope of the treaty provisions on free movement of workers and enjoy the right laid down by those provisions to equal treatment. This right encompasses benefits of a financial nature, such as the jobseekers' allowance. A citizen who is seeking employment in another member state cannot be discriminated against on grounds of nationality when he claims such an allowance. The UK legislation concerning the allowance differentiated between those habitually resident in the UK and others. This requirement is more easily met by UK nationals and thus places at a disadvantage nationals of other

member states who have exercised their right of free movement. A residence requirement can only be justified if it is based on objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aims of the national provisions. In granting a social security benefit such as the allowance, a state may seek to establish that there is a genuine link between the recipient and the state. The existence of such a link may be determined by establishing that the person concerned has, for a reasonable period, genuinely sought employment in the member state in question. However, if the period of residence is to be proportionate, it cannot exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking employment in that state.

GENDER DISCRIMINATION

Case C-342/01 *María Paz Merino Gómez v Continental Industrias del Caucho SA*, 18 March 2004. Ms Merino Gómez was on maternity leave from the respondent between 5 May and 24 August 2001. That period coincided with a period of annual leave in her workshop, which had been fixed in a collective agreement. On her return, she applied to take her annual leave. Her employer refused to grant her this leave. She brought proceedings before the Spanish courts, which referred the case to the ECJ. It pointed out that the *Working time directive* provides for paid annual leave of at least four weeks' duration. This is a particularly important principle of EC social law with the aim that workers should take a proper break from work. The purpose of maternity leave is different. It is intended to protect a woman's physical condition throughout the relevant period and to protect the special relationship between a woman and her child after childbirth. The directive on the protection of pregnant workers provides that, in principle, the rights connected to an employment contract must be ensured in a case of maternity leave – including the right to paid annual leave. The determination of when paid annual leave is to be taken falls within the scope of the directive on the principle of equal treatment. The directive allows provisions to be adopted that are intended to protect women during pregnancy and the period following childbirth. However, these provisions may not result in unfavourable treatment regarding their working conditions. Thus, EC law requires that a worker should be able to take her annual leave during a period other than the period of her maternity leave, including in a case in which the period of maternity leave coincides with the general period of annual leave fixed, by a collective agreement, for the entire workforce.

Case C-117/01 *KB v National Health Service Pensions Agency and Secretary of State for Health*, 7 January 2004. KB was a nurse who had worked for the British National Health Service for 20 years. She had contributed to the NHS pension scheme during that period and this meant that a survivor's pension should have been paid to a surviving spouse. KB had been in a long-term relationship with R, who had undergone female-to-male gender reassignment surgery. KB wished R to have the right to the widower's pension. UK legislation provides that birth certificates on which a person's original gender is recorded cannot be altered.

Thus, transsexuals cannot marry in their acquired gender. English law deems void any marriage to which the parties are not male and female. KB and R had been unable to marry and R was not eligible to receive a survivor's pension. KB brought proceedings in England arguing that she was the victim of discrimination on grounds of gender in relation to pay. She had argued that the term 'widower' should be interpreted as including the surviving member of a couple who would have acquired the status of a widower had his gender not resulted in a need for surgery. The English Court of Appeal referred the matter to the ECJ. It held that a survivor's pension paid under an occupational pension scheme falls within the scope of the treaty provisions prohibiting discrimination on grounds of sex in relation to pay. The ECJ held that the decision to restrict benefits to married couples, while excluding couples that live together without being married, could not of itself be regarded as contrary to EC law as discriminatory on grounds of gender. For the purposes of awarding the pension, it is irrelevant whether the survivor is a man or a woman. However, the court did find inequality of treatment relating to the capacity to marry, where marriage is a pre-condition for receipt of the pension. This inequality of treatment does not directly undermine enjoyment of a right protected by EC law but it affects one of the conditions for the grant of that right. The ECJ had already accepted that making it impossible for transsexuals to marry in their acquired gender is an infringement of their right to marry under article 12 of the *European convention on human rights*. The court held that the English legislation must be regarded as being in principle incompatible with EC law. However, it is for member states to determine the conditions under which legal recognition is given to change of gender. Thus, it is for the national court to determine whether a person in KB's situation can rely on EC law in order to nominate his/her partner as the beneficiary of a survivor's pension.

LEGAL PROFESSION

Case C-289/02 *AMOK Verlags GmbH v A&R Gastronomie GmbH*, 11 December 2003. The case concerned litigation before the German courts. The Austrian party was successful and sought to have its Austrian lawyer's fees reimbursed. Both Austria and Germany have a scale for lawyers' fees, with the Austrian scale being considerably higher than the German. It also sought reimbursement of its German lawyer, who had been working in conjunction with the Austrian lawyer. The German court held that the amount of legal fees that could be claimed were limited to the amount that a German lawyer could claim. It also held that the client could not recover the fees of the German lawyer. The case was referred to the ECJ to determine whether the court ruling was discriminatory contrary to articles 12 and 49 of the *EC treaty*. It held that the German court was within its rights to limit the level of fees payable to a lawyer appearing before it. However, the Austrian client can recover the fees of the local Germany lawyer, who was obliged under German law to work in conjunction with the Austrian lawyer. G

Law School *Negotiations competition* and *Client counselling competition* 2004

About 60 students participated in this year's negotiations and client counselling competitions. The winners go on to represent Ireland in the international competitions, which are a valuable opportunity for educational and cultural interchange.

In the negotiations competition, teams of two students participate in a simulated negotiation on behalf of their client. In the client counselling competition, students must conduct a first interview with a client and then advise on both the legal and non-legal solutions. Three of the four winners are trainees with Dillon Eustace.

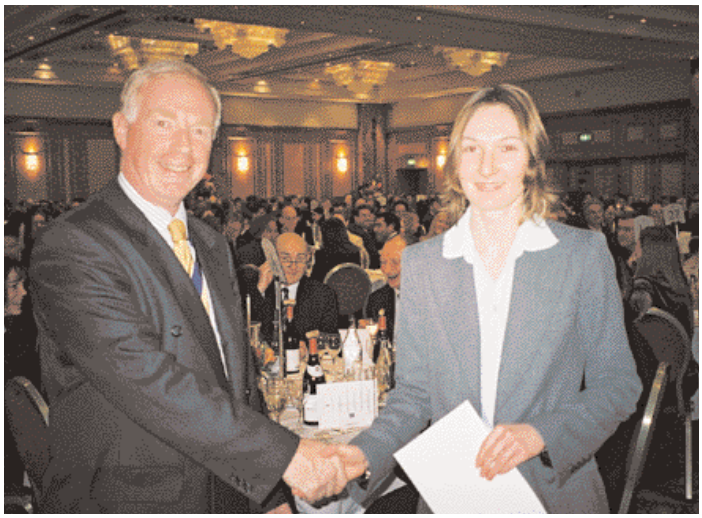
Special thanks to the many judges and co-ordinators, and especially to Justine Kelly, without whom the organisation of these competitions would have been impossible.

Negotiating team
Negotiation competition winners Adrian Flynn and Alan Keating (of Dillon Eustace) with Law Society director of education TP Kennedy and training solicitors Michael Barker and John Doyle

Learned counsel
Client counselling competition winners Bill Fleury (of FH O'Reilly & Co) and Andy Traynor (of Dillon Eustace) with Law Society director of education TP Kennedy and training solicitors Felim O'Reilly and Mark Thorne

Making the cut
Lord Mayor of Cork Colm Burke officially opens the new premises of Anne L Horgan & Company, Solicitors, in Blackrock, Cork

Buddy, can you spare a dime?
All proceeds from the sale of the *Law Society Gazette* Yearbook and Diary go to the Solicitors' Benevolent Association. Pictured are SBA chairman Thomas Menton and Law Society president Gerard Griffin receiving a cheque for over €19,000 from *Gazette* advertising manager Seán Ó hOisín



Less haste, more Speed
Clare Speed, who recently joined the trademarks team at Tomkins & Co, accepts the *Peter Fitzgibbon memorial award in overseas trademark law and practice* from Ian Buchan, president of the Institute of Trademark Attorneys

PIC: MARY KEANE

Out on a rim
Delegates at last month's Law Society annual conference in Sicily walking on the rim of one of Mt Etna's craters

It's all Greek to them
Delegates at the Law Society's annual conference in Sicily last month take a break at the Greek Theatre in Syracuse

Distinguished gentlemen
Frank Griffin, father of Law Society president Gerard Griffin *(left)*, chatting to Mr Justice Joseph Finnegan, president of the High Court, at the society's annual conference

More fun than a barrel of monkeys
Retiring registrar of solicitors, PJ Connolly, sees the funny side of a quip from director general Ken Murphy at his retirement party last month

With thanks and best wishes
Law Society president Gerard Griffin makes a presentation to PJ Connolly on his retirement after 29 years with the society

Dublin & beyond!

Laurence Simons International, the leading recruiter of Lawyers for multinationals and law firms throughout Europe is delighted to announce the opening of its Irish office.

The office will be headed up by Sharon Swan who has been based in the London office of Laurence Simons International since 2000. Sharon has extensive experience from London, Sydney and Dublin and will continue to service the requirements of Law firms and multinationals in Ireland.

Private Practice

Commercial Property Partner — Dublin — c.€200,000

Our client which has a leading reputation for property matters is seeking a property (equity) partner. The work will include the traditional categories of property/real estate - financings, acquisitions and disposals, developments, joint ventures and leasing. Someone with a good reputation is required to spearhead this practice area. Ref: 10255

Fin.Services-Associate/Partner — Dublin — c.€100,000

This hugely successful law firm is now looking to recruit a financial services specialist to join its highly regarded team. Acting for some of the leading institutions in the banking sector, you will advise on all aspects of banking and financial services. You will represent lenders and borrowers on secured and unsecured loans, property finance syndications, asset finance, acquisition finance and regulatory aspects of the financial services industry in Ireland. Ref: 10691

International Finance — Jersey — to £70,000

One of the world's leading offshore firms based in Jersey boasts an outstanding international client base. Continued growth has created an opening for a 2-5 year qualified finance lawyer with a strong track record in a leading firm. The role offers high quality work, excellent career prospects, an offshore lifestyle and a very competitive low-tax package. Ref: 9570

In-House

Funds Lawyer — Dublin — c.€80,000

An opening exists for a General Counsel Funds to join the legal team of a global fund company. You will have 2-5 years experience from a Fund Administration/Investment environment and will be well versed in current laws and regulations relating to Irish off shore funds and investments. Alternatively you will have a strong commercial background and wish to move into the funds area. Ref: 10574

Legal & Compliance — Dublin — c.€70,000

This global financial services group is seeking a lawyer to join its team. The bank operates a full service branch providing corporate and commercial banking services for local and multinational companies. As a member of the Legal & Compliance team you will have experience in advising on the practical implementation of regulatory banking requirements relating to company formations and acquisitions. Ref: 10542

Deputy General Counsel — London — to £175,000

This global investment services company seeks a lawyer with 10-15 years experience to provide legal support to the business and manage a small team. Extensive knowledge of onshore and offshore fund structures, fund regulation and distribution in multiple jurisdictions is of paramount importance. In addition, the successful candidate will have at least five years experience managing people. Ref: 10661

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MEGHENGROUP

A discreet move within the legal circle; an impossible task?

Changing jobs is always a daunting prospect and a challenging task. In order to maximise your chance of securing the perfect position it is vital to be well informed about matters such as salary and the recruitment climate and to adopt a carefully structured approach to your job search. Employers often consider that your method in applying for jobs is indicative of your approach as a lawyer.

Determination and a high level of motivation are required in order to diverge from an established career path. Updating a CV, targeting the appropriate firms, finding the right person to receive your application and chasing feedback is often time consuming and stressful. Maintaining discretion throughout this process may sometimes appear an impossible aim, and yet it is a vital consideration in the context of the intimate legal circle. It is all too tempting to discuss career plans with work colleagues or to send a hurried, indiscreet e-mail from your desk, without contemplating the adverse consequences that may follow if your intention to move becomes common knowledge.

CLARE REED

At Meghen Group our approach is centred on discretion and confidentiality; this has become our mantra. Our consultants understand the importance of your search and dedicate their own time, energy and expertise to finding you the ideal position.

Our familiarity with the recruitment requirements throughout practice and industry and our strong relationship with the various legal professionals means we can ensure that your application is reviewed by the relevant individual and that, at the very least, constructive feedback is obtained.

Our consultants will take the time to meet with you and discuss your career aspirations before contacting suitable clients to highlight your experience and background without revealing your name. With your permission we will send an anonymous CV, omitting your name, personal details and even the details of your present employer.

You will benefit from the advice and assistance of an experienced barrister, Catrin Prys-Williams, and a successful recruitment consultant, Clare Reed, in structuring your job search. By allowing our consultants to work on your behalf you will reduce stress and frustration, thereby ensuring that your job search does not become all-consuming and enabling you to focus on your current work.

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This global investment company is looking for a 1-3yr PQE lawyer to work with their investment product range, including hedge funds. This role will advise, draft and review fund documentation, compliance and regulatory matters.

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An excellent opportunity for an experienced conveyancer, 1-4 yrs PQE, to join this reputable practice. Confidence to work autonomously is important.

Pensions Solicitor
A pure pensions opportunity has arisen for a strong pensions specialist. Working in a dynamic growing top tier firm you will ideally have 1-4 years PQE

Employment Solicitor
A top tier practice seeks a motivated, versatile employment solicitor with 3 years PQE to provide comprehensive advice and training to corporate clients on all aspects of employment law. Your relevant experience will have been gained within practice or industry.

Commercial Property Solicitor
An exciting opening has arisen in this top tier practice. Experience in large deal commercial property with secured lending or construction is required with 3years PQE.

I.T Lawyer
A great opportunity exists with a prestigious client. Experience in software licensing, IP, data protection and e-commerce preferably in a top tier practice is required. 2-4 years PQE in preferably the domestic market would be advantageous.

Banking and Finance Lawyer
An excellent opportunity for a domestically experienced financial lawyer. Experience in international transactions and advising commercial and investment banks is required, preferably from a top tier background.

Corporate Finance Solicitor
This prestigious firm is looking for a corporate finance expert to join its growing team. With experience in M&A's, MBO's, inward investment and excellent drafting and advisory skills you will ideally have 1-4 years PQE.

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Is your level of pay doing you justice?

The HRM *Legal salary survey 2004*, in conjunction with the *Law Society Gazette*, will provide an informative and comprehensive analysis of current compensation and benefits available to qualified solicitors throughout Ireland.

The research will be carried out by means of postal survey, electronic questionnaire and telephone interview. Aside from assimilating minimum and maximum salary information according to year of qualification, position, type of firm or company, we will seek to identify some of the more interesting trends within the legal profession.

The survey is completely confidential and the results will be published exclusively in the *Gazette*.

HRM Legal Recruitment is part of the Professional Services Group at HRM and the leading provider of top legal talent to law firms, industry and financial institutions in Ireland.

For initial enquiries, please contact:
Eamonn O'Reilly, head of recruitment, HRM Legal
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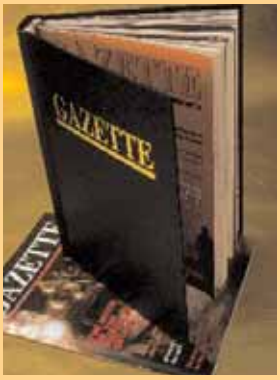

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Please return to *Law Society Gazette*, Blackhall Place, Dublin 7.

LOST LAND CERTIFICATES

Registration of Title Act, 1964

An application has been received from the registered owners mentioned in the schedule hereto for the issue of a land certificate as stated to have been lost or inadvertently destroyed. A new certificate will be issued unless notification is received in the registry within 28 days from the date of publication of this notice that the original certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the certificate is being held.

(Register of Titles), Central Office, Land Registry, Chancery Street, Dublin
(Published 7 May 2004)

Regd owner: John Joseph Cleary; folio: 6821 and 6638; lands: townland of Cappanavarnoge and barony of Clonderalaw; area: 8.5338 and 11.5841 hectares; **Co Clare**

Regd owner: Elizabeth Broderick; folio: 54607; lands: plots of ground being part of the townland of Ardcahan in the barony of Carbery East (West Division) and county of Cork; **Co Cork**

Regd owner: Bernard Doherty, Maghernell, Isle-of-Doagh, Clonmany, Lifford, Co Donegal; folio: 35963; lands: Magheranaul; area: 10.5977 hectares; **Co Donegal**

Regd owner: Michael Howard; folio: DN3335; lands: property situate in the townland of Clonshagh and barony of Coolock; **Co Dublin**

Regd owner: Gerard and Patricia Ronan; folio: DN42546L; lands: property situate in the townland of Jobstown and barony of Uppercross, the property situate to the east of Cookstown Lane in the town of Tallaght; **Co Dublin**

Regd owner: Noel Thomas Malone and David Joseph Malone; folio: DN1335; lands: property situate in the townland of Sheepmoor and barony of Castleknock; **Co Dublin**

Regd owner: Vincent Meagher and Brenda Sheils; folio: DN51651L; lands: property known as 16 Westwood Avenue situate in the parish of Finglas, district of Finglas North; **Co Dublin**

Regd owner: Terry O'Brien and Sorcha McDermott; folio: DN138715F; lands: a plot of ground shown as site no 9 Luttrellstown Rise, Luttrellstown Glen, Castleknock, situate in the townland of Diswellstown and barony of Castleknock; **Co Dublin**

Regd owner: Lawrence Conway, Ballyeighter, Loughrea, Co Galway; folio: 5043; lands: townland of Ballyeighter and barony of Leitrim; area: 4.6490 hectares; **Co Galway**

Regd owner: Declan Dooley: folio: 821F; lands: townland of Creggaun (ed Castleblakeney) and barony of Tiaquin; **Co Galway**

Regd owner: John Egan (deceased); folio: 49750; lands: townland of Tonroe (ed Clarinbridge) and barony of Dunkellin; area: 1.7220 hectares; **Co Galway**

Regd owner: John Morris (deceased); folio: 1778; lands: townland of (1) and (2) Balrobuck Beg and barony of (1) and (2) Clare; area: (1) 5.7693 hectares, (2) 0.7360 hectares; **Co Galway**

Regd owner: Owen and Kathleen Moynihan; folio: 4689; lands: townland of Lissardboola and barony of Trughanacmy; **Co Kerry**

Regd owner: Anne Nash; folio: 1512; lands: townland of Knockognoe and barony of Trughanacmy; **Co Kerry**

Regd owner: Thomas Connolly; folio: 11632F; lands: townland of Dowdingstown and barony of Connell; **Co Kildare**

Regd owner: Oliver Coyne and Ann Lyons; folio: 22253F; lands: townland of Allenwood North and baronies of Connell; **Co Kildare**

Regd owner: Brigid Delaney; folio: 1663; lands: townland of Brownstown Great and barony of Offaly East; **Co Kildare**

Regd owner: Eamonn and Maureen Sheehan; folio: 1544F; lands: Killamuck and barony of Cullenagh; **Co Laois**

Regd owner: Patrick J Weston; folio: 2110F; lands: Laught or Commons and barony of Tinnahinch; **Co Laois**

Regd owner: John Byrne; folio: 23205F; lands: Knockainy West and Ballyhaukish and barony of Smallcounty; **Co Limerick**

Regd owner: Patrick Byrnes; folio: 24990F; lands: townland of Ballynoe and barony of Connello Upper; **Co Limerick**

Regd owner: Sidney Herbert Tabor; folio: 1966F; lands: townland of Ballygoghlan and barony of Shanid; **Co Limerick**

Regd owner: Richard Dwyer, Rathdrina, Beauparc, Co Meath; folio: 7106R; lands: Commons; area: 11.1080 hectares; **Co Meath**

Regd owner: Mary Jane Maguire, Beggstown, Dunboyne, Co Meath; folio: 16936; lands: Warrenstown; area: 0.910 hectares; **Co Meath**

Regd owner: John Domegan, Clashforde, Naul, Co Meath; folio: 27330; lands: Naul; area: 1.200 acres; **Co Meath**

Regd owner: Teresa Treacy; folio: 3118; lands: Cloncollog and barony of Ballycowan; **Co Offaly**

Regd owner: Florrie Tormey (née McHugh); folio: 9127F; lands: townland of Deerpark (ed Boyle Rural) and barony of Boyle; area: (1) 0.3850 hectares, (2) 1.1890 hectares; **Co Roscommon**

Regd owner: John Quigley; folio: 29125; lands: townland of Grange and barony of Ballintober; area: 9 acres; **Co Roscommon**

Regd owner: Damien Beirne; folio: 17298F; lands: townland of Carkfree and barony of Boyle; area: 6.74 hectares; **Co Roscommon**

Regd owner: Daniel Kilfeather; folio: 3419; lands: townland of Breeoge and barony of Carbury; area: 3.4904 hectares; **Co Sligo**

Regd owner: Bill O'Brien; folio: 30202; lands: Ballyard and barony of Owney and Arra; **Co Tipperary**

Regd owner: Barry Michael Keane; folio: 2316L; lands: plots of ground situate to the east side of Colligan River in the urban district of Dungarvan, being part of the

townland of Monag in the barony of Decies-without-Drum and county of Waterford; **Co Waterford**

Regd owner: Edward Casey, Drumraney, Athlone, Co Westmeath; folio: 14321; lands: Drumraney; area: 74.8040 hectares; **Co Westmeath**

Regd owner: Edith Mary Macken, Mary Street, Mullingar, Co Westmeath; folio: 10691; lands: Mullingar; **Co Westmeath**

Regd owner: Arthur O'Leary; folio: 6366F; lands: Clonee Upper and barony of Scarawalsh; **Co Wexford**

Regd owner: Irish Fertilizer Industries Limited; folio: 4004F; lands: townlands of Ballyraine Upper and Lamberton and barony of Arklow; **Co Wicklow**

WILLS

Flynn, Mary (deceased), late of 30 Craigford Avenue, Artane, Dublin 5. Would any person having knowledge of the whereabouts of a will made by the above named deceased, who died on 4 September 1996 at Beaumont Hospital, Dublin 9, please contact Niall Corr & Co, Solicitors, 32 Malahide Road, Artane, Dublin 5; tel: 01 831 2828, fax: 01 831 6320, e-mail: niallcorrsolrs@eircom.net

Hogan, Edmund (deceased), late of 65 St Margaret's Avenue, Kilbarrack, Dublin 5. Would any person having any knowledge of the whereabouts of a will made by the above named please contact Carvill Rickard & Co, Solicitors, 1 Main Street, Raheny, Dublin 5; tel: 01 8312163

Killeen, Sarah Carmel (deceased), late of 45 Callery Road, Mount Merrion, Co Dublin, and lately of Nazareth House Nursing Home, Malahide Road, Dublin 3. Would any person having any knowledge of a will made by the above named deceased, who died on 11 October 2003, please contact Killeen Solicitors, 14 Mountjoy Square, Dublin 1; tel: 01 855 5587, fax: 01 855 4091

McHale, James (deceased), late of 49 Sandymount Road, Dublin 4. Would any person having knowledge of the whereabouts of any will of the above named deceased, who died on 1 March 2004, please contact Orpen Franks, Solicitors, 28/30 Burlington Road, Dublin 4; ref: RMW; tel: 01 668 9622, fax: 01 668 9004

Rodgers, William Andrew (Andy) (deceased) and **Rodgers, Catherine Maria (Connie)** (deceased), late of 'Rachra', Coast Road, Malahide, Co Dublin. Would any person having knowledge of a will made by either of the above mentioned deceased, who died on 27 November 2003 and 4 February 2004 respectively, please contact Ronald J Clery & Co, Solicitors, 3 Centaur Street, Carlow; tel: 059 913 4702, fax 059 913 7855, e-mail: rjclerysolrs@eircom.net

Sinnott, Mary (deceased), late of Broomville, Ardattin, Co Carlow. Would any person having knowledge of a will made by the above named deceased, who died on 16 September 1993 at Kyle, Bunclody, Co Wexford, please contact Messrs Peter G Crean & Co, Solicitors, Estate House, Castle Hill, Enniscorthy, Co Wexford; tel: 054 34500, fax: 054 34257; e-mail: petercrean@securemail.ie

EMPLOYMENT

Apprenticeship required. A graduate (B Comm and MBS international business) with two years' work experience in banking and financial industry seeks trainee position. Passed all eight FE1s. Computer literate. Any area considered. Please reply to **box no 40/04**

Experienced solicitor – with seven years' PQE in general practice seeks part-time employment in north Dublin, north Kildare or Meath area. Please reply to **box no 41/04**

Litigation solicitor required for a small-to-medium size south Dublin city practice – minimum two to three years' experience. Reply to **box no 42/04**

Locum solicitor required for a busy practice in the Kilkenny area for a period of four months commencing mid-June. Conveyancing experience essential. Replies to Thomas A Walsh & Co, 23 James Street, Kilkenny

Law graduate – reliable, energetic, seeks apprenticeship. FE1s passed with experience of conveyancing, probate and litigation work. Excellent computer skills. Reply to **box no 43/04**

Part-time solicitor required for a 12-month contract position in insurance industry. Must be able to work Monday and Tuesday of each week. Must have personal injury defence litigation experience. Contact Oisín Mason at 01 609 1368 or e-mail hr@eaglestar.ie

Part-time and/or locum solicitor required for Limerick city practice. Please reply to **box no 44/04**

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

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

Solicitor required for busy Co Tipperary general practice. Up to three years' post-qualification experience preferred, but may suit a newly-qualified solicitor. Reply to **box no 45/04**

Solicitor with ten years' PQE in conveyancing, litigation and District Court advocacy seeks position in south Tipperary/Kilkenny/Waterford/east Cork area. Reply to **box no 46/04**

Co Mayo: locum solicitor required for three months from end of June 2004 with post-qualification experience in conveyancing, probate and litigation. Please apply by post to Mairead Bourke, Solicitors, Westport, Co Mayo, or e-mail to jennylaw@anu.ie

Apprenticeship required – preferably NW or west but all areas considered. B Corp, LLB (both 2:1). Four FE1s passed; awaiting results for last four. Excellent references. Available now. Tel: 087 798 9265, e-mail: sineadmcnelis@hotmail.com

MISCELLANEOUS

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

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

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

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

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

Ideal legal location
New, modern, bright self-contained first-floor office space to let. Reception, conference room, open-plan office (easily subdivided). Own kitchen, WC, gas-fired central heating, cat 5 wired for computer network and telephone system, communications box, monitored alarm system. **42 Arran St East, D7**, adjacent to LUAS, Four Courts, Law Library; flexible terms, 85m² (915 sq ft). Contact: Donal Fitzpatrick, North Estate Agents; tel: 01 433 2222

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**

Translations: English/German. Contact: Brigitte Henning, certified translator for legal and other documents; tel: 061 367 067, e-mail: brigittehenning@eircom.net

Wanted: seven-day ordinary publican's licence. Replies to ref: AG, Vincent & Beatty Solicitors, 67/68 Fitzwilliam Square, Dublin 2; tel: 01 634 0000, fax: 01 634 0001, e-mail: postmaster@vblaw.ie

TITLE DEEDS

Yorke, James (deceased), late of 3 Rock Street, Rathdrum, Co Wicklow. Would any person having knowledge of storage of title documents relating to the above named deceased, who died on 17 November 2003, please contact Denis Hipwell, solicitor, Patrick O'Toole, Solicitors, Church Street, Wicklow, Co Wicklow; tel: 0404 68320, fax: 0404 68001, e-mail: potoolesols@eircom.net

In the matter of the *Landlord and Tenant Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) No 2 Act, 1978*: an application by Orsigny Limited
Take notice that any person having any interest in the freehold estate of the following property: all that piece or parcel of ground situate on the north side of the road leading from Stillorgan to Newtownpark being part of the lands of Stillorgan Grove in the barony of Rathdown and county of Dublin and commonly known as the motor house or garage erected thereon and adjacent to the property known as 44 Stillorgan Park, Blackrock, Co Dublin, being the property comprised in an indenture of lease dated 30 November 1951 and made between Helena McCormack, Louisa McLaughlin, Alice Hayes, Mary O'Dwyer and Frances O'Hara of the one part and Pierce Michael Oatway Purcell of the other part for a term of 55 years, except the last ten days thereof, from 29 September 1951 at a yearly rent of one shilling, if demanded.

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

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

Date: 7 May 2004
Signed: Beauchamps Solicitors, Dollard House, Wellington Quay, Dublin 2

In the matter of the *Landlord and Tenant Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978* and in the matter of an application by Patrick Walsh of 173 Charlotte Quay Dock, Dublin 4
Take notice that any person having any interest in the freehold estate of the following property: all that the premises with the buildings erected thereon situate at Arbour Hill in the city of Dublin more commonly known as 'The Stores' and more particularly described on the map

FINDLATER RECIPIENTS

The late Sir William Findlater DL, a past president of the Law Society, founded this scholarship in 1877. The Law School has compiled a list of recipients from 1877 to the present day. There are a number of gaps in the list of recipients. **We have been unable to locate the recipients of the scholarship for the years listed below**. If you are one of the recipients or have any information about a recipient, please contact Philomena Whyte, admissions administrator in the Law School, tel: 01 672 4802, alternatively, you can send an e-mail to p.whyte@lawsociety.ie.

1965 • 1974 • 1975 • 1976 • 1981
1984 • 1985 • 1986 • 1987

annexed to the indenture of assignment made on 8 February 1983 between Thomas Walsh of 'Cill Dara', Carrickbrack Road, Sutton, in the city of Dublin, of the one part and TC Walsh & Sons Limited, having its registered office at 49 Arbour Hill in the city of Dublin, of the other part.

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

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

Date: 7 May 2004

Signed: Brady Walsh (solicitors for the applicant), 'Leoville', 23 Carysfort Avenue, Blackrock, Co Dublin

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

Take notice that any person having any estate in the freehold of or superior interest in the following premises: all that and those the piece or plot of ground, dwellinghouse and premises comprised in and demised by an indenture of lease dated 3 February 1964 and made between Christopher Gore Grimes and William Cremin of the one part and Bernard McCormack of the other part and herein described as all that and those that piece or plot of ground with dwellinghouse and premises erected thereon and formerly known as no 33 South Circular Road, Portobello, situate in the parish of St Peter and city of Dublin, which said premises are now known as no 61 South Circular Road, Portobello, and which said piece or plot of ground, dwellinghouse and premises are now known as 61 South Circular Road in the city of Dublin.

Take notice that the applicants, Michael Ryan and Kevin Ryan, intend to apply to the county registrar for the county of the city of Dublin for the acquisition of the freehold interest in the aforesaid property, and any party asserting that they hold an interest superior to the applicants in the aforesaid property are called upon to furnish evidence of title to same to the below named solicitor within 21 days from the date of this notice.

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

Date: 7 May 2004

Signed: George McGrath (solicitor for the applicants), 11 Clanwilliam Terrace, Dublin 2