Law Society Gazette

Regulars

COVER PIC: REX FEATURES

Cover Story

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

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E-mail: c.oboyle@lawsociety.ie Law Society website: www.lawsociety.ie

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NATIONWIDE
News from around the country

CORK

New court building

After some years of both the High Court and Circuit Court in Cork sitting in a controversial and run-down building on the city's Camden Quay, a new and exciting era is close to dawning. Cork's solicitors are awaiting their new courthouse in Washington Street, believed to cost up to €40 million, which is expected to open for business in the coming months. The District Court will remain in Anglesea Street.

'The business of the courts is serious business and it is entirely appropriate that we are at last close to getting a suitable building for the higher courts', noted James O'Sullivan of the Southern Law Association. The dignity of the judicial arm of government demanded that courts be properly housed, he added.

The refurbished building is also expected to include the most modern technological and electronic equipment ever seen in an Irish courtroom. The setting for justice administration in our largest county will soon enter the 21st century.

Annual conference

Granada in southern Spain was the destination last month of Cork solicitors when they exchanged their travails in Camden Quay and Anglesea Street to attend the Southern Law Association's annual conference.

The conference was both well attended and hugely successful. Speakers included Mr Justice Michael Peart, who spoke on the judicial approach to liability following the Glencar Exploration case. Other speakers included Patrick Dorgan, chairman of the Law Society's Conveyancing Committee, who spoke on the Competition Authority's investigation into the solicitors' profession, and Rosemary Horgan, who spoke on recent developments in family law. And the solicitors present even got CPD hours for attending.

Cork's Washington St courthouse: a new era dawning?

DONEGAL

Registrar of solicitors

The new registrar of solicitors, John Elliott, is due to visit the Donegal Bar Association on 25 November as part of what is understood to be one of a number of such meetings with local bar associations around the country. 'We think that it is an excellent opportunity for us to meet him and better understand his role and duties as the Law Society's registrar of solicitors and director of professional practice', said the Donegal Bar Association's Margaret Mulrine.

DUBLIN

Continuing professional development

CPD must now be solicitors' most-used acronym – if you don't count PIAB, that is. Could it have anything to do with approaching deadlines?

Dublin's bar association, the DSBA, last month held a further two valuable seminars for solicitors. More than 200 solicitors attended the *Wills and risk management* seminar early in the month. The critical importance of taking clear and detailed instructions from clients making wills was emphasised by Anne Stephenson, whose practice is in Blackrock, Co Dublin. Brian Spierin SC spoke on the ensuing litigation when wills go wrong and when solicitors are not where they want to be in the courtroom.

This is an important area of law that can be very unforgiving of mistakes, noted John O'Malley, the DSBA's programmes director. Over the coming months, the DSBA would be producing for members a precedent wills instruction sheet that would help members to get it right, he added.

Presentation

The DSBA's administrator of 18 years, Mary Rigney, was honoured last month with a presentation by the association's outgoing president, John O'Connor. He noted that the DSBA was a hugely successful body and that this was due in no small way to Mary's contribution over the years.

LONGFORD

Pro bono work

Thirty solicitors in Co Longford are now providing free legal advice to those in need through the local citizens' information centre in Longford town. It is a free service that has a constant stream of users.

'It is one way in which we can contribute to the well-being of local people without being paid for it', according to one local solicitor. The work, which is done on a rota basis, helps to bring solicitors closer to the community. It also helps to give the lie to unfair and unfortunate suggestions that we are all greedy and grasping.

WICKLOW

Across the water

In Wicklow, they also know that there is more to life than CPD, PIAB and the office. Bray practitioner Brian McLoughlin, who is the current president of the Wicklow Bar Association, recently led his members on a visit to north Wales.

The visit was the latest input in the ten-year tradition of cultural and educational exchanges between Wicklow solicitors and their counterparts in the Gwynedd district of north Wales. Legal information and social and cultural exchanges take place during such visits and foster goodwill among lawyers in the two differing jurisdictions.

'It is important that we encourage understanding of how lawyers function in neighbouring countries and that they also better understand us', according to Karl Varney, secretary of the Wicklow Bar Association.

Such visits are enjoyable and educational for both visitors and hosts. A visit to Wicklow in Summer 2005 by Gwynedd solicitors is already being planned. G

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

EURO PATENT CONFERENCE

The European Patent Office is holding its third *epoline* annual conference in Salzburg, Austria, on 23-24 November. Among other things, the conference will examine the latest developments in on-line patent management and information dissemination and its cont-ribution to EU innovation. For more information, visit *www.epoline.org*.

COMMERCIAL COURT MAKING ITS MARK

Ireland's new Commercial Court is speeding up the rate at which commercial disputes are resolved, according to a new report from the Dublin law firm McCann FitzGerald. Since its introduction in January of this year, cases in the Commercial Court have taken on average just five weeks from entry into the court's list to allocation of a date for trial. And of the 21 cases that have been entered in the list so far this year, 14 have either been disposed of through settlement or court order, following trial or the early hearing of a key issue in the proceedings. The full report, *Ireland's Commercial Court in action*, is available at *www.mccannfitzgerald.ie*.

LRC conference on reform of land law and conveyancing

The Law Reform Commission (LRC) is holding a conference on *Modernising Irish land and conveyancing law* on Thursday 25 November at the O'Reilly Hall, University College Dublin. The conference is being run in conjunction with the Department of Justice, Equality and Law Reform and will focus on the proposals outlined in the LRC's consultation paper, which was published at the end of last month. The conference will also deal with the modernisation of the Land Registry and preparations for e-conveyancing.

The consultation paper, launched by justice minister Michael McDowell, provisionally recommends the reform of over 150 pre-1922 statutes relating to land law which remain in force in Ireland, including the repeal of those laws that are either obsolete or have long been superseded by more recent legal developments. The paper also recommends the reform of some statutes that, although used frequently by conveyancers in everyday property transactions, date back almost 150 years and are framed in unnecessarily archaic language.

At the launch of the LRC report were solicitors Marjorie Murphy and Vivian Bradley, Chris Hogan of the Land Registry, Michael McDowell, Deirdre Morris, solicitor, and Professor John Wylie

Further information on the conference is available on the LRC's website, *www.lawreform.ie*, or by calling 01 637 7603. Submissions on the provisional recommenda-tions contained in the consultation paper must be made to the LRC by 31 December 2004.

No more Law Society diaries

The Law Society has decided to discontinue the production of both Law Society pocket diaries and the *Gazette yearbook and diary*. The decision was taken reluctantly in the wake of dwindling sales of the products and the advent of electronic organisers and diary functions contained on most PCs. Pocket diaries and desk diaries are available at most good stationers nationwide.

ONE TO WATCH: NEW LEGISLATION

Industrial Relations (Miscellaneous Provisions) Act, 2004

In the 2003-2005 *Sustaining progress* agreement between the government and the social partners, it was agreed to enhance the effectiveness of the procedures in the code of practice on voluntary dispute resolution and make some amendments to the *Industrial Relations (Amendment) Act, 2001*. Following through on this commitment, the *Industrial Relations (Miscellaneous Provisions) Act* became law on 9 March 2004 and was commenced on 6 April by SI 138/04.

The act means that binding decisions by the Labour Court can be achieved more quickly (the target in *Sustaining progress* is 26 weeks, to a maximum of 34 weeks, unless longer by agreement). The 2001 act and this act have the effect of imposing on an employer who does not engage in collective bargaining such terms and conditions for the employees as the Labour Court decides. The Labour Court has recently imposed rates of pay and pension conditions and these are enforceable against the employer, so that he is required by law to employ his workers on terms he has not agreed to.

Investigation and enforcement

Section 2 amends section 2 of the 2001 act to provide that the Labour Court may investigate a trade dispute under extended conditions:

- If the employer does not engage in collective bargaining negotiations with the category of workers in the trade dispute and any internal dispute resolution procedures have failed, and
- Either the employer has not observed a time limit in the code of practice on voluntary dispute resolution, or an agreed extension, or if the dispute has been referred to the Labour Relations Commission in accordance with the code and the commission believes it can do nothing more to resolve the dispute.

The 2001 act provided for the Labour Court to first make a recommendation and then a reasoned determination. Section 4 of the 2004 act provides for a new system of enforcement of a Labour Court determination by civil proceedings. The time limit is no longer one year, but is the period specified in the determin-ation for the terms to be complied with, or immediately if no period is specified. After the period (if any) has expired, the trade union or excepted body can apply to the Circuit Court for an order directing the employer to carry out the terms of the determination. The

Trainees to get salary hike

The Law Society has reviewed the recommended salary rates payable to trainee solicitors during the course of their in-office training. The last such review was undertaken in 2000. The result of this review is that with effect from 1 January 2005, the recommended rates have been increased. The new rates are:

- Post-professional practice course 1 – €360 a week
- Post-professional practice course 2 – €428 a week.

The Education Centre: a rewarding experience

The new rates are mandatory for all trainees with effect from 1 January 2005. The position of trainees working in the office prior to starting the professional course 1 is slightly different. The mandatory salary levels do not apply. However, as four months of this time can form part of the in-office training period, the Law Society strongly recommends that such trainees should be paid at least €272 a week.

At the same time as the increase in trainee salaries, the Law Society also considered it appropriate to increase the number of hours that a trainee is expected to work. Again, with effect from 1 January 2005, trainee solicitors will be required to work 36 hours a week, an increase of one hour from the current working week of 35 hours.

AWARD FOR FLAC LAWYERS
Three lawyers have been named as ESB/Rehab *People of the Year*. Peter Ward BL, Iseult O'Malley BL and Siobhan Phelan BL of the Free Legal Advice Centres were presented with their awards by RTÉ's Mary Wilson.

RETIREMENT TRUST SCHEME
Unit prices: 1 October 2004
Managed fund: 441.089c
All-equity fund: 102.555c
Cash fund: 256.772
Long-bond fund: 118.438c

COYNE TAKES OVER AT DSBA
Orla Coyne has been elected president of the Dublin Solicitors' Bar Association for 2004/05, taking over from John O'Connor.

Society proposes tax changes 'to help the most vulnerable'

The Law Society's Probate, Administration and Taxation Committee recently published its pre-budget submissions to the minister for finance. The submissions fall into four categories: promoting business, helping the family, helping support older people, and easing the administrative burden.

Many of the submissions focus on the anomalies in the taxation system that affect families (particularly where the transfer of the family home is concerned) and also suggest tax changes to assist the most vulnerable members of society – the elderly and families caring for elderly relatives and children.

The full text of the submission is available on the society's website, *www.lawsociety.ie*.

Circuit Court must do this without hearing the employer or any further evidence.

Victimisation

Section 8 contains a prohibition of victimisation under wide conditions – the employer does not engage in collective bargaining negotiations and any internal dispute resolution procedures have failed, and:

- A trade union invokes the procedures under the code of practice on voluntary dispute resolution, or
- Such procedures have been invoked by a trade union in relation to a trade dispute, or
- An employee or trade union intends to make a request for a Labour Court investigation under section 2, or such a request has been made but the Labour Court decides the requirements have not been met, or
- The Labour Court decides the requirements have been met and an investigation is being or has been carried out, or any follow-up procedure has been or is being carried out.

In any of these conditions, the employer or an employee or a trade union shall not victimise an employee (including a manager) on account of membership of or activities for a trade union (or lack thereof). The definition of 'victimise' excludes dismissal. A remedy for alleged victimisation lies in a complaint to a rights commissioner within six months, or a further six months with reasonable cause. The rights commissioner may find that the complaint is well founded and direct that the conduct complained of shall cease, and require the respondent to pay compensation up to two years' remuneration. Proceedings before a rights commissioner are to be conducted otherwise than in public, but the rights commissioner's register of decisions is to be open for public inspection. Appeals with a rehearing lie to the Labour Court (section 10).

The Labour Court has the power to administer oaths and compel witnesses, and the making of a false statement is an offence, punishable by a fine up to €3,000 and/or six months' imprisonment. Failing to attend or give evidence is similarly an offence. The Labour Court may refer a question of law to the High Court, and an appeal on a point of law lies to the High Court also. Decisions of rights commissioners and the Labour Court are enforceable by the Circuit Court six weeks after the expiry of the appeal period, without hearing fresh evidence. G

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

KRAKOW 2005

Law Society of Ireland

ANNUAL CONFERENCE 2005

It is with great pleasure that we invite you to the magical city of Krakow, situated in the southeast of Poland on the banks of the Vistula River. Krakow is one of the best-preserved medieval city centres in Europe. The old royal capital, Krakow is the most legendary and beloved of Poland's cities. Hospitable, vibrant and fascinating, with a renaissance charm plus plenty of sights: arguably the largest old town square in Europe, with a bugle call every hour, the kings' castle Wawel, Gothic art masterpieces, the old Jewish quarter Kazimierz, man-made hills, and much more.

Join us for what promises to be a most memorable conference in a most memorable city.

Please note full brochure and booking form will be available in the December issue of the *Gazette*. Places are strictly limited and are allocated on a first-come basis. If you would like any further information, please contact Evelyn O'Sullivan, Law Society of Ireland, Blackhall Place, Dublin 7; tel: 01 672 4823; e-mail: e.osullivan@lawsociety.ie

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

Firm: _____

Tel: _____ Fax: _____ E-mail: _____

BY CHEQUE: I enclose a cheque in the sum of € _____ (€450 per person travelling) representing booking fee (non-refundable after 20 February 2005).

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ECHR augments traditional rights of accused

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

The Special Criminal Court considered the fair trial provisions (article 6) of the *European convention on human rights* in a recent IRA membership case (*Re DPP v Niall Binead and Kenneth Donohoe*, O'Donovan J, 15 October 2004) and held that the convention 'augment[s] the traditional rights of an accused person'.

Chief superintendent Philip Kelly gave evidence of his belief that the accused were members of an illegal organisation, under section 3(2) of the *Offences Against the State (Amendment) Act, 1972*, which provides that such an officer's statement of belief of membership of an illegal organisation shall be evidence against the accused. He stated that his belief was based on oral and written sources within and outside the Garda Síochána, but claimed privilege for the identity of his sources.

Counsel for the defence argued that this breached the principle of equality of arms as laid down by the ECtHR in *Rowe & Davis v UK* (application no 28901/95, 16 February 2000) and that preventing the defence from investigating the reliability of the chief superintendent's sources was a breach of article 6, sub-articles 1 and 3(d), of the ECHR, now part of the domestic law in this state.

IRA membership: is a chief superintendent's word still good enough?

Imbalance

The defence suggested that a special counsel should be appointed to enquire into the basis of the chief superintendent's beliefs, or that the court itself could conduct this enquiry. The prosecution accepted that traditional informer privilege was not absolute, being subject to innocence at stake (*Ward v Special Criminal Court*, [1999] 1 IR 60, SCt), but argued that the ECHR did not have any impact on the traditional law with regard to informer privilege and that there was no jurisdiction or precedent for the court to do what the defence counsel suggested.

The court acceded to the principle argued for by the defence:

'The court is of the view that if no enquiry whatsoever is made into the basis of Chief Superintendent Kelly's belief, then there is substance to the defence argument that there is an imbalance in the trial in favour of the prosecution and an absence of equality of arms, which could be interpreted as a lack of fairness insofar as the accused are concerned.

'The court is also of the view that article 6 of the European convention on human rights, *which is now part of the domestic law in this country, does augment the traditional rights of an accused person in the course of his/her trial in that it is now the law that one of his minimum rights is the right to examine and have examined, and I emphasise the "have examined", witnesses against him. In the context of this case, this right would appear to include the right to have Chief Superintendent Kelly examined with regard to the basis for his beliefs'.*

The court accepted that informer privilege continues to be part of the law, but held that some enquiry must be made with regard to the basis of the chief superintendent's belief. It held that it did not have jurisdiction to appoint a special counsel, 'which in this jurisdiction would be a very radical step'. However, it decided that it was entitled to and should, in the interests of justice, review some of the documentation on which the chief superintendent based his belief.

The court stated that it will, in time, elaborate on the reasons for these conclusions, and it reserved its judgment in relation to the guilt or innocence of the accused.

Breaking new ground

This case is one of the first in which the ECHR has been considered and applied by an Irish court since the *ECHR Act, 2003* came into effect on 31 December 2003. Under section 5 of the act, 29 cases have been notified to the Human Rights Commission as potentially giving rise to declarations of incompatibility. Seán Barton mentioned another instance at the conference entitled ECHR Act *review and human rights in committed relationships* on 16 October 2004:

'A good example of how convention issues may unexpectedly develop significance is the decision of the High Court in Re Eurofood IFSC Limited and the Companies Acts *(HCt, Kelly J, 23 March 2004). This case raised a jurisdictional issue relative to the winding up of a company incorporated in Ireland in respect of which a provisional liquidator had been appointed by the High Court on 27 January 2004. Before the hearing of the winding-up petition before the Irish court, an Italian "extraordinary administrator" was appointed to the same company (one of the Parmalat group) by an Italian ministry and a hearing was held in an Italian court for the purpose of placing the company in insolvency in Italy. The judgment largely concerned the resolution of the jurisdictional issue under EU council regulation 1346/2000 on cross-border insolvency proceedings. It is, however, perhaps significant that the High Court judgment placed emphasis on the relevance of breach of convention rights (in this instance, the apparent breach of the right of creditors of the company to a fair hearing under article 6, as they were not heard, or afforded an opportunity to be heard on the Italian application) as a proper ground for refusing recognition in one member state to a judgment previously given in another'.* G

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

PRESSING FOR *reforming the*

Royalty, ministers, tabloid editors and the promise of a press council all played their part in the recent Law Society conference on privacy law. The *Gazette* got out its long lens and took a peek

A recent European Court of Human Rights (ECtHR) ruling involving Princess Caroline of Monaco has made it necessary for the government to bring legislation before the Oireachtas to protect the individual's right to privacy, justice minister Michael McDowell told a recent Law Society conference.

The ECtHR found that Princess Caroline was entitled to have her private life protected, even when she was in a public place. The princess had taken three magazines to the German courts after they published photographs of her skiing, playing tennis and shopping in a number of public places with her family.

Private eyes: a capacity audience turned out for the conference

McDowell said that while the German courts found that she was a 'public person *par excellence*' and was effectively fair game once she was in a public place, the ECtHR disagreed and ruled that she should not have to face harassment by the *paparazzi* every time she appeared in public. 'The German state was told that its laws were not sufficiently protective in this area', he said.

Speaking at the conference, *Protecting privacy*, in Blackhall Place on 9 October, McDowell said that, as a result of the ruling, Ireland could be in breach of its obligations under the *European convention on human rights* and had to deal with the issue. He told the capacity audience that the government intended to bring a set of proposals for the legislation before the Oireachtas by Christmas.

Justice minister Michael McDowell makes a point, watched by solicitor Michael Kealey

Packed lunch

The proposals will form part of an overall package of reforms to the state's defamation laws. McDowell said they would include an independent press council that would offer members of the public with grounds for complaint against the media an alternative means of redress to going to court.

He said that under the new law, the media would have the right to publish material about individuals under the privilege of commenting on public affairs. At the same time, it would be able to rely on a defence similar to that recognised by the House of Lords in the Albert Reynolds libel action against the British *Sunday Times*.

The minister explained that this would mean that the media could get stories factually wrong as long as they had made a fair attempt to establish the truth. As a *quid pro quo*, he said, newspapers and television

CHANGE: *law on privacy*

would have to comply with press council rulings on retractions and corrections.

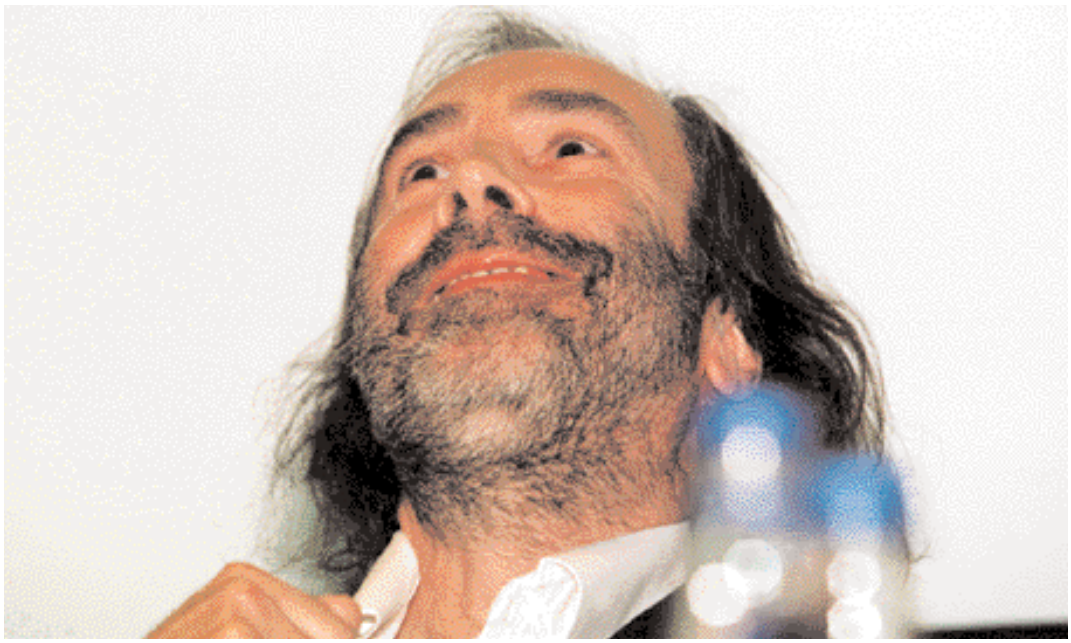
'I am saying that we want to expand further the laws of defamation to include a right to be wrong, but that would be balanced by the need to treat people fairly on an on-going basis', he said.

In the course of his address, McDowell made it clear that he was personally wary of a privacy law regime. 'You may find that a privacy law is a shield which malefactors of various kinds can use to hide what they are doing', he warned. 'I think there is a middle way.'

He added that the government's proposals were that middle way.

However, solicitor Michael Kealey, a partner with Dublin law firm William Fry, warned that while the excesses of today's media frequently shocked judges, the cure was considerably worse than the disease. Kealey, who acted for Beverly Cooper-Flynn in her unsuccessful libel suit against RTÉ, also referred to the Princess Caroline case (known as *Von Hanover v Germany*), but argued that its net effect would be to force the media to censor itself when dealing with stories about figures such as her.

He pointed out that her own family, the Grimaldis, was particularly adept at using publicity for its own ends. Kealey maintained that members of a hereditary royal family hold their position simply through an accident of birth. 'It is well-nigh impossible for the media to draw distinctions between public behaviour in a public place and private behaviour in a public place, but that is what the court insists they must do', he said.



Irish Times columnist John Waters keeps his chin up at the conference

Conference chairwoman Miriam O'Callaghan and Minister McDowell see the funny side

Kealey asked if Princess Caroline and her husband, Prince Ernst, were photographed arguing in a public place, would it be a private matter or one of public interest because it could spell the end of their marriage? 'Faced with the possibility of expensive litigation, it would hardly be surprising if self-censorship came into play', he warned.

He added that decisions like this had resulted in a situation in France where individuals taking part in a public demonstration had to be photographed from the waist down because it is illegal for the French press to identify participants in events such as this without their consent.

Soup and a sandwich

Kealey told the conference that the English House of Lords' ruling against the *Daily Mirror* in the Naomi Campbell case was disturbing because it resulted in the bench taking on the role of editor. The paper published a picture of the model leaving a Narcotics Anonymous meeting that she had been attending as part of a treatment programme for drug addiction. She had earlier denied that she took drugs and implied that she was in some way morally superior to other

Mr Justice Michael Peart listening to the proceedings

Lost in thought: Michael Kealey and John Waters

figures from the fashion industry who did indulge.

In light of that statement, the court ruled that the paper did have the right to publish the fact that she was an addict and was receiving treatment.

However, Kealey said that a majority found that the picture and the report had intruded on her privacy as it had revealed details of something akin to medical treatment.

'It is hard to resist the suspicion that, in reaching their decision, the judges were influenced more by issues of taste than by legal principle', he said. 'We should beware when taste and tone are left to the discretion of the courts'.

Turkey and ham

Irish Daily Star editor Gerard Colleran described cases such as *Campbell* and *Von Hanover* as farcical. He said that the imminent arrival of a privacy law filled him with a dark foreboding, adding that there was a growing movement within this country's establishment to remove any image of reality from the media.

'Journalists have a duty to print what goes on in the real world', he said. 'And it is also in the public interest to resist any attempts to smother that'. He also reacted to disparaging remarks made by other speakers about 'red top' tabloid journalism by saying it was class-based, ill-informed snobbery against working class people. 'It's saying that people are not capable of deciding for themselves what newspapers they read, so posh people will do it for them', he said.

In contrast, RTÉ's chief news reporter Charlie Bird said that he favoured legislation protecting privacy, but stressed that there was a fine line between individual rights and the public interest. He stated that if somebody had cash in an Ansbacher account and was evading tax, then they should be exposed.

Bird said that when the national broadcaster began investigating National Irish Bank's (NIB) use of bogus non-resident accounts and offshore investments to facilitate its clients' tax evasion, the financial institution tried to stop it by claiming that the broadcaster would be invading account-holders' right to privacy.

'RTÉ fought this in the High Court and lost', he said, 'but by a three-to-two majority the Supreme Court came down in our favour because it was in the public interest that this wrong-doing be exposed. We believed it was right to follow the story and that belief was justified by the Supreme Court and the High Court inspectors' report into NIB'.

Bird also said that he had no problem with a press council, but warned that it should be not made up of 'the cronies of some government minister from the same political party'.

Another journalist who argued for reining in the press from time to time was *Irish Times* writer John Waters. He told the gathering that he himself had been on the receiving end of unwanted media attention. 'Five years ago, I tried to stop comment about my daughter and me in the papers, and went to the High Court and got an injunction', he said. 'After the order, I noticed that things actually got worse'.

He explained that, because he got the order in a family court, he could not show it to the editors of the papers against which it was directed, because of the *in camera* rule. As a result, they were effectively

The panel: Ger Colleran, William Binchy, Charlie Bird, Michael McDowell and Michael Kealey

Law Society president Gerard Griffin opening the conference

protected against further action because they did not know the terms of the order with which they were supposed to comply.

Waters said that rights were only rights if they were available to people. He argued that as ordinary citizens generally had to resort to long and expensive litigation to enforce their rights against the media, in real terms they had no rights when it came to dealing with a powerful commercial organisation.

Fruit salad

Professor William Binchy, of the Trinity College law faculty, said it was clear that there was a right to privacy under the Irish constitution. However, he said that in *McGee v Attorney General* ([1974] IR 284), five members of the Supreme Court disagreed on what its basis was. One identified it as article 41, while the others based it on article 40.3.1. In that case, which established a right to marital privacy, Budd J stated that the right to privacy was universally recognised.

Binchy said that the next landmark case was *Norris v Attorney General*, in which independent senator David Norris argued that the now-defunct law that criminalised homosexuality violated his right to privacy. The Supreme Court shot Norris down, and Justice O'Higgins in his judgment said that the right could never be absolute. He argued that, given the Christian nature of the state and the grounds that the deliberate practice of homosexuality was morally wrong, the law was not inconsistent with the constitution. Binchy said that, on that basis, O'Higgins ruled that 'no right of privacy can prevail against the operation of such criminal sanctions'.

Binchy said that Justice Henchy's dissenting judgment in the same case gave a detailed view of the right to privacy in the constitution, and helped capture its essence. The judge defined the right as existing 'within a secluded area of activity or non-activity, which may be claimed as necessary for the expression of an individual personality, for purposes not always necessarily moral or commendable'.

He said that the media frequently advocated retraction and correction as possible remedies for breach of privacy, but he argued that this would not undo the damage. 'The victim of an infringement of privacy is likely to derive little solace from a retraction – since what was disclosed was true – or an apology, since that does not undo the damage and does not improve the plaintiff's standing in society'.

Injunctions as remedies for breach of privacy also posed their own problems, he told the conference. He said that where they prevented the revelation of facts, then it interfered with the defendant's freedom of expression and the public's general right to be informed.

'I would suggest that the court should not decline to grant an injunction merely because the defendant invokes freedom of expression', he said. 'This important freedom has to be balanced against the equally important right to privacy'.

However, he was sceptical of what he called 'soft law' remedies like the press council.

'International experience indicates that they tend not to work,' he said. 'The media loves them because they are essentially free'.

'Why I oughta...': Charlie Bird gets tough on cronyism

Editor of the *Irish Daily Star*, Gerard Colleran

According to criminal law solicitor Michael Staines, the use of CCTV cameras in public places should require ministerial permission, and that notices informing people of their use should be displayed. Staines argued that some forms of state invasion of a citizen's privacy were controlled by law, while others were not.

'The right to privacy is a fundamental right', he said. 'Competing interests such as the investigation of crime or the protection of state security may have to dilute that right. However, any such diminution in the right to privacy must be regulated and stringent safeguards put in place'. He added that the most effective safeguard was where a separate arm of government, such as the judiciary, could ensure that correct procedures were being carried out by An Garda Síochána.

Other speakers at the conference included Joe Meade, the data protection commissioner, who said that privacy legislation already existed in the form of data protection legislation, and Dr Alpha Connelly, chief executive of the Human Rights Commission, who said that the law in relation to privacy needed to be reformed. G

Ken Murphy, Charlie Bird, John Waters, Gerard Griffin, Miriam O'Callaghan, Joe Meade, Michael Kealey and Michael Staines

CORK FAMILY LAW

In a move that will surely resonate with practitioners around the country, family lawyers in Cork are speaking out about the inadequate resources and facilities in the city's District Court. Conal O'Boyle reports

'All the charm of an abattoir'. That's how one prominent Cork solicitor has characterised the facilities at Cork's District Courthouse on Anglesea Street, where backlogs, delays and lack of resources are causing serious concern and frustration to the city's family law solicitors and their clients.

According to James O'Sullivan, president of the Southern Law Association, practitioners are particularly concerned about the backlog in the family law and childcare lists, with months of delays not uncommon. The other major sticking point is the lack of facilities for solicitors and members of the public in the courthouse. Not only is there a dearth of consultation rooms, but there is not so much as a water fountain for those who may have to wait around all day for their cases to be called.

Part of the problem is that the area handled by the city's District Court has been increased by the recent addition of Carrigaline, Ballincollig and Glanmire, three large urban areas. And while the number of district judges has risen from one to three, the sheer increase in the volume of business means that only so much work can be done in a day.

Practitioners are also quick to point out the irony that when there was only one district judge sitting, two days a week were given over to family law. Now the court has three sitting judges but there are still only two family law days a week.

However, O'Sullivan is at pains to praise the district judges and the way they handle their lists, describing their work as 'above and beyond the call of duty'. Judges dealing with the family law and childcare lists have been known to sit until 6pm or 7pm just to get through their workload.

Rosemary Horgan, of Ronan Daly Jermyn, believes that many people underestimate the importance of the work that goes on at District Court level, writing it off as 'summary jurisdiction', as if the kind of law practised there is of an inferior kind.

'If you look at what is going on in childcare cases', she says, 'the issues involved are supremely important to people. Can there be anything more serious than taking a child into care? This is not something that any judge of the District Court does lightly or rapidly. It's not done in a summary manner; it's done with great care and deliberation, and these are very, very lengthy cases. There have been childcare cases that took five days or more at hearing, so this is the level of complexity of the work that's going on in the District Court. It's important to remember what's at stake'.

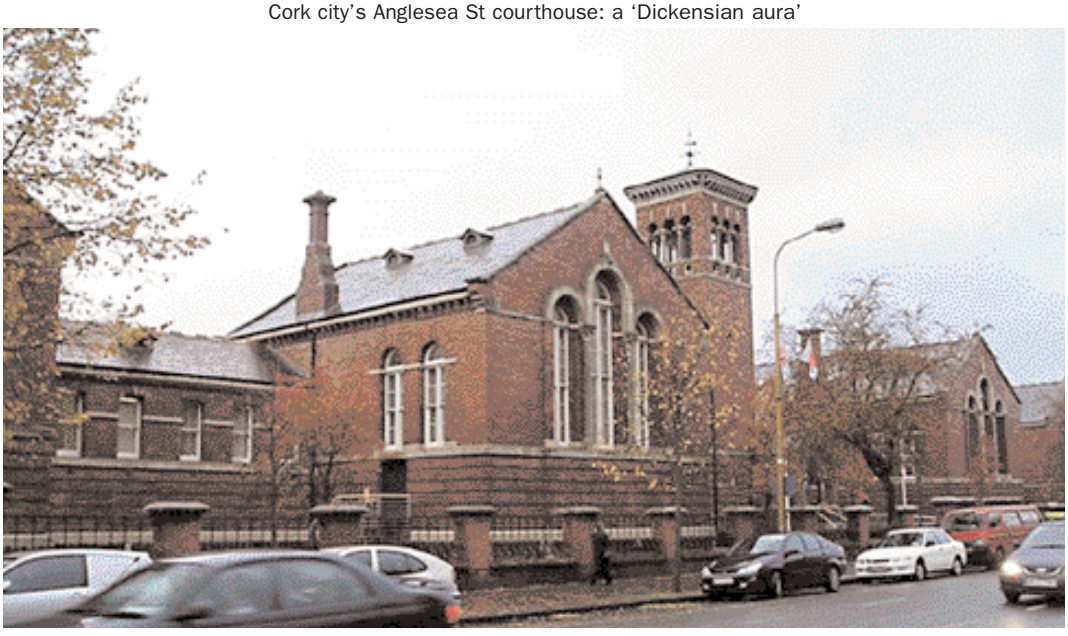
I don't like Mondays

Between 25 and 30 family law cases can be listed for hearing on Mondays and Tuesdays. The net result is that, between plaintiffs, respondents, their supporters and their legal teams, there could be up to 80 people milling around the Anglesea Street courthouse waiting their turn to be heard. For people who are already in a stressful situation, this is an additional burden they just don't need. It would also appear to make a mockery of the *in camera* principle.

'The whole arrangement is supposed to be *in camera*', says Horgan, 'and indeed the courts and the legal system have huge regard for the *in camera* rule of privacy. But there's very little privacy when you're there with 80 other people. It's not very dignified for clients'.

The judges have tried to alleviate the problem by arranging for separate morning and afternoon lists, but the complex nature of family law and childcare and juvenile cases means that hearings take as long as they have to, with a consequent knock-on effect on the lists. Judge Con O'Leary, who handles the childcare list,

Cork city's Anglesea St courthouse: a 'Dickensian aura'



PIC: FIONA HOEY

COURTS IN CRISIS

is singled out for particular praise for the sensitive way he handles his caseload. But despite the best efforts of the district judges, the Southern Law Association believes that the only way to solve this particular problem is the allocation of more family law judges to Cork.

However, seasoned practitioners point out that even if more judges were appointed to the Cork district, the facilities and services available to lawyers and their clients in the Anglesea Street courthouse would not be improved. According to SLA president James O'Sullivan, there is light at the end of the tunnel as far as consultation rooms are concerned. The Courts Service in Cork appears to have found external office space for court administrative staff, which should free up the consultation rooms that were annexed some years ago.

For Brian Sheridan, chief of Cork's South Mall Law Centre, the problems at Anglesea Street are disturbingly familiar.

'As a Dublin solicitor practising in Cork, it reminds me of the controversy some ten years ago when family law courts were being held in proximity to criminal law courts in Chancery Street', he says. 'That blew up because there was an almighty fight outside the criminal court in Chancery Street in the presence of the families who were waiting for family law courts. Now that hasn't happened here in Cork, but there's always that possibility, because you have the criminal courts beside the childcare court on a Wednesday and you have young children seeing people manacled and being brought into the criminal court.

SLA president James O'Sullivan: light at the end of the tunnel

Rosemary Horgan: 'It's important to remember what's at stake'

Brian Sheridan: 'With limited resources, you provide a limited service'

PICS: roslyn@ol.ie

'After the brawl in Chancery Street reached the media, the family law courts were transferred away from the criminal courts. That's a healthier environment really. What disturbs me about Anglesea Street is that you have young children watching people going in and out. There's a Dickensian aura about the place. There's nothing at all that has any sort of human touch to it'.

'Every hour that they have to hang around Anglesea Street is another lost opportunity to do some actual good in the real world'

When Cork practitioners talk about lack of resources and inadequate facilities, they aren't just referring to the physical condition of Anglesea Street courthouse. In an analysis that probably resonates in every district courthouse around the country, those at the coalface in Cork can see how lack of funding and lack of vision leads to a cycle of deprivation. Their frustration stems from other people's inability to see it too.

Can't get no satisfaction

'Many years ago', says Rosemary Horgan, 'the probation and welfare service was available to the court, and if the court sought a report to assist it to determine, for example, a sensitive custody or access matter, the court could ask the probation and welfare officer to prepare a report. That facility hasn't been available to the District Court for quite a considerable amount of time. Because of lack of funds, the probation and welfare service had to stop its involvement in civil cases, and it's now available only in criminal cases.

'And now, with the incorporation of the *European convention on human rights* into our legal system, there is the issue of representation of the children. We have no infrastructure for that. All of these things hamper the proper operation of the court system'.

Brian Sheridan agrees – and why wouldn't he? He has seen legal aid board solicitors tied up for a whole day because of uncertainty as to when their case will be heard. The same is true of social workers and other professionals who come into contact with our creaking family law system. And every hour that they have to hang around Anglesea Street is another lost opportunity to do some actual good in the real world.

'You're trying to provide a service', says Sheridan, 'but you can't perform the loaves and fishes miracle. You simply cannot do it. With limited resources, you provide a limited service'.

Rosemary Horgan nails the problem neatly: 'They say that services for the poor rapidly become poor services. But in this case, it's not the fault of the service providers'. G

FOLLOW the pa

After a Supreme Court recommendation in 1999, the rules governing the discovery of documents were amended to curtail general discovery. Tom Power takes us on a fishing trip

Discovery is provided for in the *Rules of the Superior Courts* at order 31, rule 12, as amended. It is a procedure available to facilitate litigants in obtaining documents. In *Clarke v Drogheda Corporation* (16 January 2003), the master of the High Court described it as 'getting access to any writing (of any sort, hand or printed) which makes reference to the disputed facts'. Discovery of 'details' or 'information' will not be granted (Fennelly J, *Ryanair v Aer Rianta Ltd*, unreported, Supreme Court, 2 December 2003).

Following on from the recommendation of the Supreme Court in *Brooks Thomas Ltd v Impac Ltd* ([1999] 1 ILRM 171), this rule was amended to curtail general discovery. Prior to this change, documents that were relevant were routinely discovered, unless the respondent convinced the court otherwise. The Supreme Court in *Ryanair* gave its view that the amended rule essentially made three changes to the pre-existing process:

- It is now necessary to write to the respondent requesting voluntary discovery within a reasonable period of time

ING
per trail

- The letter must specify precise categories of documents and must contain reasons why each category of documents is being requested
- An affidavit must be filed averring that the discovery of documents sought is necessary for disposing fairly of the cause or matter or for saving costs.

In *Taylor v Clonmel Healthcare Ltd* (unreported, Supreme Court, 12 February 2004), Geoghegan J indicated that 'the purpose of the amendment was so that the master or the court, as the case may be, and the respective parties would focus on what documents were really needed for the purpose of advancing the case of the moving party or defending, as the case might be'. Although it was always a requirement that the documents should be necessary, the issue of necessity was not really applied until the 1999 changes put it in focus. *Taylor* also confirmed that the onus of proof was shifted by the changes to the applicant.

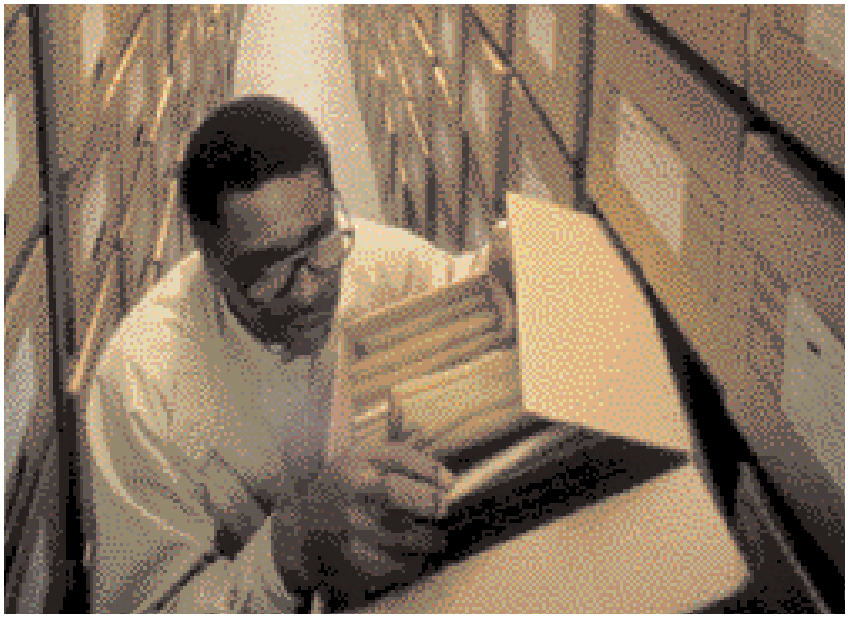
A sense of purpose

In *Taylor*, Geoghegan J confirmed that, although one side-effect of discovery may be to bring the parties closer to a settlement, the purpose of discovery is not merely to enable the settlement. He stated that discovery is granted 'to provide a party with the necessary additional ammunition to enable him or her win his or her case'.

In *Ryanair*, Fennelly J indicated that the purpose of discovery was to create a litigious advantage. He cited Bingham MR in *Taylor v Anderton* ([1995] 1WLR 447):

MAIN POINTS

- **Process and criteria for discovery**
- **Common pitfalls in discovery applications**
- **Recent unreported cases**



'The purpose of the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of a document not being produced for inspection'.

Master mind

The master's written decisions are generally concise and clear. *Kelly v Van den Bergh Foods Ltd* (16 January 2003) is probably the master's most useful decision because it summarises the master's view of the rules relating to discovery. For the sake of clarity and of having a good place to begin, the master summed up the nature of litigation by saying that:

'[Litigation] is not a general process of inquiry into all of the circumstances of the accident; rather, it is an adjudication of the truth or falsity (on the balance of probability) of the facts alleged in the statement of claim (and denied in the defence), no more and no less'.

In other words, the boundaries of the entire litigation (and interlocutory applications such as discovery) are set by the parties themselves in their pleadings. At discovery stage, the court is not concerned with anything outside of the pleadings. The master went on in this case to say that:

'There are several other factors which govern the decision on a discovery application, as follows:

a) No general discovery will be ordered

b) Only material facts ought to have been alleged: if non-material (or "surplus") facts have been alleged, discovery will not be granted

c) In the case of any material fact in the nature of a non-specific allegation, eg, "failing to provide a safe place of work", discovery in pursuit of evidence of such allegation is a "fishing expedition" and will not be ordered

d) Only documents which may yield evidence probative of a material fact will be discoverable. So-called "similar fact" evidence (ignoring for the moment the question of admissibility) is rarely probative of a material fact. The fact often suggested in this context is the state of knowledge of the defendant: this is rarely material

e) Has the party seeking discovery other proof or proofs of the fact to which the documents are stated to relate? If so, discovery is not necessary'.

Discovery is a discretionary process. In the *Ryanair* case, Fennelly J said that 'the overriding interest in the proper conduct of the administration of justice will be the guiding consideration when evaluating the necessity for discovery'.

On a more practical level, Fennelly J went on to say:

'The court, in exercising the broad discretion conferred upon it … must have regard to the issues in the action as they appear from the pleadings and the reasons furnished by the applicant to show that the specified categories of documents are required. It should also consider the necessity for discovery, having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. The court should be willing to confine categories of documents sought to what is genuinely necessary for the fairness of the litigation. It may have regard, of course, to alternative means of proof, which are open to the applicant'.

RECENT UNREPORTED CASES

***Ryanair v Aer Rianta* (Supreme Court, 2 December 2003):**

- Re-affirms *Peruvian Guano* definition of relevance
- Confirms court may have regard to other means of proof open to applicant
- Confirms the 'litigious advantage' approach
- Confirms burden of proof shifted to applicant for discovery
- Confirms amendment in *Rules of the Superior Courts* made no fundamental change in discovery.

***Taylor v Clonmel Healthcare Ltd* (Supreme Court, 11 February 2004):**

- Re-affirms *Peruvian Guano* definition of relevance
- Confirms that burden of proof shifted to applicant for discovery
- Master not confined in jurisdiction based on strict compliance with *Rules of the Superior Courts*
- Master has full power to waive any technical breach if object of rules met (essentially overruling *Swords v Western Proteins Ltd*)
- Purpose of discovery is to fight case, not to settle.

This essentially affirms the position taken by the master. Fennelly J fixes the reasons for the categories being sought to the issues in the pleadings and ties this into the concept of *necessity*. He also confirms that the court has the power to alter the categories sought and to consider the necessity of the documents sought in light of the fact that the applicant may have other means of proof at his disposal.

What are the criteria?

An applicant for discovery should demonstrate that the documents sought are *relevant*, *necessary* and *material*, especially if it is not immediately apparent. The applicant must also demonstrate that there is an evidentiary *lacuna* (that is, a hole or gap) that these documents may help to fill and that the applicant would have difficulty proving otherwise.

The court needs to be convinced of the relevance of the documents to the case. This is relatively easily achieved and is usually addressed very well by applicants, and is usually the most difficult to attack for respondents, because some degree of relevance can usually be demonstrated. Once satisfied of the relevance, the court needs to be convinced of necessity and materiality. This essentially means that the documents sought should relate to disputed issues that are central to the applicant's case. Finally, the document must fill a material gap in the evidence. If the document is available from another source or if the applicant can prove the fact without the document, discovery will not be given. This is because there is no evidential *lacuna*. In other words, even though a document may relate to the case and may relate to an issue pleaded and disputed, discovery will not be granted unless the issue is material (as opposed to collateral or surplus), or if the document is available from another source or there is another way of proving the fact.

Precision strikes

In *David Kelly v Mona Ltd* (21 October 2003), the master said that:

'Practitioners have been in the habit of responding to the requirements of specificity in relation to discovery requests by first identifying categories of documents which would have come their way in the old days of general discovery, and having listed them, then turn their minds to figuring out some stateable "reason" as to why they need them. This is putting the cart before the horse'.

Clearly, the master's concern here is that the categories sought are given no further vetting beyond 'figuring out some stateable reason'. There are other criteria apart from the reasons that the master has indicated (repeatedly) that are being ignored.

The master recommends that applicants for discovery should start at the end of the process, by looking first at the evidential *lacunae* and working back from there.

Ideally, the categories of documents being sought should be precise. Up until recently, failure to identify categories precisely was likely to have an adverse effect on the result in relation to that category. However, Geoghegan J in *Taylor* stated that:

'In interpreting the nature of the particular category of documents being sought by reference to its description, the master of the High Court or the court, as it may be, must look at the context and in that connection surrounding correspondence which is exhibited may be relevant. No

COMMON PITFALLS

- Information or details sought rather than documents
- Categories of documentation sought are too broad: master is likely to regard the application as a fishing expedition
- Inadequate or no reasons in letter for voluntary discovery
- Reasons refer to post-event facts
- No averment as to necessity in the affidavit
- Fact sought to be proved is not disputed by respondent
- Fact is expressly 'not admitted' (this means the fact is not in dispute)
- Fact sought to be proved is self-evident
- The disputed fact relates to a novel and unstateable proposition
- Applicant is already 'home and dry' on the fact
- The applicant's substantive case cannot succeed
- Disputed fact is not material
- The fact relates to general or non-specific pleadings
- Applicant is able to give evidence on the disputed fact personally
- Expert evidence can be given on the disputed fact.

JOHNNY MNEMONIC

The applicant must demonstrate that the categories sought are **r**elevant and **n**ecessary and **m**aterial but there is a hole in the **e**vidence that can only be filled by the **d**iscovery.
To put it another way:
R + N + M – E = D

matter how a particular category of documents is described, the opposing party is only bound to discover such as are material to the issues'.

This may help the applicant in narrowing down the category on the day of the application so that some of the documents in that category may still be discovered. However, this may involve some extra effort on the part of the master or the court and may impact on the awarding of costs.

Geoghegan J in *Taylor* pointed out that 'the opposing party must be put into a position that he understands what type of documents are required'. Essentially, therefore, reasons are included to facilitate the respondent in deciding whether or not they should provide the category of documentation voluntarily. However, they are probably much more important to demonstrate to the court that you are not simply fishing.

African or Indian?

Once precise categories have been set and stateable reasons offered in respect of each category, the next step is to consider the legal relevance of the categories of documentation being sought. The test for relevance is well established and was recently approved again by the Supreme Court in *Taylor*. The test derives from the *dicta* of Brett LJ in *Compagnie Financiere du Pacifique v Peruvian Guano Company* ([1882] 11 QB 55).

The *Peruvian Guano* relevance test is met by answering 'yes' to one of two alternative questions:

- Is it reasonably likely that the documents in this category *may* contain information that *may* advance your case? This is a very low threshold. All that is required at this stage is that you can reasonably say that it is possible that some of this documentation may lead you to a train of enquiry that may help your case. If the answer is 'yes', then that category of documentation is relevant. If the answer is 'no', then move on to the alternative question
- Is it reasonably likely that the documents in this category *may* contain information that *may* damage the respondent's case? Again, this is a very low threshold. All that is required at this stage is that you can reasonably say that it is possible that some of this documentation may lead you to a train of enquiry that may damage your adversary's case. If the answer is 'yes', then that category of documentation is relevant.

If the answer to both of the questions is 'no', then the documents are irrelevant.

The mother of invention

In the aftermath of the 1999 amendment, it is not enough anymore just to demonstrate that the categories sought are precise and relevant. Among other things, it is also a must to demonstrate that the category is necessary. Kelly J, in *Cooper Flynn v RTÉ* ([2000] 3 IR 344), cited Lord Salmon's speech in *Science Research Council v Nasse* ([1980] AC 1028) in an attempt to tie down what the term means: *'What does "necessary" in this context mean? It, of course, includes the case where the party applying for the order for discovery and inspection of certain documents could not possibly succeed in the proceedings unless he obtained the order; but it is not confined to such cases. Suppose, for example, a man had a slim chance of success without inspection of documents but a very strong chance of success with inspection; surely the proceedings could not be regarded as being fairly disposed of, were he to be denied inspection'.*

For a category of documents to be legally necessary and consistent with the *Nasse* case, not only must that category be relevant but it must also be demonstrated that:

- It is relevant to an issue. An issue is a fact that is alleged. For example, in negligence, one of the issues of fact to be proved is the existence of a duty of care
- This issue has been pleaded. The issue should be pleaded in the pleadings. It is not sufficient for the purposes of discovery that the issue to which the category is relevant is alleged in correspondence or on affidavit
- This issue is disputed. This means that one party must have pleaded the issue in its pleadings and the other party has denied this issue in their pleadings. It is not necessary to prove a point that

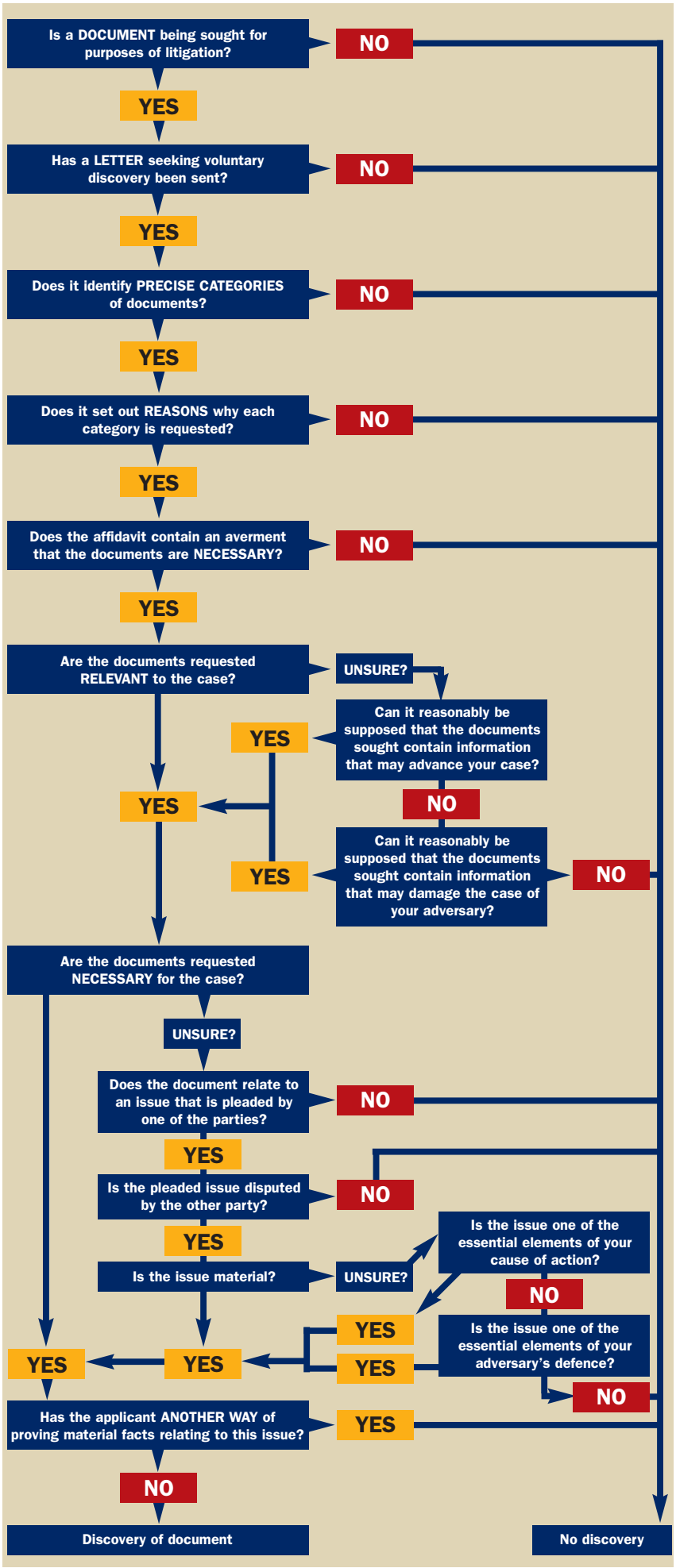
MATERIAL WORLD

It is not sufficient to demonstrate that the category of documents sought is *precise*, *relevant* and *necessary*. The category must also be *material*.

To be material, the disputed issue to which the category of documentation is relevant must be a material issue. In other words, the disputed issue must be an issue on which the applicant must succeed in order to prove or defend his case successfully. The master's decisions split pleaded issues into two types – material and surplus. His view is that anything can be pleaded, but only some matters need be proved in order to succeed. Only material facts need to be proved to succeed.

For example, in a negligence action, the existence of a duty of care is an essential component, and in a contract action, consideration is an essential component. Documents that tend to prove these facts would be material (assuming they are denied).

The master has said in a number of his decisions that the state of knowledge of the defendant is not a material fact because whether or not the defendant knew of the danger, it can be established that he ought to have known. The master has put documents such as safety statements and risk assessments into the non-material category (see *Kelly v Van den Bergh Foods Ltd*, 16 January 2003).



has not been disputed.
- The issue must be material (see **panel,** page 18).

In short, the court will consider the categories sought to confirm that each one relates to a pleaded issue and also that that issue is in dispute. The master has indicated that he will consider whether the reason drafted refers to the disputed issue and take this into account when awarding costs (*Rose Ann Hardiman v EHRA*, 17 October 2003).

No more big gaps

Once an applicant has demonstrated that a category of documents is material, all that remains is to demonstrate an evidential *lacuna*, or an evidential deficit. An applicant must point to the hole (*lacuna*) in his evidence that the documents sought may plug.

It goes without saying that the *lacuna* must relate to a material fact. In other words, the applicant must have difficulty in proving or denying a disputed core fact, such as the existence of a duty of care.

If the evidential deficit relates to a surplus issue, discovery of this category will not be granted. For example, in a negligence action, while a safety statement may fill an evidential *lacuna* (by tending to prove the actual state of knowledge of the defendant), it is not discoverable because this fact is not a material fact. The master has indicated that his view is that the defendant cannot escape liability by saying he did not know, so it is immaterial.

The master has indicated that where an applicant has another way of proving a fact, discovery will not be granted. The Supreme Court in *Ryanair* adopted a similar view:

'The court should be willing to confine categories of documents sought to what is genuinely necessary for the fairness of the litigation. It may have regard, of course, to alternative means of proof, which are open to the applicant'.

The essence of this criterion is that even where an applicant has demonstrated that the category of documents sought is relevant, necessary and material, if he has another way of proving this fact – for example, by testifying himself or arranging for an expert witness to testify to the fact – no discovery will be granted.

The core of the matter

When an applicant identifies and peels away the layers of documentation that will not be granted using the tools of relevance, necessity and materiality, all that should remain are categories relating to the evidential *lacuna* (if there is one).

This effectively brings us to the master's starting point in *Kelly v Mona*:

'What evidence am I missing which is crucial to the client's claim? Then: can I get this evidence without accessing the defendant's files? And, if not, what category of documents may yield up evidence of the missing pieces of the jigsaw?' G

Tom Power is a Dublin-based barrister.

a friend

In 2002, a group of Irish solicitors went to South Africa to provide a commercial law course for lawyers from underprivileged backgrounds. They went back again this year. Nic Swart of South Africa's law society reports on the impact of this inititiative

MAIN POINTS

- Commercial law course provided by Irish solicitors
- Legal training in South Africa
- Participants' comments

A *friend in need* was the title of an article in the May 2002 issue of the *Law Society Gazette*. It reported on the first of two commercial law courses that were offered in South Africa that year by a group of Irish practitioners under the leadership of Michael Irvine. The courses entailed five days of intensive training by Irish solicitors for 50 South African attorneys in private state practice.

The introduction of the course in 2002 and its continuation in 2004 has, without any doubt, enhanced the friendship between our countries in general and our two law societies in particular. This article is intended to express our profound appreciation for the Law Society of Ireland's initiative and for the funding provided by IrelandAid.

This year, South Africa has been celebrating ten years of democracy, and there are clear indications of increased economic activity and participation in local and international trade. Transformation in these and other spheres of life has naturally brought greater demands for skills development in all sectors of the economy. The legal environment is no exception.

Under the *Skills Development Act*, the South African government has created so-called Sector Education and Training Authorities (SETAs) for all fields of the economy, with the aim of enhancing and monitoring skills training. When the legal sector's SETA investigated its sectors for skills requirements, it identified training in commercial law as one of its top priorities on a national basis.

There are more than 16,000 practising attorneys in South Africa. Many of them practise in small firms focusing on criminal or civil litigation, whereas the practice of commercial law is often limited to the larger, mostly white-owned firms.

Additional input

The Law Society of South Africa and the Attorneys' Fidelity Fund have, over the past decade, invested vast resources in pre- and post-admission educational programmes for prospective and

WHAT THE PARTICIPANTS THOUGHT

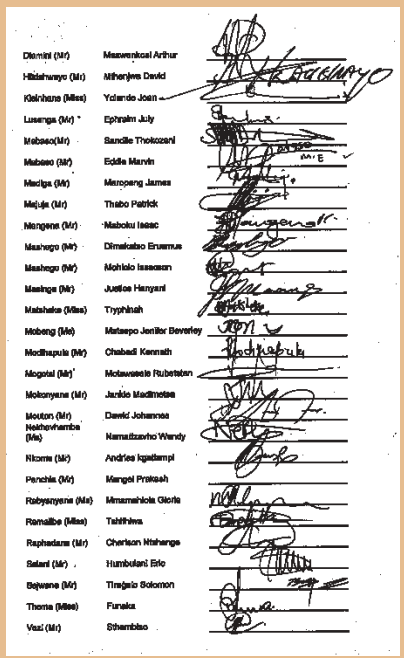
'We write to express our sincere and heartfelt gratitude for the sterling job you have done. Not only have you demonstrated your willingness to share the knowledge, but you have also shown the commitment of your society and country to contribute in the development of our profession.

The role you played may not have attracted media highlights, it may not form part of the annual report of your embassy and certainly was not good enough to get the attention of even a junior official from the Department of Justice. However, we believe these are not standards upon which your contribution should be judged.

We, who have seen you take us by the hand and patiently walk with us into these minefields, avail ourselves to be the living testimony of the value of your contribution. It is the legacy we will treasure and carry with honour. We add your names to the list of great men history has honoured. All great men in history were honoured for helping the poor. Nelson Mandela is a great man today, not only because he has forgiven his jailers, but because he sacrificed the comfort of his profession, his home, and was prepared to die for the poor. Jesus Christ has a multitude of followers because he sacrificed his life for other people to have eternal life.

You may not be Nelson Mandela and certainly you are not Jesus Christ, but like them you sacrificed the comfort of your offices, your salaries, your families, and embarked on a journey to help black attorneys in South Africa. For this, we are forever indebted to you, and when the history of the legal profession in this country is written, it will know that it is incomplete without acknowledging your contribution.

As you fly home, may you take comfort in the knowledge that you have laid a solid foundation upon which the future of a black commercial attorney will be built'.



INDEED

Irish solicitors and participants on the commercial law course in South Africa

practising attorneys. However, with commercial law being such a specialised field, it became clear that we needed additional input so as to address meaningfully the problem of those who, for historical reasons, had not had access to this area of practice.

As a result, the establishment of the course in 2002 enjoyed the support of the legal sector's SETA, the South African minister of justice and all constituent members of the Law Society of South Africa.

There can be no doubt about the success of the training. The first course for 2004 – offered in Pretoria in July – was described by some students as 'one of the best experiences of their careers' and 96% of the participants declared the speakers to be 'excellent'.

These are some of the participants' comments about the benefits of the course:

- 'It has given me an understanding of the mechanisms of companies, why they do what they do, and how they go about it'
- 'Knowing my role as an attorney within a commercial transaction'
- 'Everything! It is difficult to single out'
- 'The course is beneficial. I believe a follow-up programme will add more value'
- 'I am satisfied with the course and the knowledge of the instructors'

Michael Irvine *(left)* swaps gifts with Nelspruit attorney Dimakatso Mashego

- 'The course was outstanding and very informative!'
- 'It developed my confidence and my understanding of corporate law'
- 'More time should be allocated. South African lawyers should also be on board'
- 'Presenters were patient and have come across as experienced practitioners willing to share knowledge'
- 'Course was exceptional'
- 'The course was great. I just hope there will be a follow-up'.

Your essential
ingredients
for keeping up to date!

Intellectual Property Law in Ireland

Second edition

By Robert Clark, BA, LLM, PhD, BL, Professor of Law, University College, Dublin; and Shane Smyth, BCL, BSc (Comp), Solicitor, Partner, FR Kelly & Co

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Comments such as these are inspiring not only to the Irish presenters but certainly to the organised profession in South Africa. The second group of 25 practitioners who will attend the course in Cape Town during November 2004 will no doubt gain the same benefits.

The content of the programme is most suitable for the needs of the participants. At a general level, it will contribute to broad-based empowerment of the country as a whole, whereas specific topics such as 'business structures' and 'due diligence' will assist general practitioners to provide a better service to emerging entrepreneurs, albeit on an occasional basis.

The next phase of this project is to map the way forward. Communication with South African law firms has already begun, so as to involve local practitioners in the funding and possibly also in presenting the course. There appears to be a need for more advanced tuition and for greater exposure to actual commercial work.

Nic Swart and the Irish solicitors *(left)*, while *(above)* South African attorneys get to grips with the course

A personal observation

I had the privilege of visiting Ireland for two days in 1991. The warm hospitality I experienced from the Irish people during my stay, and the commitment and quality of work that has been demonstrated so far during this particular training project, leave me in no doubt about the need for the continuation of this constructive contact between our countries and professions.

In 2001, a representative of the Irish Law Society visited me to enquire about training needs in South Africa. His promise to look into the matter and return to us led to better results than any of us could ever have hoped for at the time! G

Nic Swart is the Law Society of South Africa's director of legal education and development.

PERMISSIO

On 20 May, Michael Noonan TD introduced the *Planning and Development (Amendment) Bill, 2004*, a short piece of legislation to amend parts of sections 34 and 35 of the *Planning and Development Act, 2000*. John Gore-Grimes explains the lay of the land

MAIN POINTS

- **Refusal of planning permission for previous non-compliance**
- ***Planning and Development Act, 2000***
- ***Planning and Development (Amendment) Bill, 2004***

What was to become section 35 of the *Planning and Development Act, 2000* first appeared as a sub-section of the *Planning and Development Bill, 1999*, but its status increased and it merited a separate section in the 2000 act. The memorandum of the 1999 bill summarises the section as it was introduced: *'Where the planning authority is satisfied that a person who has made a planning application, or a connected person, or a connected company, has not completed the development in accordance with the permission granted or the conditions to which the permission is subject, and the planning authority considers that there is a real and substantial risk that, if permission were to be granted, it would similarly not be complied with, it may form the opinion that permission for the development should be refused. If that opinion is formed, the authority must seek authorisation from the High Court to refuse permission. This provision is intended to enable the planning authority to refuse to grant permission to a person who persistently fails to comply with permissions or conditions to which they are subject, for example, by failing to finish developments'*.

Section 35 of the 2000 act provides that:

1) The planning authority must consider that there is a real and substantial risk that the development would not be completed in accordance with the permission, if granted, or that a condition would not be complied with, and that if it is of the opinion that the permission should not be granted, it may apply to the High Court for authorisation to refuse permission
2) The planning authority must only consider failures to comply with any previous permissions or conditions that are of a substantial nature
3) Once the opinion has been formed by the planning authority in compliance with sub-section 1, it must apply to the High Court by motion for authorisation to refuse planning permission, and the High Court, on hearing the application, may:
   a) grant an authorisation to the authority to refuse permission for that reason, or
   b) refuse to grant an authorisation to the authority to refuse permission, and remit the application to the authority for a decision, or
   c) give such other directions to the authority as the court considers appropriate
4) The time limits provided for in section 38(4) shall not apply where an application is made to the High Court under this section, and if the matter is remitted to the planning authority, a decision on the permission shall be made within a period of eight weeks from the date of the decision of the High Court
5) A decision made to refuse permission pursuant to an authorisation of the High Court may not be appealed to the board.

Putting it on the bill

Much of the same reasoning applies in the *Planning and Development (Amendment) Bill, 2004*, and the following should be noted:

1) The planning authority must be satisfied that a person or company to whom the section applies is not in compliance with a previous permission or previous permissions or with a condition to which previous permission or previous permissions is subject
2) Once that opinion has been formed by the planning authority and it is satisfied that there is a real and substantial risk that the development in respect of which permission is sought would not be completed in accordance with such permission,

ON SLIPS

if granted, or with a condition to which such permission would be subject, and that the planning permission should not be granted to the applicant concerned in respect of that development, the planning authority shall notify the person to whom the opinion relates or the authority's intention to refuse permission

3) In forming its opinion, the planning authority shall only consider those failures to comply with any previous permission, or any conditions to which that permission is subject, that are of a substantial nature
4) An opinion under this section shall not be a decision on an application for permission for the purposes of this part
5) When that person to whom the opinion relates receives notice from the authority of its intention to refuse permission, he may apply by motion, on notice to the planning authority, to the High Court for a direction to the planning authority not to refuse permission to the person on the grounds that there is in fact no real or substantial risk that the development in respect of which permission is sought would not be completed in accordance with such permission, if granted, or with a condition to which such permission would be subject
6) The High Court, on hearing the application, may:
   a) grant the direction and remit the application to the authority for decision
   b) refuse to grant the direction, or
   c) give such other direction to the authority as the court considers appropriate
7) The time limits provided for in section 38(4) shall not apply where an application is made to the High Court under this section, and if the matter is remitted to the planning authority, a decision on the permission shall be made within a period of eight weeks from the date of decision to the High Court
8) Where an authority has granted an authorisation of the court to refuse permission, no appeal shall lie to the board from that refusal.

Although this is not relevant to the topic of refusing permission, there is another section in the bill that amends section 34 of the 2000 act by substituting the following words for sub-section 9:
'Where, within the period of eight weeks beginning on the date of receipt by the planning authority of the application, the applicant for permission under this section gives to the planning authority, in writing, his or her consent to the extension of the period for making a decision under sub-section 8, the period for making the decision shall be extended for a period consented to by the applicant, or by a period of six months, whichever shall be the shorter'.

Provisional movement

It was recognised, particularly by local authorities, that a difficulty with the existing law is that planning authorities have been reluctant to use the provisions of section 35 for fear that it could expose them to compensation claims. It is envisaged that, when passed, the *Planning and Development (Amendment) Bill, 2004* would allow the planning authorities to refuse permission on the grounds of previous non-compliance without the need for an application to the High Court. However, the applicant for permission would be permitted to appeal such a decision to the High Court. 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.

End of TE

Last year, Ireland finally complied with its obligation to implement the European directive on fixed-time work, with the introduction of the *Protection of Employees (Fixed-Term Work) Act, 2003*. Ian Moore analyses the implications of the new legislation

MAIN POINTS

- ***Protection of Employees (Fixed-Term Work) Act, 2003***
- **Workers' rights**
- **Employers' responsibilities**

On 14 July 2003, the *Protection of Employees (Fixed-Term Work) Act, 2003* was passed, complying with Ireland's obligation to implement European Council directive 1999/70/EC providing for a framework agreement on fixed-time work. As is often the case with EU directives, this one is based on the consensus reached between the various signatory parties at employee level. Therefore, the stated purpose behind the directive takes account of the various interest groups comprising employer and employee organisations, a process that does not necessarily lead to a cohesive result capable of ready assimilation in each of the member states. Recognising this, the directive set out minimum requirements and left it to member states to craft legislation suitable to their respective jurisdictions.

The key objectives of the directive are twofold:

- Improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination
- Establish a framework to prevent abuse arising from the use of successive fixed-term contracts.

The parties to the directive would prefer contracts of indefinite duration, but accepted that fixed-term arrangements on occasion also respond to the requirements of both employers and employees. The opening up of the global market has led to both greater mobility and a requirement by employers for greater flexibility. This in turn has led to changed working patterns and greater use of a variety of different contracts, including those of a fixed-term nature. It is clear, however, that despite the lip service paid to their perceived usefulness for employers and workers, the parties to the directive determined that the use of fixed-term contracts be constrained and the rights of employees under them protected.

One of the most interesting things is the sheer breadth of the group protected by the legislation (see **panel** opposite). Some of the most prolific users of fixed-term arrangements are those employers in the state sector constrained by tight budgetary and headcount limitations. Those in the health sector are particularly exercised by the impact of this legislation on their frequent use of fixed-term contracts.

Employees' rights

Fixed-term employees are to be treated in *no less favourable* a manner than a 'comparable employee'. Employers must now have good reasons, unrelated to the fact that the person is labelled 'fixed-term', to justify the different term or condition applied to that worker from his comparable permanent colleague. Differences are justifiable where, 'taken as a whole', the terms are comparable. Despite the fact that a permanent employee may be granted eligibility for various benefits or other conditions, the actual value of those when added to that permanent employee's basic salary may on occasions equate to the better salary paid to a fixed-term employee.

Respecting the overriding aim of the directive to move employees into open-ended employment, the act places an obligation on employers to inform their fixed-term employees of any vacancies and to ensure that those employees have exactly the same opportunity as any other person of securing those permanent positions.

Also, fixed-term employees must be given access

to appropriate training opportunities with a view to enhancing their skills, career development and occupational mobility.

Comparable permanent employee

This comparator must be employed by the same employer or an associated employer and:

- Perform the same work
- Under the same or similar conditions, and
- Be interchangeable with the other.

The work must be the same or similar in nature, and any differences must be of small importance or occur irregularly. Also, the work must be no greater than that of the fixed-term employee, having regard to skill, physical/mental requirements, responsibility and working conditions.

Interestingly, the directive took a far more simplistic approach and defined the term 'comparable permanent worker' as meaning 'a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills'.

The directive addressed the situation where there was no comparable permanent employee. The drafters of the 2003 act picked this up and provide that, in certain circumstances, the comparator can be another employee employed in the same industry or sector of employment as the relevant fixed-term employee. This opens up the prospect, admittedly on limited occasions, of comparisons being made within an industry or employment sector rather than within the employment.

Successive contracts

In keeping with the second principal objective of the directive, the act addresses the thorny issue of successive contracts. While I would argue that the

WHO IS COVERED BY THE 2003 ACT?

All employees are covered, including:

- State employees
- Local authority officers/employees
- Harbour authority employees
- Health authority/board employees
- VEC employees.

The act does *not* apply to:

- Individuals engaged through employment agencies
- Members of the defence forces
- Trainee gardaí
- Nurses in training
- Employees in vocational training/apprenticeships
- Specific public or publicly-supported training/integration/vocational retraining programmes.

amendments introduced by section 3 of the *Unfair Dismissals (Amendment) Act, 1993* would have already undermined any perceived attraction attaching to successive fixed-term contracts, the 2003 act puts the final nail in their coffin.

In short, successive fixed-term contracts will not be allowed to continue beyond a fourth year, and the employee thereafter will be deemed to be on a contract of indefinite duration. Unless there is an objective ground justifying it, at the end of three years of continuous employment the employer has only one remaining shot at a fixed-term, and that is for another year, expiring at the end of those four continuous years.

The aggregate of all the fixed-term contracts cannot go beyond four years.

Pensions issues

There is a carve out for pensions. Only those fixed-term employees whose normal hours of work are less than 20% of the normal hours of work of their comparable permanent employees can be excluded from entitlement to join employer pension schemes. With this low threshold, it is unlikely that there will be many cases where a fixed-term employee can be validly excluded.

Penalisation and enforcement

Employers are prohibited from penalising a fixed term employee, for example, by dismissal, making an unfavourable change to terms and conditions of employment, any unfair treatment (including unfair selection for redundancy), or any other prejudicial action against the employee.

If, with the ending of a fixed-term contract, it is not renewed and there is no objective justification for that, the employer's action may be regarded as penalisation.

Claims can be brought to a rights commissioner and appeals from there are to the Labour Court. Thereafter, the parties have a right to appeal on a point of law only to the High Court, whose determination is final and conclusive.

A rights commissioner can:

- Declare the complaint well founded or otherwise
- Require the employer to comply with a provision of the act
- Require the employer to reinstate or re-engage the employee (including on a contract of indefinite duration), and
- Award compensation not exceeding two years' remuneration.

Complaints must be brought within six months, beginning on the date of the contravention complained about or the date of termination of the contract of employment, 'whichever is the earlier'. Where the rights commissioner is satisfied that the failure to present the complaint within that six-month period was 'due to reasonable cause', he is empowered to extend that period up to 12 months. Appeals from a rights commissioner must be within six weeks of communication of the decision to that party. If an employer fails to comply with a decision of a rights commissioner and fails to bring an appeal to the Labour Court in the time allowed, the employee may then bring a complaint to the Labour Court for the purposes of it making a determination to the same effect. In that event, the Labour Court hearing takes place 'without hearing the employer concerned or any evidence'. If there is a failure to comply with the Labour Court's determination, a complaint can be brought after six weeks to the Circuit Court, which can in turn make an order directing the employer to carry out the particular determination.

In order to ensure they are compliant, employers should now:

- Consider whether a fixed-term contract is appropriate to their needs
- Consider their justification when entering into and renewing fixed-term contracts
- Take care when terminating fixed-term contracts
- Examine the terms and conditions of fixed-term employees for compliance with the 'less favourable treatment' test, and
- Be careful to avoid taking any action that might be interpreted as a form of penalisation. G

Ian Moore is a partner in the Dublin law firm A&L Goodbody and a member of the Law Society's Employment and Equality Law Committee.

WHAT IS A FIXED-TERM EMPLOYEE?

A fixed-term employee must be employed under a contract that has a pre-determined end related to an 'objective condition' recorded in the contract. This may be:

- Arriving at a specific end date
- Completing a specific task, or
- The occurrence of a specific event.

In the case of renewals, the employee must be informed in writing of the objective condition before expiry of the contract term.

Employers should be advised that there must be some good reason for a decision not to give the fixed-term employee a contract, or to give another fixed-term contract of indefinite duration.

A taxing

Since February, an exemption from income tax on compensation paid to an employee or former employee is available in very limited circumstances. Richard Grogan and Patrick Bradley look at how this new exemption applies and how it will affect those dealing with such claims in practice

MAIN POINTS

- Taxation of compensation awards
- Employment law
- *Taxes Consolidation Act, 1997*

Section 7 of the *Finance Act, 2004* inserts a new section 192(A) into the *Taxes Consolidation Act, 1997*. The first thing that must be said is that this merely reinstates the practice that applied prior to the summer of 2002. In 2002, the Revenue started to tax awards and settlements in employment law cases where there was no loss of earnings. These included awards under the *Employment Equality Act* and the *Maternity Protection Act*. Significantly, payments in respect of earnings, termination of employment, or change in functions or procedures are excluded from the exemption that has applied since 4 February 2004 (**see panel opposite**). The normal tax rules continue to apply in respect of these (that is, they are taxable).

For practitioners, the most important effect of the legislation is that compensation for such matters as harassment, bullying, maternity rights claims (excluding any loss of earnings element), or equality claims will be exempt from tax. The minister must be congratulated for at least confirming that such compensation, where there is not any loss of earnings element, will be exempt from tax.

Where there is a recommendation, determination, decision or mediated settlement, it will be necessary for the relevant authority to set out clearly what portion relates to compensation for a wrong and what portion is compensation for remuneration. They have already started to do so. It appears the Revenue will take the view that, unless there is a split set out by the relevant authority between what is compensation and what is for loss of earnings, the entire sum will be treated as remuneration and will be subject to tax.

It will be important for practitioners, as part of any case, to make sure that detailed particulars are available to the relevant authority in relation to any possible loss of earnings claim.

To the extent that any amount ought properly be treated as remuneration, the obligation on the employer is to deduct tax (which includes PRSI). The employer then pays the net sum, less the tax, to the employee or ex-employee. The tax should be returned as part of the employer's normal tax returns in relation to payroll deductions.

Practical problems

Practitioners will now have to be more careful in structuring any settlement. The employee and his representatives are going to seek to have the

experience

highest amount of any settlement classified as compensation rather than loss of remuneration. For advisors, the danger is that the documents can subsequently be reviewed by the Revenue. On a Revenue audit, the settlement will be subject to review, and in the event that it is considered that an excessive amount has been treated as compensation rather than loss of remuneration, the Revenue will most likely seek additional tax, interest and penalties. To avoid this, advisors will need to evaluate any settlement carefully.

It is an unfortunate fact, but it is likely that

THE NEW EXEMPTION

The exemption applies to compensation payable under employment legislation for infringement of an employee's rights or entitlements under the law. The exemption is not absolute. It only applies where:

- The settlement or award relates to a 'relevant act'. This means employment legislation that contains provisions for the protection of employees' rights and entitlements or where there is an obligation on employers towards their employees
- The compensation is paid in accordance with a recommendation, decision or determination of a rights commissioner, the Employment Appeals Tribunal, the director of equality investigations, the Labour Court, the Circuit Court or the High Court. These are referred to in the legislation as a 'relevant authority'
- The payment is paid in accordance with a settlement arrived at under a mediation process provided for by legislation that contains provisions for protecting the rights of employees (effectively the *Employment Equality Act*)
- There is a written settlement between persons who are not connected (as defined by section 10 of the *Taxes Consolidation Act, 1997*) of a claim which, had it been made to a relevant authority, would have been a *bona fide* claim and if it had not been settled would be 'likely to have been the subject of a recommendation, decision or determination' by a relevant authority. The amount of any settlement cannot exceed the maximum award possible under a relevant act by a relevant authority (other than the Circuit Court or the High Court)
- The compensation must not relate to loss of salaries or wages. The minister has specifically excluded from the exemption any payment, however described, in respect of salaries or wages or arrears of salaries or wages. In addition, payments referred to in sections 123(1) and 484(2)(a) of the *Taxes Consolidation Act, 1997* (payments on termination of employment or change in function) are excluded, but the reliefs provided for in those sections are unaffected. Therefore, compensation that relates to payments due to retirement or removal from office, including unfair dismissal claims, will be taxable. Compensation that relates to a reduction or a possible reduction of salary due to a reorganisation or to a change of working procedures, methods, duties or rates of pay will also continue to be taxable.

SETTLEMENTS AND THE EXEMPTION

Settlements between an employer and an employee will not attract the exemption unless additional paperwork is put in place. This will apply even where both parties are represented.

If an employer and an employee wish to settle rather than fight a case, there are certain steps that the employer must put in place:

- The employer will have to investigate the case fully
- The employer will have to decide if the claim is valid
- The employer will have to be satisfied that the claim is one that is likely to succeed
- The employer must determine what amount is reasonable. What is meant by 'reasonable' is a sum that would be likely to be awarded by a rights commissioner, the director of equality investigations, the Employment Appeals Tribunal or the Labour Court. If the case is in the Circuit Court or High Court, even though they have higher possible levels of compensation that can be awarded, the maximum that will be exempt for tax purposes is that which would be granted by a rights commissioner, the director of equality investigations, the Employment of Appeals Tribunal or the Labour Court
- The employee must put his claim in writing
- The employer and the employee must enter into a written settlement
- The parties must not be 'connected' within the provisions of section 10 of the *Taxes Consolidation Act, 1997*. In practice, this restriction is unlikely to apply except in cases of family-owned companies.

Where there is a settlement, an employer must:

- Keep copies of the agreement and the statement of claim for a period of six years from the day on which the payment is made, and
- Make copies available for inspection by the Revenue Commissioners when requested.

As with awards, any element of a settlement that relates to loss of earnings will be excluded from the exemption. The legislation specifically provides that a payment, however described, in respect of remuneration (including arrears of remuneration), is, and will continue to be, taxable.

'Lawyers dealing with employment cases will now, more then ever, need to be cognisant of taxation legislation'

some employers will look to have claims settled on the basis of being able to claim the tax exemption. There are a number of difficulties with this approach. The first, as stated already, is the potential liability for tax, interest and penalties on a subsequent audit.

The second is not immediately evident. It is that if an employer settles a claim on the basis of there having been a breach of an employment law right, there will now need to be a written document on file that will be evidence that an incident was reported and was found to be correct. If this related to an equality claim, an employer may need to go to the expense of an equality audit, reviewing its equality policy and possibly putting in place additional training for staff. In the case of bullying, the Health and Safety Authority may expect a health and safety audit to be undertaken. A failure to do so can create its own problems subsequently. Advisors will need to be careful not to allow a client to dictate settlements for what may be perceived as a short-term gain, only to find out later that they have opened a Pandora's Box of other problems. We anticipate that this is more likely to arise where an employee is not prepared to settle without a net settlement being agreed, leaving the employer to pick up the tax liability.

Nuisance claims

A third difficulty for advisors and clients alike is that the legislation takes no account of what might be termed 'nuisance claims'. As every employer knows, significant costs can arise in terms of time, staff, engaging lawyers and so on, in defending cases. In a number of cases, the employer will seek to settle the claim early for a small amount of money that may be less than the cost of having to defend it. There is an economic reality in this approach, but unfortunately the legislation takes no account of this. It would appear to us that the exemption will not be available in such cases, as the compensation under the settlement would not be such as a relevant authority might award. This would mean that the employer would have to pick up any tax costs, which is something that employers are likely to oppose.

A similar difficulty would arise where a decision is made, for good business reasons, to settle a claim for an amount in excess of its value. The employer may be of the view that, in order to avoid adverse publicity or disruption in the workplace, or for strategic reasons, it would be better to settle a particular case. This may mean that the employer has to settle for more than the employer believes the case is worth. In such cases, the employer may well be in a situation of having to try to get the employee to take a portion of the settlement subject to tax, even where this relates to, for example, an equality claim where there is no loss of remuneration. The more probable outcome is that the employer will have to pick up the tax cost, on a grossed-up tax basis, of the difference between what the employee would have received if the case had run its course compared with what the employer is prepared to pay to settle the case without a hearing.

Advisors are in an unenviable position as regards settlements. Settlements are, by their very nature, pragmatic and subjective. Each individual case is unique. While the Revenue may claim to apply an objective test, in reality it will be extremely difficult to apply objective criteria to settlements. The Revenue assessment may be made a number of years after the payment has been made. For this reason, it would be important for advisors and employers to make sure that, in addition to the statement of claim and the written settlement, very detailed records in relation to the claim –

including all investigations, statements, legal advice and so forth on which the value of the settlement was set – are kept for at least six years.

Making life complicated

The legislation has added a new complexity to dealing with employment claims. The procedure in respect of tribunals was intended to be simple. Now it is going to be more complex.

While the minister is to be congratulated for at least reinstating the practice that applied prior to the summer of 2002, he has failed to do so in a way that reflects the realities of life. The new arrangements may simply have the effect of creating additional expense for both employers and employees.

Lawyers are now likely to be involved in cases to an even greater degree than ever. Their involvement is likely to be earlier because of the requirement to keep documentation relating to any settlement and the requirement in relation to the valuation of claims. Lawyers dealing with employment cases will now, more then ever, need to be cognisant of taxation legislation.

There is also probably going to be a greater reliance on tax advisors. Because of the possible tax exposure of an employer in relation to the settlement of such cases, advice will be sought not only from lawyers in relation to valuation but also from tax advisors as to the potential liability if the settlement is challenged by the Revenue. This is going to increase costs.

Section 7 of the *Finance Act, 2004*, which inserts the new section 192(A) of the *Taxes Consolidation Act, 1997*, is a section that every employment lawyer should read and understand. This legislation is going to change the entire way advisors approach employment claims from now on. It is a short section. But it will have a huge impact in practice. G

Richard Grogan is a partner in the Dublin law firm PC Moore & Co and a member of the Law Society's Employment and Equality Law Committee. Patrick Bradley is a partner in the Cork law firm JW O'Donovan and a member of the society's Probate, Administration and Taxation Committee. The views of the authors are personal and do not necessarily reflect the views of either committee or of the Law Society.

Infinity and

A recent English case highlights some important points that should be borne in mind when drafting agreements, reviewing due diligence and considering the disclosure process. Sean Ryan conducts the audit

MAIN POINTS

- ***Infiniteland and Aviss v Artisan Contracting Limited and Artisan (UK) Plc***
- **Financial due diligence**
- **Drafting a share price agreement**

Infiniteland and Aviss v Artisan Contracting Limited and Artisan (UK) Plc, heard in the English High Court, has highlighted the importance of the interaction between the disclosure process, the drafting of a share purchase agreement and the ability of a purchaser to bring a claim for breach of warranty.

Practitioners would be wise not to underestimate the importance of this case. As a result of (a) the wording of certain clauses in the share purchase agreement, (b) the manner in which the financial due diligence process was conducted, and (c) the purchaser's failure to comply with time limits set out in the share purchase agreement, the purchaser failed both in its attempt to claim on foot of the warranties and to enforce a price variation clause – even though the trial judge found that the vendors had not fairly disclosed to the purchaser the matter that was at the core of the purchaser's claim.

Facts of the case

The case arose from the sale by Artisan Contracting Limited of a number of companies, including Bickerton Construction Limited, to Infiniteland Limited. Soon after the sale, Bickerton's business failed and it was placed in voluntary liquidation.

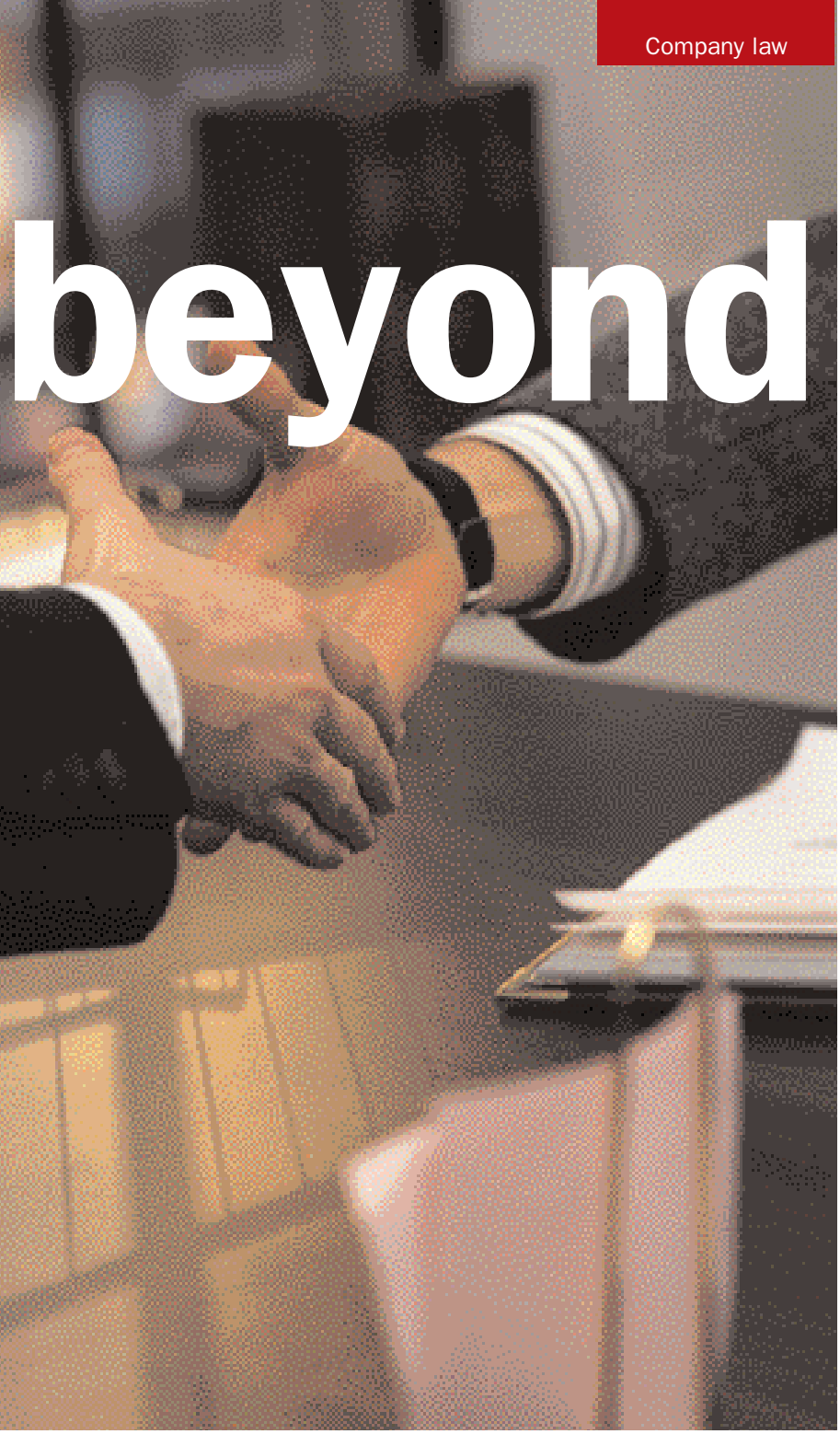
At some point prior to the sale, Artisan had injected the sum of £1,081,000 into Bickerton. Infiniteland claimed that this had not been properly disclosed in Bickerton's accounts (the accounts being the basis on which Infiniteland had proceeded). Infiniteland argued that it believed that Bickerton had in the previous accounting year earned a trading profit of over £500,000. However, it was this cash injection of £1,081,000 that accounted for the difference between the profit of £500,000 and a loss of about the same amount.

Artisan, while admitting that the £1,081,000 was not properly shown in the accounts, argued that the purchaser and the professional team advising the purchaser knew all about it. As a result, Infiniteland claimed damages for misrepresentation and breach of warranty. Artisan counter-claimed for the deferred consideration payable under the share purchase agreement, which Infiniteland had withheld.

Statutory accounts

Bickerton's accounts were drawn up to 31 March 2001, being a few months before the sale. The profit and loss account showed a turnover of £20,948,233 and cost of sales of £18,440,556, giving a gross profit of £2,507,677. What the profit and loss account did not show, and what the notes did not explain, was that the figure for cost of sales had been reduced by the £1,081,000 injection.

Infiniteland had instructed its accountant to carry



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out financial due diligence on the target, and its accountant had full and free access to the books and records of Bickerton. One of the queries made was in relation to the £1,081,000. In evidence, the accountant confirmed he had received a full explanation from Bickerton and he understood the nature of the credit and how it affected the accounts. He did not pass on the information to Infiniteland as he believed Infiniteland's financial advisor had already discussed the point with Artisan.

Share purchase agreement

The agreement comprised 83 pages and was supported by an 11-page disclosure letter. In brief, two of the warranties that were key to the case provided that:

- *'The audited accounts of the company give a true and fair value of the assets and liabilities of the company at 31 March 2001'*, and
- *'The warranties are true and accurate in all respects and … will continue to be so up to and including completion'*.

Infiniteland argued that Artisan was in breach of the first warranty by virtue of the £1,081,000 not having been separately shown in the profit and loss account.

Park J noted that the agreement was entered into on 24 May 2001 and was due to complete on 8 June 2001. Artisan had warranted that the warranties set out in schedule 3 'are' true and accurate and 'will continue' to be true until completion. Park J then went on to point out that, while there were draft accounts on 24 May 2001, there were no audited accounts (although there were audited accounts at the completion date). Artisan argued that because there were no audited accounts at the time of the contract, Infiniteland could not have relied on the accounting warranties and the agreement did not give an operative warranty.

Park J accepted this argument. As a result, the accounting warranties were ineffective. While there were draft accounts at the time of exchange and audited accounts at the time of completion, Park J felt that it was not possible to construe the warranties as applying to either of those sets of accounts.

The warranties also provided that *'the contents of the disclosure letter … are true and accurate in all respects and fully, clearly and accurately disclose every matter to which they relate'*.

Park J referred to the 1997 case of *New Hearts Limited v Cosmopolitan Investments Limited*, where it was held that neither (a) reference to a source of information in a complex document within which a diligent enquirer might find the relevant information nor (b) an invitation to the purchasers and their representatives to make what they will of the documents to which warranties have been given can be considered fair disclosure.

The disclosure letter provided that 'in the year ended 31 March 2001, a management charge paid by Bickerton was reversed'. Park J felt that this sentence did not succeed in accurately disclosing the £1,081,000 injection.

Artisan argued that because the disclosure letter disclosed 'all matters from the documents and written information supplied by us to your reporting accountants' and because documents supplied to Infiniteland's accountants contained information about the £1,081,000, sufficient disclosure had been made. Park J dismissed this argument on the same grounds: in his view, the disclosures did not match the standard laid down in the *New Hearts* case.

Actual knowledge

As Park J found that the relevant disclosure did not fully, clearly and accurately disclose the matter to which it related, Artisan could have been held to be in breach of the third warranty set out above. However, the agreement included a clause that provided that *'the rights and remedies of the buyer in respect of any breach of the warranties shall not be affected by any investigation made by it or on its behalf into the affairs of any of the target companies (**except to the extent that such investigation gives the buyer actual knowledge of the relevant facts and circumstances**)'*.

The wording in bold turned out to be crucial. Park J held that it was clear that Infiniteland's accountants knew about the £1,081,000 and therefore knew that insofar as the accounts gave the impression of a trading profit of £596,609, this impression was misleading.

Critically, Park J held that where a purchaser chooses to act through an agent for any specific purpose of an acquisition, the actual knowledge of the agent, so far as it is knowledge within the aspect for the purpose of which the agent is acting, must be treated as the knowledge of the purchaser. As Infiniteland's accountants were acting as the agent of the purchaser in investigating the financial affairs of Bickerton, knowledge acquired by them in that capacity was deemed to be knowledge of the purchaser.

Therefore, it was held that, while there had been a breach of warranty, the express provision of the agreement deprived Infiniteland of any remedy that it would otherwise have for the breach.

Price adjustment

Infiniteland claimed that certain contracts had been overvalued and, as a result, it was entitled to recover under the price adjustment provisions of the agreement and that the deferred consideration should be reduced accordingly.

Park J noted that the agreement set out a detailed procedure for operating the price adjustment, whereby Infiniteland was required to calculate the net asset value before 1 September 2001. Infiniteland had failed to produce the net asset value calculation by the due date (notwithstanding that time was of the essence).

Artisan argued that Infiniteland could not now through court proceedings claim a price adjustment, as the agreement laid down its own procedure and Infiniteland had failed to follow those procedures. Park J agreed with this argument and held that Infiniteland could not raise before the court issues it should have raised in the manner provided for under the agreement. In making his decision, Park J noted that the valuer prescribed in the agreement was to have particular characteristics, which meant that it was even less suitable for the valuer to be replaced by a judge.

Misrepresentation

Infiniteland claimed that, in a conversation between the parties, it had been indicated that the companies were making pre-tax profits of about £500,000 a year. On the evidence presented, Park J felt that it was not clear whether this referred to past profits, the current accounting period or was a general reference with an eye to future profits.

Park J noted that for a misrepresentation to be actionable, it has to be a representation as to fact and it was difficult to categorise a prediction of how things will turn out in the future as a representation of fact. In addition, he stated that for a cause of action in misrepresentation to exist, the claimant must have relied on the representation. Given that financial due diligence had taken place, he felt it was not credible that Infiniteland had exchanged contracts in reliance on impressions obtained as a result of 'a short conversation over coffee in a hotel'.

Furthermore, the agreement provided that *'the purchaser has entered into this agreement on the basis of and in reliance upon the warranties, the purchaser acknowledges that it has not been induced to enter into this agreement by any representation or warranty other than the warranties'*, and Park J made a point of noting that Infiniteland had committed itself to a contract that contained this provision and, as such, was estopped from asserting that the facts recorded in the agreement were not true.

Implications

It is clear that the Infiniteland case addresses some very important points, which should be borne in mind when drafting agreements, reviewing due diligence and in considering the disclosure process.

Practitioners should note, in particular:

- Infiniteland's failure in enforcing the accounting warranties and the price adjustment provisions
- The implications 'actual knowledge' has in defeating warranting claims
- A purchaser being deemed to have the knowledge of its agents – even if this knowledge is not passed on to the purchaser
- What constitutes a fair disclosure and the reluctance of the court to accept vague and ambiguous disclosures, and
- The risk involved in relying on oral representations. G

'The Infiniteland case addresses some very important points, which should be borne in mind when drafting agreements, reviewing due diligence and in considering the disclosure process'

Sean Ryan is a solicitor with the Dublin law firm O'Donnell Sweeney.

A marathon PERFORMANCE

With its strong performance compared to others in the market, the Law Society retirement trust scheme should be top of the list for solicitors when making plans for pension contributions, says Carina Myles

Bank of Ireland Asset Management (the main fund manager for the Law Society retirement trust scheme) still maintains its number-one position in Irish fund management. As a result, the news for investors in the Law Society RTS managed fund has been positive over the five- and ten-year periods to June 2004.

MAIN POINTS

- Pension planning
- Law Society of Ireland retirement trust scheme
- Long-term prognosis

Consistent performance

The panel **(overleaf)** shows the performance of the Law Society RTS managed fund compared with the segregated funds provided by some of the largest Irish investment managers. It shows that, despite a weaker than average one-year performance, the fund has been very consistent in delivering above-average performance over three, five and ten years.

LAW SOCIETY OF IRELAND RETIREMENT TRUST SCHEME

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

- Current value of the scheme: €134,000,000
- Number of solicitors in the scheme: approximately 900
- Scheme trustee: Governor & Company of the Bank of Ireland
- Investment managers: Bank of Ireland Asset Management manages the cash fund, long-bond fund and all-equity fund and 70% of the managed fund; KBC Asset Management manages 30% of the managed fund
- Initial fee: 2.5% of each contribution
- Annual fee: 0.5%* (this includes all trust services and investment fees).

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

What you need to know

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

Tax relief information

The return filing date is extended to 18 November ONLY where the return is filed and tax is paid via the Revenue On-line Service. The personal pension deadline is also extended to 18 November in the above circumstances.

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

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

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

For more information, log onto *www.lawsociety.ie*. For a copy of the retirement scheme booklet, an application form, or any details you might require, contact Brian King or Fiona Kiernan at Bank of Ireland Trust Services, 40 Mespil Road, Dublin 4, tel: 637 8770/637 8769.

ANNUALISED SEGREGATED MANAGED FUND PERFORMANCE RETURNS TO 30 JUNE 2004

Fund	One year	Three years (pa)	Five years (pa)	Ten years (pa)
Law Society RTS	**14.1**	**-2.7**	**2.5**	**10.9**
AIBIM	12.9	-5.2	-0.7	8.9
BIAM	14.9	0.00	3.9	11.5
Eagle Star	14.1	-2.2	0.6	n/a
Friends First (F&C)	15.1	-2.5	0.6	n/a
Hibernian	16.2	-2.0	1.5	n/a
Irish Life	16.0	-2.4	1.9	9.7
KBCAM	13.2	-6.0	-0.9	8.9
Standard	15.1	-3.2	0.4	9.4
Average	**14.8**	**-2.8**	**1.2**	**9.7**

*(*Source: Combined Performance Measurement Service, June 2004)*

Elma Lynch, chairman of the Law Society retirement trust scheme

We can see what this means in euros and cents if we compare what happened to the average euro in the Law Society RTS over the last ten years (from June 1994) to a euro invested in the average pension fund. In simple terms, €1,000 in the RTS (excluding charges) grew to €2,814, whereas the average pension fund euro grew to €2,524 – a difference of €290 per €1,000 invested.

The scheme is also among the most cost-effective available in the Irish market. With up-front charges amounting to 2.5% and on-going fees of typically 0.5% a year, investors in the scheme start with something of an advantage compared with many competing products – particularly compared to the annual management fees of 1% to 1.5% a year that typically apply in the market.

Predicting recovery

Although the period 2001 to 2004 was exceptionally difficult, the long-term returns from pensions are what counts. At 10% per year (excluding charges) over the past decade, investors in the Law Society RTS have been well served and should, over the long term, continue to benefit from the considerable growth potential at these levels.

The Law Society RTS provides solicitors with one of the most cost-effective schemes available in Ireland. With its comparatively strong investment performance, it should top the list of contenders when making plans for pension contributions. When combined with the Law Society ARF fund, the profession has a very complete range of cost-effective investment available to it. G

Carina Myles is a pensions specialist at Bank of Ireland Private Banking Limited.

Committee reports

ARBITRATION AND MEDIATION

SIMI arbitrations

The Society of the Irish Motor Industry (SIMI) has implemented a new arbitration scheme in consultation with the Chartered Institute of Arbitrators – Irish branch (CIA) with effect from 1 September 2003.

Under the new scheme, all SIMI vehicle order forms will contain an arbitration clause referring to the new scheme. Except in the case of order forms that pre-date the new scheme (where the party who nominates the arbitrator, in default of agreement between the parties, is the president for the time being of the Law Society), all nominations will henceforth be made by the CIA. Further information is to be found on *www.arbitration.ie*.

Edmund Butler, Arbitration and Mediation Committee

CRIMINAL LAW

Criminal justice (legal aid) (tax clearance certificate) regulations 1999: retention of name on criminal legal aid panel for the panel year commencing 1 December 2004

A solicitor who wishes to have his/her name retained on the legal aid panel(s) beyond 30 November 2004 must submit to the relevant county registrar(s) a tax clearance certificate (TCC) with an expiry date after 30 November 2004.

Where a solicitor's TCC has an expiry date **on or before 30 November 2004**, and he/she wishes to have his/her name retained on the criminal legal aid panel(s) for the panel year commencing 1 December 2004, application must be made to the Revenue Commissioners for a new TCC.

Practitioners may apply for a TCC through the Revenue's online application facility at *www.revenue.ie/services/taxclearance.htm*. Those wishing to apply in writing should contact their local Revenue District Office (details of which are at *www.revenue.ie*) for an application form (TC1).

Criminal Law Committee

Practice notes

FORM OF ENDURING POWER OF ATTORNEY

Since 1997, the society has had for sale to members a 'floppy' disk containing the statutory form of enduring power of attorney. The disk is produced in *Word* format and consequently permits deletion of text from the EPA document.

It has come to the attention of the society that, on a number of occasions, deficiencies have been discovered in EPAs submitted for registration. In particular, certain essential phrases have been omitted, resulting in the EPA being ineffective. A more detailed note of the difficulties encountered appears below.

In view of the above matters, the society strongly recommends that practitioners destroy any copies of the disk that they hold and that they carry out, without delay, a review of all existing EPAs to ensure that they conform to the prescribed form. Practitioners should refer to the society's recently circulated *Guidelines on EPAs* (which may be viewed elsewhere on the website) and to the relevant legislation, SI 196/1996 and SI 287/1996.

Omissions/deletions from EPA document

The most common problem is that the words 'I intend this power to be effective during any subsequent mental incapacity of mine' have been physically deleted from the disk version of the document (first schedule, part B/second schedule, part B). A variation of this is where the words are present in the text but have been struck through, indicating an intention to exclude the words from the document. It is important to note that these words **must** appear in the document, as they form an integral part of the statutory form of enduring power of attorney and to omit same is an extremely serious flaw that may be fatal to the effective creation and/or registration of the EPA. An EPA that does not have the necessary or the correct wording regarding the donor's intention for the power to be operative when he/she loses capacity cannot be rectified by re-execution of the EPA at the registration stage, as the donor will no longer have capacity to execute a legal document.

Further, it has come to light that in the second schedule, part B (that is, EPAs dealing with personal care decisions only), at the point where the donor declares 'X and Y should be consulted for his/her/their views as to **my wishes and feelings and as to** what would be in my best interests', the words in bold appearing above were omitted from the disk version when produced. The society apologises for this error. However, the Wards of Court Office has advised the society that the omission poses no threat to the creation or registration of an effective enduring power of attorney.

If you have any queries in relation to this matter, please contact Colette Carey at the society (tel: 672 4800).

Probate, Administration and Taxation Committee

STAMP DUTY: FLOOR AREA COMPLIANCE CERTIFICATE

The latest edition of the Revenue's statement of practice on stamp duty, SD10A, contains new requirements, the effect of which *may* be that certification of compliance with the building regulations from the Department of the Environment will be sought by Revenue as a prerequisite to obtaining stamp duty relief on the purchase of new houses. The inference is that if a department inspector is not satisfied, stamp duty relief may be refused. Urgent clarification has been sought from the department but, in the meantime, practitioners should approach the matter with caution.

Conveyancing Committee

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E-MAIL DISCLAIMERS

E-mail has undoubtedly become one of the greatest enhancements to productivity in our law offices, given its speed and low cost. However, it is not a perfect medium. It is not fully secure, and confidential information can be accessed by third parties. Its security depends in part on the level of security operating within your own computer network and also the level of security within the network operated by your internet service provider.

The use of a disclaimer in each e-mail that issues from your office is recommended.

This can be achieved by generating an auto signature that contains a disclaimer each time the e-mail program is used.

Sample template for e-mails:

From: [name of sender]

Date:

[Text of e-mail, or blank if there is an attachment]

[Name of sender]

[Name of firm]

[E-mail address]

[Telephone no]

[Fax no]

[Disclaimer:]

This e-mail and any files transmitted with it are confidential and intended solely for the use of the individual or entity to whom they are addressed. If you have received this e-mail in error, please notify us immediately at [name of sender] ***and delete this e-mail from your system. Thank you.***

It is possible for data transmitted by e-mail to be deliberately or accidentally corrupted or intercepted. For this reason, where the communication is by e-mail, [the name of firm] ***does not accept any responsibility for any breach of confidence that may arise through the use of this medium.***

Steps to set up an auto signature:

- Open *Outlook 2000*
- Click 'Tools'
- Click 'Options'
- Click 'Mail format'
- Click 'Signature picker'
- Click 'New'
- Follow the steps and give your signature name
- Click 'Start' with a blank signature
- Insert your own text. This could be a typed form of your name, perhaps in italics, beneath which you can draw a line, beneath which you can insert the name of your firm. Beneath that again, you can insert the wording of the e-mail disclaimer, as above
- Click 'Next'
- Click 'Finish'
- Click 'OK' repeatedly to get back to *Outlook*.

From then on, each time you click on 'new' to start a new e-mail message, your signature with the disclaimer will automatically appear at the end of the message.

Guidance and Ethics Committee/ Technology Committee

REGISTRY OF DEEDS: REQUIREMENT FOR COUNTY TO BE INCLUDED IN DEED AND MEMORIAL

It has been brought to the attention of the committee that considerable difficulty is caused arising out of the failure of colleagues, when drafting deeds and memorials, to include in the description of the property the **county** in which the property is situated. Deeds that do not have a county indicated in the description of the property being assured are filed by the Registry of Deeds under a category 'NS', which means 'not specified'. This categorisation will result in solicitors obtaining search results that are based on incomplete records.

The committee strongly recommends to practitioners that it is essential when drafting deeds and memorials to ensure that a correct and adequate description, including in particular the county in which the property is situated, is included in the description of the property in the deed and memorial. It should be noted that inclusion of the county in the memorial alone will not suffice as, under present Registry of Deeds legislation, this information must be in the deed before it can be accepted as part of the memorial.

Conveyancing Committee

LAND REGISTRY-APPROVED SCHEME MAPS

It has been brought to the attention of the committee that it is becoming a frequent occurrence that a solicitor acting for the purchaser of a new house or apartment would be required by the contract to accept an undertaking on closing from a builder's solicitor in respect of the Land Registry scheme map and close the purchase based only on a copy map provided for identification purposes. It seems that this new practice is designed to limit the builder's exposure to the cost of amending Land Registry scheme maps accordingly as the development progresses.

From a conveyancing point of view, this new practice is completely unacceptable and all solicitors are encouraged to ensure that it is stamped out before it gains any further ground in practice. The acceptance of such a condition in a contract means that a purchaser cannot proceed, following closing and stamping, to register the client's title or the lender's mortgage, where applicable. In registration terms, it places the client's and the lender's priority in great jeopardy and, if accepted by the borrower's solicitor, places that solicitor in breach of his or her obligations under the undertaking given to the lender. It is the committee's view that no solicitor should expose their client in this manner to the risks associated with a builder going into liquidation or otherwise going out of business in circumstances where a development may be unfinished and where the architect or engineer on a project has not provided Land Registry-approved scheme maps for the client's site.

The committee will be urging all the lending institutions that participate in the certificate of title system to refuse to accept proposed qualifications to solicitors' undertakings or certificates of title in this regard.

Conveyancing Committee

LEGISLATION UPDATE: 25 SEPTEMBER – 19 OCTOBER

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

ACTS PASSED

Intoxicating Liquor Act, 2004
Number: 34/2004
Contents note: Amends the *Intoxicating Liquor Act, 1988*, as amended by the *Intoxicating Liquor Act, 2000* and the *Intoxicating Liquor Act, 2003*, to provide for the holding of alcohol-free events for persons under the age of 18 years in licensed premises, or a part of licensed premises, at a time when intoxicating liquor is not being sold, supplied or consumed and any bar counter there is securely closed. Amends sections 33 and 34A of the *Intoxicating Liquor Act, 1988*, as amended, by the substitution for '9pm' of '9pm (10pm during the period commencing on 1 May and ending on 30 September)'
Date enacted: 15/10/2004
Commencement date: 15/10/2004

Public Service Management (Recruitment and Appointments) Act, 2004
Number: 33/2004
Contents note: Provides new management structures for the recruitment and appointment processes of the civil service, An Garda Síochána and certain other bodies in the public service. Repeals the *Civil Service Commissioners Act, 1956* and provides for the establishment of the Commission for Public Service Appointments to oversee the implementation and development of the new structures and the Public Appointments Service as a recruitment and selection body for the civil service and other public service bodies. Also provides for a voluntary licensing system, whereby secretaries of departments and heads of offices may apply to the Commission for Public Service Appointments for a recruitment licence in order to recruit staff directly themselves, rather than using the Public Appointments Service. Provides that recruitment under licence will be subject to codes of practice to be drawn up by the Commission for Public Service Appointments
Date enacted: 6/10/2004
Commencement date: 6/10/2004; establishment-day order to be made appointing an establishment day for the Commission for Public Service Appointments and for the Public Appointments Service (per s3 of the act)

SELECTED STATUTORY INSTRUMENTS

Child Care Act, 1991 *(commencement) order 2004*
Number: SI 547/2004
Contents note: Appoints 23/9/2004 as the commencement date for section 79 of, and the schedule to, the *Child Care Act, 1991*, insofar as they relate to the repeal of unrepealed provisions specified in the schedule, with the exception of s119 of the *Children Act 1908* and s31(2) of the *Adoption Act, 1952*

Child care (special care) regulations 2004
Number: SI 550/2004
Contents note: Set out the requirements to be complied with by health boards in relation to the placing of children in special care units, the conduct of special care units provided by health boards or a voluntary body or any other person, the care, supervision, visiting and review of children placed in special care units and the discharge of children from such units
Commencement date: 24/9/2004

Children Act, 2001 *(commencement) (no 2) order 2004*
Number: SI 548/2004
Contents note: Appoints 23/9/2004 as the commencement date for part 2 (other than ss7(1)(a), 10(2) and 13(2)) and part 3 (other than s23D) of the *Children Act, 2001*. These parts of the act regulate family welfare conferencing and the provision of special care services for non-offending children in need of special care or protection by health boards. Part 3 also regulates private fostering arrangements

Children (family welfare conference) regulations 2004
Number: SI 549/2004
Contents note: Prescribe procedures in relation to the holding of a family welfare conference under part 2 of the *Children Act, 2001*
Commencement date: 24/9/2004

Civil Registration Act, 2004 *(section 65) (commencement) order 2004*
Number: SI 588/2004
Contents note: Appoints 1/10/2004 as the commencement date for section 65 (enquiries by an tArd-Chláraitheoir) of the act

Criminal Justice (Joint Investigation Teams) Act, 2004 *(commencement) order 2004*
Number: SI 585/2004
Contents note: Appoints 1/10/2004 as the commencement date for the *Criminal Justice (Joint Investigation Teams) Act, 2004*

District Court* (Taxes Consolidation Act, 1997) *(amendment) Rules 2004
Number: SI 586/2004
Contents note: Amend the *District Court Rules 1997* (SI 93/1997) by the amendment of order 38, rule 2 and the substitution of new forms 38.12 and 38.13 in schedule B. These amendments prescribe procedures under section 908A of the *Taxes Consolidation Act, 1997* (as inserted by section 207 of the *Finance Act, 1999* and as amended by section 68 of the *Finance Act, 2000*, section 132 of the *Finance Act, 2002*, and section 88 of the *Finance Act, 2004*), whereby an authorised officer of the Revenue Commis-sioners may make application on oath and in writing to the District Court to inspect and take copies of books or records held in financial institutions where he or she suspects that there are reasonable grounds to suspect that an offence in serious prejudice to the proper assessment and collection of tax is being, or has been, or is or was about to be committed and where such information is likely to be of substantial value to the investigation
Commencement date: 6/10/2004

Finance Act, 2002 *(section 43) (commencement) order 2004*
Number: SI 646/2004
Contents note: Appoints 24/9/2004 as the commencement date for s43(1) of the act. This section extends to 31/12/2004 the qualifying period for tax relief for corporate investment in certain renewable energy projects under s486B of the *Taxes Consolidation Act, 1997*

Finance Act, 2004 *(commencement of sections 31 and 42) order 2004*
Number: SI 551/2004
Contents note: Appoints 2/2/2004 as the date on which sections 31 and 42 of the *Finance Act, 2004* are deemed to have come into operation. Section 32 deals with the amendment of schedule 24 (relief from income tax and corporation tax by means of credit in respect of foreign tax) to the *Taxes Consolidation Act, 1997*. Section 42 inserts a new section 626B (exemption from tax in the case of gains on certain disposals of shares) into the *Taxes Consolidation Act, 1997*

Finance Act, 2004 *(commencement of section 39) order 2004*
Number: SI 645/2004
Contents note: Appoints 27/9/2004 as the commencement date

for s39(1) of the *Finance Act, 2004*. This section extends to 31/12/2006 the qualifying period for tax relief for corporate investment in certain renewable energy projects under s486B of the *Taxes Consolidation Act, 1997*

Industrial designs (amendment) regulations 2004
Number: SI 574/2004
Contents note: Amend the *Industrial designs regulations 2002* (SI 280/2002)
Commencement date: 1/11/2004

Maternity Protection (Amendment) Act, 2004 *(commencement) order 2004*
Number: SI 652/2004
Contents note: Appoints 18/10/2004 as the commencement date for all sections of the act, other than s24

Maternity protection (postponement of leave) regulations 2004
Number: SI 655/2004
Contents note: Set out the details of the postponement of maternity leave and/or additional maternity leave in the event of hospitalisation of the child, under sections 7 and 12 of the *Maternity Protection (Amendment) Act, 2004*
Commencement date: 18/10/2004

Maternity protection (protection of mothers who are breastfeeding) regulations 2004
Number: SI 654/2004
Contents note: Set out the details of the general entitlement of employees to time off work, without loss of pay, to breastfeed in the workplace or a reduction in working hours for the purpose of breastfeeding outside the workplace, under s9 of the *Maternity Protection (Amendment) Act, 2004*
Commencement date: 18/10/2004

Maternity protection (time off for ante-natal classes) regulations 2004
Number: SI 653/2004
Contents note: Set out the details of the general entitlement of employees to time off work without loss of pay for the purpose of attending ante-natal classes, under s8 of the *Maternity Protection (Amendment) Act, 2004*
Commencement date: 18/10/2004

Residential Tenancies Act, 2004 *(section 202) regulations 2004*
Number: SI 649/2004
Commencement date: Provide that the statement referred to in s62(1)(g) of the *Residential Tenancies Act, 2004* is not required to be included in a notice of termination under that act that is served before part 6 of the act comes into operation
Commencement date: 7/10/2004 G

Prepared by the Law Society Library

SOLICITORS DISCIPLI

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

In the matter of Gerard Carthy, a solicitor practising in partnership as Connellan Solicitors, 3 Church Street, Longford, and in the matter of an application by the Law Society of Ireland to the Solicitors Disciplinary Tribunal and in the matter of the *Solicitors Acts, 1954-2002* [4664/DT438]
Law Society of Ireland (applicant)
Gerard Carthy (respondent solicitor)

On 15 July 2004, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in that he was in breach of the provisions of SI 85 of 1997 and in particular regulation 4(a) thereof, having been involved as a solicitor in a partnership acting for both vendor and purchaser in the sale and purchase for value of a newly-constructed residential unit or a residential unit in course of construction, where the vendor is the builder of that residential unit or is associated with the builder of that residential unit.

The tribunal ordered that the respondent solicitor:

a) Do stand advised never to again breach the regulations
b) Pay the whole of the costs of the Law Society of Ireland and of any person appearing before them as taxed by a taxing master of the High Court in default of agreement.

In the matter of Patrick G Enright, solicitor, carrying on practice under the style and title of Lees Solicitors at 45 Church Street, Listowel, Co Kerry, and in the matter of the *Solicitors Acts, 1954-2002* [5353/DT368]
Law Society of Ireland (applicant)
Patrick G Enright (respondent solicitor)

On 6 April 2004, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he had:

a) Failed to reply to correspondence from the society and in particular its letters of 15 January 2002, 29 January 2002, 11 February 2002, 22 February 2002, 8 March 2002, 23 April 2002, 3 May 2002, 7 June 2002 and 24 June 2002
b) Failed to attend at the Registrar's Committee meetings on 19 March 2002 and 30 April 2002, despite being requested to do so
c) Failed to comply with the directions of the Registrar's Committee on 30 April 2002 to transmit his file to his client in a timely manner or at all
d) Failed to respond to a section 10 notice served on him by the society in a timely manner
e) Failed to take steps to process the complainant's claim in a timely manner or at all
f) Failed to respond to the complainant's query and correspondence and to keep her advised of the progress of her claim.

The tribunal ordered that the respondent solicitor:

a) Do stand censured
b) Pay the sum of €2,000 to the compensation fund
c) Pay the sum of €1,000 to the Law Society of Ireland as measured by the tribunal and agreed by the parties. The said sum of €1,000 to be paid within a period of three months from the date of this order.

In the matter of Patrick G Enright, solicitor, carrying on practice under the style and title of Lees Solicitors at 45 Church Street, Listowel, Co Kerry, and in the matter of the *Solicitors Acts, 1954-2002* [5353/DT345]
Law Society of Ireland (applicant)
Patrick G Enright (respondent solicitor)

On 6 April 2004, the Solicitors Disciplinary Tribunal found that the respondent solicitor was guilty of misconduct in his practice as a solicitor in that he:

a) Failed to protect his client's interest in a timely manner or at all
b) Failed to communicate with his clients
c) Failed to progress proceedings on behalf of a minor client although instructed in 1993 to do so
d) Failed to respond to the society's correspondence
e) Failed to attend at the Registrar's Committee meetings on 13 December 2001 and on 30 April 2002, despite being requested to do so
f) Failed to comply with a notice issued pursuant to section 10(1) of the *Solicitors (Amendment) Act, 1994* in the time specified in that notice
g) Up to the date of swearing of the society's affidavit, sworn 10 July 2002, failed to comply with the direction of the Registrar's Committee made pursuant to section 8 of the *Solicitors (Amendment) Act, 1994* to hand over the file to the complainant

The tribunal ordered that the respondent solicitor:

a) Do stand censured
b) Pay the sum of €3,000 to the compensation fund
c) Pay the costs of the Law Society of Ireland, measured at €4,000 and agreed by the parties. The said sum of €4,000 to be paid within a period of three months from the date of the order.

In the matter of Mary O'Connor, solicitor, practising under the style and title of Mary O'Connor & Company at 90 Marlborough Road, Donnybrook, Dublin 4, and in the matter of an application by a client of the said Mary O'Connor to the Solicitors Disciplinary Tribunal and in the matter of the *Solicitors Acts, 1954-2002* [3023/DT396]
A client of the respondent solicitor (applicant)
Mary O'Connor (respondent solicitor)

On 17 June 2004, the Solicitors Disciplinary Tribunal found that the respondent solicitor was guilty of misconduct in that she had:

a) Failed to provide her client with particulars in writing of the actual charges, contrary to section 68(1) (a) of the *Solicitors (Amendment) Act, 1994*
b) Failed to provide her client with an estimate of the charges, contrary to section 68(1)(b) of the *Solicitors (Amendment) Act, 1994*
c) Failed to provide her client with any information on the basis on which the charges would be made, contrary to section 68(1)(c) of the *Solicitors (Amendment) Act, 1994*
d) Failed to inform her client in writing of the client's right to require a solicitor to submit a bill of costs to a taxing master of the High Court for taxation on a solicitor and own client basis, contrary to section 68(8)(b)(i) of the *Solicitors (Amendment) Act, 1994*.

NARY TRIBUNAL

The tribunal ordered that the respondent solicitor:

a) Do stand censured
b) Pay a sum of €2,000 to the compensation fund
c) Pay the whole of the costs of the applicant as taxed by a taxing master of the High Court, in default of agreement.

Before the president the High Court: in the matter of Peter Fortune, solicitor, formerly practising under the style and title of Peter M Fortune & Co, Solicitors, at 38 Molesworth Street, Dublin 2, and in the matter of the *Solicitors Acts, 1954-2002* [2003 no 33 SA]

On 26 April 2004, the president of the High Court ordered:

1) That the name of Peter Fortune be struck off the roll of solicitors
2) That the said Peter Fortune do pay to the society its costs of the proceedings before the Disciplinary Tribunal and also the costs of and incident to the application to the High Court, to be taxed in default of agreement, and that execution on foot thereof be stayed for a period of four months from the date of the order
3) That the Law Society be at liberty to re-enter the matter in relation to the question of restitution by the said Peter Fortune.

The president had before him the report of the Disciplinary Tribunal to the High Court, dated 12 December 2002.

Reference to 'society' refers to the Law Society of Ireland.

Reference to 'regulations' refers to the *Solicitors' Accounts Regulations No 2 of 1984* (SI no 304 of 1984).

The said report recorded the following findings of misconduct against the said Peter Fortune in his practice as a solicitor, in that he had:

a) Failed to disclose the existence of a judgment against him in his application for a practising certificate for the period 6 January 1993 to 5 January 1994
b) Breached regulation 21(1) in failing to file an accountant's report covering his financial year ended 30 April 1992 within the period prescribed by the said regulation
c) Failed to keep proper books of account in breach of regulation 10
d) Misrepresented to the Compensation Fund Committee at its meeting on 17 June 1993 that there would be no shortfall in client funds when his books of account were written up
e) Failed to lodge clients' funds to the client account, as evidenced by the qualifications attaching to his reporting accountant's report dated 24 March 1993, in breach of regulation 3
f) Drew monies from the client account in excess of funds held for the time being in such account, causing the client bank account to go into overdraft as set out at paragraph 2.4 of the society's investigation report, dated 7 May 1993, in breach of regulation 7
g) Failed to comply with a direction of the Compensation Fund Committee of 13 May 1993 that his books of account were to be written up to date within two weeks of the date of that meeting
h) Failed to reply to correspondence from the society's investigating accountant and the registrar of solicitors in respect of the writing-up of his books of account
i) Breached the terms of a consent order of the High Court, made on 23 July 1993, in failing to discharge the amount of £39,890.88, necessitating the initiation of contempt proceedings against him by the society
j) By his own admission, utilised client monies to fund the day-to-day running of his solicitor's practice
k) By his own admission, admitted the misappropriation of the monies of a client in the amount of £2,500
l) Breached a solicitor's undertaking to the Bank of Ireland to discharge a sum of £2,500 to the bank on completion of a conveyancing transaction
m) Failed to account to the Bank of Ireland for the sum of £2,500 in respect of the said conveyancing transaction, causing the society to have to pay the sum of £2,500 to the bank out of its compensation fund
n) Understated in his books of account the amount received and held by him in respect of the said conveyancing transaction by the amount of £1,500
o) Failed to stamp and register a purchase deed in relation to the purchase of a property by a client, notwithstanding receipt of £3,990 for stamp duty and a further sum of £26 in respect of registration
p) Failed to account to the client in respect of the monies referred to at (o) above
q) Failed to account to the client referred to at (o) above or her estate for a further sum of £109.15
r) Caused the society, in respect of the transaction at (o) above, to have to pay out of its compensation fund the sum of £4,151.15 in respect of the estate of the client referred to at (o) above
s) Failed to account to two clients for the sum of £10,978 received on their behalf for the purpose of stamping and registration deeds of purchase and mortgage
t) Caused the society to have to pay out of its compensation fund to the clients referred to at (s) above the amount of £10,978
u) Failed to stamp and register a purchase deed and mortgage on behalf of a client, notwithstanding the receipt of a total of £11,002 in respect of such stamping and registration
v) Failed to account to his clients for the sum of £11,094.05 received from them, causing the society to have to make a payment out if its compensation fund of £11,094.05.

In relation to the allegation that the respondent solicitor had caused a substantial deficit in client monies resulting in claims totalling £169,230 being admitted by the society on its compensation fund, the respondent solicitor was found guilty of professional misconduct in respect of the amount agreed at £39,890.88. G

Personal injury judgment

Trip and fall on public pavement – trench dug some ten years previously – whether duty on local authority to maintain public road – rule of non-feasance contrasted with rule of misfeasance

CASE

***Imelda Collier v Enniscorthy Urban District Council*, Circuit Court, South Eastern Circuit, Judge Bryan McMahon, judgment of 29 October 2003.**

THE FACTS

On 31 May 2001, at approximately 3pm, Imelda Collier tripped and fell when lawfully using the footpath at Castle Hill, Enniscorthy. It was a fine, bright day and she was in the company of her niece and the niece's two children. Her niece was wheeling one of the children in a buggy and was walking behind holding the other child by the hand. She was wearing ordinary shoes with a wedge heel and was not carrying anything in her free hand.

At the location of the accident, a trench had been dug diagonally across the whole pavement some ten years previously. When it was being reinstated at that time, the work was not carried out properly: the backfill was not compacted properly so that, over time, the concrete used to cover the trench began to subside and this created an uneven lip that caused Ms Collier to fall on the day in question.

Ms Collier sued Enniscorthy Urban District Council as the local authority responsible for the maintenance and upkeep of roads and footpaths. The UDC pleaded non-feasance in its defence. The case came before Judge Bryan McMahon in the Circuit Court at Wexford.

THE JUDGMENT

Judge Bryan McMahon delivered judgment on 29 October 2003. Having set out the facts as above, he stated that before considering the law on the matter, from the evidence before the court, the uneven surface where Ms Collier fell was a hazard or trap and should not have been on the public pavement. To leave the pathway in this condition was an act of negligence for any person who did not have a special defence in law.

The judge found no carelessness on Ms Collier's part that could amount to contributory negligence: she was going about her business in the normal way; she was not 'tricking or larking', as Morris J put it in *Austin v Arklow UDC and An Bord Telecom* (Doyle Court Reports, High Court, 31 October 1997 at 31) and no fault could be found with her footwear. The judge stated that persons using the footpaths of our towns and cities are not bound to go around with their eyes cast down looking for flaws in the pavement. Moreover, in the present case, Ms Collier was walking immediately behind her niece, who was wheeling a buggy, which would have hidden the pavement from Ms Collier even if she had been looking downwards.

The UDC resisted Ms Collier's claim by relying on the well-recognised defence of non-feasance. Judge McMahon stated that this historical immunity continues as an anomaly in our law, despite legislation drafted as far back as 1961, which was designed to subject local authorities to the general rules on liability for their failure to adequately maintain public roads (section 60, *Civil Liability Act, 1961*). This section, however, requires a ministerial order to bring it into operation and no such order has been made, presumably because successive governments were of the opinion that to do so would cast too great a financial burden on local authorities. So the rule remains that local authorities are not liable for non-feasance in failing to adequately maintain public roads in their areas (see further McMahon and Binchy, *Law of torts*, 3rd ed, pp714, 716).

The immunity, however, does not cover positive acts of misfeasance, even if the negligence is by way of omission. So, for example, if the local authority fails to place warning signs or lights on a trench it has opened, this omission would render it liable if a member of the public falls in and is injured. Neither will the local authority escape if it engages the services of an independent contractor who does not take reasonable care. Similarly, if the local authority licenses someone to carry out works, it will also be liable for the negligence of the licensee. Clearly, the person licensed in such a case may be liable to a third party if it is negligent, but the local authority can be liable also in not ensuring that the licensee is competent and in failing to supervise the works and inspect the works when finished.

If, however, works commenced on the public road are commenced by some person or body that has its own statutory powers to do so, then the legal precedents favour the continuation of the local authority's immunity in such a case. So if the trench is opened by Eircom Ltd, Bord Gáis or by another public utility with its own statutory powers, then the local authority can claim the protection of the non-feasance rule if the works or the reinstatement prove unsatisfactory. The rationale here would seem to be that in such cases the public utility is not the licensee of the local authority and this is so even if the public utility is, under its own legislation, bound to consult with the local authority before commencing such works.

The perceived wisdom is, according to the judge, because the local authority cannot prevent the utility company carrying out the works, the local authority should not lose its normal defence of non-feasance in the circumstances.

The public utility, however, has no such immunity and it may be sued, of course, if it carries out the works in a negligent fashion which results in damage (see Keane, *Local government in Ireland*, 1986 ed, p65, citing Teevan J in *Johnson v Kilkenny County Council*, unreported, High Court on circuit, 1969).

In *Austin v Arklow UDC and An Bord Telecom* (citation above), these principles were applied

when the plaintiff tripped on rough ground in a footpath that was not properly reinstated by An Bord Telecom after it had dug a trench. Morris J acceded to counsel's application for a direction in favour of the UDC, even though the work had been carried out more than 15 years earlier and the footpath had long since reverted to the council. Judgment was entered against An Bord Telecom.

It was submitted in the present case that the trench was opened by the ESB. The judge stated that, if so, Enniscorthy UDC cannot be liable for failure to maintain the pavement once subsidence and unevenness began to manifest itself. The judge was bound by legal authorities in this regard. If, however, the trench was opened by a licensee with no statutory powers of its own, the position of the UDC would be different.

There had been evidence that the trench was in all probability opened by the ESB. No documents were available indicating that the ESB had consulted with the UDC, as it is obliged to do so under statute pursuant to section 51 of the *Electricity Supply Act, 1927*, before commencing the work and discovery had not been sought. The engineer called to give evidence for Ms Collier only inspected the locus after the accident and when new remedial work had been carried out at the locus. He concluded that the unevenness that caused Ms Collier to slip was due to failure to compact the ground when reinstatement had been carried out after the earlier trench had been restored. He made no inquiries as to who cut the trench in the first place.

With some hesitation, Judge McMahon held, on the balance of probability, that the trench was opened by the ESB in the first place, rather than by the local authority or some other licensee.

Having come to this conclusion, he was obliged by the legal authorities to dismiss Ms Collier's claim.

On the issue of costs, Judge McMahon stated he was not prepared to award costs for the following reasons:

1) In making its defence, Enniscorthy Urban District Council was less than explicit. It knew or should have strongly suspected that the ESB had dug the trench and was responsible for the subsidence and, in these circumstances, it should have made this more explicit in its defence. It might have pleaded perhaps that the ESB had a role in the matter, or at least have flagged this in correspondence so that Ms Collier would be on notice and might have had the opportunity of suing the ESB. To plead 'non-feasance' without more was somewhat misleading in this type of case. It gave the impression that it was relying on the immunity only, when in fact it was saying that a third party did it
2) Had Enniscorthy Urban District Council indicated that the ESB had dug the trench, Ms Collier would not have set off on 'a wild goose chase', and unnecessary costs would have been avoided and the court would have been saved a good deal of time. Neither did the UDC seek to join the ESB as a third party. Ms Collier would have to begin again if she wished to pursue her action.

In the circumstances, Judge McMahon concluded that it appropriate to deny the local authority its costs. G

This judgment was summarised by solicitor Dr Eamonn Hall.

Law Society of Ireland

CRIMINAL LAW COMMITTEE

SEMINAR AND RECEPTION FOR JUDGES OF THE DISTRICT COURT

Date: Friday 3 December 2004
Venue: Law School, Lecture Theatre,
Law Society, Blackhall Place, Dublin 7

The Children Act, 2001 – *a practical analysis from a judicial perspective*
Thomas E O'Donnell, judge of the District Court

The Criminal Justice Bill, 2004 – *an overview*
Conal Boyce, solicitor

Criminal Justice Bill, 2004, *part III – admissibility of witness statements: the new rules*
Patrick McGonagle, solicitor

Seminar chairman: Patrick McGonagle, solicitor, chairman, Criminal Law Committee

Registration: 6.00pm
Seminar: 6.30pm
Reception: 8.00pm
ADMISSION: **FREE**
CPD HOURS: **1.5**

MEMBERS ARE INVITED TO ATTEND BOTH THE SEMINAR AND RECEPTION. MATERIALS WILL BE CIRCULATED ON THE NIGHT

BOOKING FORM

Name: _____

Practice name and address: _____

_____

Please reserve _____ place(s) for me

Booking forms should be returned to Colette Carey, solicitor, Criminal Law Committee, Law Society, Blackhall Place, Dublin 7, to be received no later than 1 December 2004.

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CRIMINAL

Appeal, self-defence

Conviction – charge to jury – self-defence – concept of reasonable belief that use of force necessary for self-defence – whether trial judge's charge to jury on self-defence sufficient – whether applicant precluded from objecting to charge to jury on appeal by not raising requisition in relation thereto – whether leave to appeal should be granted

Arising out of a disturbance, the applicant had been convicted of two counts of possession of an uncertified weapon and ammunition and two further counts of possession of a firearm for an unlawful purpose and violent disorder. The applicant contended that there was sufficient confusion surrounding his possession of the firearm to preclude a conviction and that, as the shotgun cartridges found in his possession were spent, they could not constitute 'ammunition' within the meaning of section 2 of the *Firearms Act, 1925*, which defines ammunition as 'including grenades, bombs and other similar missiles whether the same are or are not capable of being used with a firearm, and also includes any ingredient or component part of any such ammunition or missile'. The applicant contended that the trial judge had not properly directed the jury in relation to self-defence in accordance with section 18 of the *Non-Fatal Offences Against the Person Act, 1997* in respect of the remaining two counts. The respondent objected to the applicant relying on defects in the trial judge's charge on the basis that the applicant had not raised a specific requisition in relation to self-defence during the trial.

The Court of Criminal Appeal affirmed the conviction on counts two and three, granting leave to appeal against conviction on counts one and four of the indictment and ordering a retrial, holding that the jury could not have been under any misconception in convicting the applicant in relation to the possession counts. The test to be applied as to whether force used in self-defence was reasonable was a subjective one. In assessing that, the jury could have regard to whether there was a reasonable ground for that belief, but that was not the deciding factor. The trial judge failed to make that clear to the jury. As the question of self-defence was central to the guilt or innocence of the applicant, justice required that the absence of a requisition ought not to prejudice the applicant's rights.

***The People (Director of Public Prosecutions) v Patrick O'Reilly*, Court of Criminal Appeal, 30/7/2004** [FL9526]

Appeal, visual identification evidence

Appeal against conviction – visual identification evidence – whether in the circumstances a formal identification parade should have been held

The applicant sought leave to appeal from her conviction for the offence of larceny. The main ground of appeal related to the visual identification evidence and specifically the failure by the gardaí to hold a formal identification parade and the absence of any justification or explanation for not holding one. It was submitted on behalf of the applicant that the identification procedures adopted in this case were so inadequate, unfair and unsatisfactory as to render the verdict unsafe.

The Court of Criminal Appeal (Murray, Lavan, O'Caoimh JJ) allowed the appeal, holding that:

1) Serious frailties occurred in the informal identification, which occurred in the courtroom. Furthermore, the applicant was identified as a suspect very soon after the offence had been committed and, accordingly, this was a classic case in which a formal identification parade should have been held
2) While the trial judge's warning to the jury complied with the general and minimum warning that should be given to a jury in a case that depends substantially on visual identification, it did not reflect the need to amplify that warning and explain its implications in the particular circumstances of the case. Specifically, the trial judge had made no reference to the fact that no identity parade had taken place. He did not refer to the fact that the other persons in the courtroom at the time the identification took place were a cross-section of women of a wide range of different ages, different hair colour and of whose general presentation and looks there was otherwise no evidence from the prosecution. The trial judge put only the prosecution case to the jury
3) The failure by counsel for the applicant to requisition the trial judge to recharge the jury regarding the visual identification evidence should not prevent the court from quashing the unsafe conviction and sentence.

***The People (DPP) v Lynda Lee*, Court of Criminal Appeal, 20/7/2004** [FL9560]

Conviction, appeal

Whether obligation on prosecution to call person as witness – charge to jury – concept of reasonable doubt – whether trial judge entitled to use examples when illustrating concept of reasonable doubt – whether charge to jury can negate adverse comments by prosecution – whether reasonable suspicion of jury bias – whether jury should have been discharged

The appellants had been convicted of arson. As identification was a central issue to their trial, the appellants contended that there was an obligation on the prosecution to call a certain Ms Treacy as a witness or to include statements from her in the book of evidence. However, they did not apply to have the jury discharged on that basis. Following a comment by prosecuting counsel in relation to the credibility of that person, the first appellant applied to have the jury discharged at the trial. That application was refused by the trial judge, who subsequently addressed the jury on the credibility of Ms Treacy and statements made by her that were referred to by a witness at the trial. Exception was also taken to the trial judge's direction to the jury on the concept of reasonable doubt. The appellants also applied, unsuccessfully, to have the jury discharged on the basis that one juror alleged that the first appellant waved to her outside the court during the course of the trial, which was indicative of possible jury bias. The respondents submitted that the incident in question could not have the implication contended for by the appellants.

The Court of Criminal Appeal refused leave to appeal against the conviction, holding that the prosecution was not at

fault in failing to call Ms Treacy as a witness or taking statements from her. As long as there would be no confusion in the minds of the jury, a trial judge could use practical examples to illustrate the concept of reasonable doubt to the jury. The allegation of juror bias had to be looked at both in relation to possible subjective bias and to possible objective bias and that the objective view of the incident in question had to be considered in light of the generally accepted independence of juries. Any argument for objective bias that might have existed due to the prosecution's comments to the jury in relation to the credibility of Ms Treacy, or due to the incident between one of the jurors and the first appellant before the trial judge's charge to the jury, had been negated by that charge.

***People (DPP) v Noel Price and Michael Stanners*, Court of Criminal Appeal, 30/7/2004** [FL9543]

Drink driving, road traffic

Failure to provide sample – whether prosecution must prove that accused had driven vehicle during period immediately prior to arrest – Road Traffic Act, 1994, *sections 13(2) and 23*

The respondent was charged with having refused to comply with a requirement by a garda to provide two specimens of breath contrary to section 13 of the *Road Traffic Act, 1994*, having been arrested pursuant to section 49(8) of the *Road Traffic Act, 1961*. He submitted, as a defence under section 23 of the 1994 act at his trial in the District Court, that he had a special and substantial reason for so doing, namely that he knew that he had not driven a vehicle during the period immediately prior to his arrest. The district judge held that, in order to sustain a conviction under section 13(2) of the *Road Traffic Act, 1994*, the prosecution had to prove beyond a reasonable doubt that the accused was driving a mechanically-propelled vehicle on a public place prior to his arrest. He stated a case for the determination of the High Court as to whether he was correct in that determination.

Quirke J answered the question posed in the negative, holding that the terms of section 13 and 23 of the 1994 act were clear and unambiguous that the offence created thereby was unconnected with the driving of a vehicle or with the concentration of alcohol in the breath of a person prosecuted. Whether or not there was a special and substantial reason for his refusal or failure to provide a specimen was a matter of fact for the determination of the trial court.

***DPP v Bernard Joyce*, High Court, Mr Justice Quirke, 15/7/2004** [FL9536]

IMMIGRATION AND ASYLUM LAW

Burden of proof, *certiorari*

Decision of tribunal – fair procedures – burden of proof – whether decision of respondent erroneous – whether assessment of claim flawed – Refugee Act, 1996 – Immigration Act, 1999 – Illegal Immigrants (Trafficking) Act, 2000

The applicant brought judicial review proceedings to challenge the decision of the Refugee Appeals Tribunal to refuse him refugee status. On behalf of the applicant, it was contended that the respondent had considered material not relevant to the application, that the respondent had placed an unfair burden of proof on the applicant and that the respondent had failed to evaluate certain information properly. In addition, it was submitted that the respondent had offended the principle of *audi alteram partem* in failing to give the applicant or her legal advisors an opportunity to address certain matters and that some of the conclusions reached by the respondent were irrational, unreasonable and contrary to constitutional and natural justice. It was also contended that there had been a failure to observe guidelines set out in the UNHCR handbook in assessing the application.

Herbert J dismissed the application. The respondent had a duty to consider all matters falling within section 16(16) of the *Refugee Act, 1996* and had appropriately done so. The respondent had not acted in breach of the guidelines set out in the UNHCR handbook. The standard of proof applied by the respondent to the assessment could not be said to be irrational or unreasonable to the applicant. It could not be said that the findings of the respondent that the applicant had not suffered persecution on account of the economic situation or the healthcare system in her country of origin or that the applicant was an economic migrant were irrational or unreasonable.

***H(D) v Refugee Applications Commissioner and Ors*, High Court, Mr Justice Herbert, 27/5/2004** [FL9609]

Certiorari, fair procedures

Judicial review – certiorari – *fair procedures – whether decision to refuse refugee status flawed – whether applicant had well-founded fear of persecution* – Refugee Act, 1996 – Immigration Act, 1999 – Illegal Immigrants (Trafficking) Act, 2000

The applicant had arrived in the state from Ghana and had applied for refugee status. The Refugee Applications Commissioner had concluded that the applicant did not have a well-founded fear of persecution and had recommended that he be refused refugee status. The applicant had appealed the decision to the Refugee Appeals Tribunal, which confirmed the decision of the commissioner. The applicant initiated proceedings seeking leave to bring judicial review proceedings to challenge the decision on a number of grounds, including the finding that the applicant did not have a well-founded fear of persecution. In addition, it was submitted that a proper investigation had not been carried out into the possibility of safe relocation for the applicant in his country.

Mr Justice Peart dismissed the application. If there was evidence before the respondents that the applicant was fleeing prosecution for activities in his country rather than persecution, then the court would not interfere with the decision. It was certainly open on the evidence presented for the respondents to reach the conclusion that the applicant was being sought by the authorities on the suspicion for having committed a crime and that the applicant was not at risk of persecution.

***Ali v Minister for Justice, Equality and Law Reform and the Refugee Appeals Tribunal*, High Court, Mr Justice Peart, 26/5/2004** [FL9569]

Certiorari, judicial review

Mandamus – certiorari – *asylum – whether the first-named respondent was entitled to reassign the applicant's appeals following an oral hearing by a member of the RAT* – Refugee Act, 1996

Two separate claims for judicial review were heard contemporaneously. Both applicants arrived in the state, claimed asylum and were refused. Both applicants appealed the recommendation of the Refugee Applications Commissioner to the Refugee Appeals Tribunal (RAT). Both applicants received an oral hearing before the respective second-named respondents. However, prior to receiving any decision from the second-named respondents, an oral hearing was rescheduled before the third-named respondents. No explanation was provided for the rescheduling. Accordingly, each applicant sought an order of *mandamus*, compelling the second-named respondent to make and give a decision in their appeals and an order of *certiorari* of the decision of the first-named respondent to reassign the hearing and determination of their appeals to the third-named respondent.

Finlay Geoghegan J granted the orders sought, holding that:

1) The intention of the

Oireachtas to be derived from the 1996 act, and in particular ss15 and 16 and the second schedule thereto, was that the tribunal was to be a legal person with rights and duties distinct from its members. Accordingly, the tribunal and the second-named respondent were two separate persons. The second-named respondent, having conducted an oral hearing in the appeals of each of the applicants, became, as a division of the tribunal, obliged to determine their respective appeals. That was an obligation owed to the applicant. Accordingly, the second-named respondent breached his duty to the applicant to determine the appeal within a reasonable period

2) The second-named respondent had seisin of the appeals and accordingly was obliged as a matter of law to determine the appeals. In the circumstances, the first-named respondent did not have an implicit power to remove the applicants' appeals from the second-named respondent. Accordingly, the decision of the first-named respondent to reassign the appeals to the third-named respondents was *ultra vires*. There was no valid reason to remove the appeals from the second-named respondent, who was under a duty to each of the applicants to determine their respective appeals.

***Messaoudi v the Chairperson of the Refugee Appeals Tribunal & Ors/Edobor v the Chairperson of the Refugee Appeals Tribunal & Ors*, High Court, Miss Justice Finlay Geoghegan, 29/7/2004** [FL9598]

JUDICIAL REVIEW

Bail, *certiorari*

Whether the respondent had jurisdiction to alter the conditions of the applicant's bail in the absence of any application in that regard from the applicant or prosecuting authority

The applicant was initially released on bail of €5 without any conditions attached. Subsequently, the respondent imposed a condition on the applicant's bail requiring him to remain out of County Clare. The respondent did not provide any reason for that condition and the applicant refused to comply with the condition and he was committed to prison. The applicant applied for an inquiry under article 40.4 of the constitution and an order of *habeas corpus* and also for leave to apply for judicial review. That application was heard by Herbert J, who granted the applicant bail in the *habeas corpus* application on less onerous terms than had been imposed in the District Court. Thus, the total exclusion from County Clare was varied. The applicant sought an order of *certiorari* of the order of the respondent on the ground that he had no jurisdiction to alter his bail conditions without any application in that behalf being made either by himself or by the prosecuting authority.

O'Neill J refused the relief sought, holding that:

1) Circumstances can occur in the course of proceedings that would justify a district judge altering bail conditions or revoking bail in circumstances where no application for that was theretofore made. Accordingly, the District Court judge did have jurisdiction to alter the conditions of bail. However, in the circumstances of this case, the applicant should have been given proper notice of the respondent's intention to alter his bail conditions. Accordingly, the respondent breached the applicant's right to fair procedures
2) There is a jurisdiction in section 6(1)(b)(iv) of the *Bail Act, 1997* to impose a condition requiring an accused to remain out of an entire county. The word 'place' in its natural and ordinary meaning could embrace a county
3) The relief claimed was superfluous because the bail order made by Herbert J had determined the applicant's application in relation to bail and remained a valid and subsisting order of the High Court, which replaced the order of the respondent that was impugned in these proceedings.

***Rice v Judge Joseph Mangan and The DPP*, High Court, Mr Justice O'Neill, 30/7/2004** [FL9599]

Evidence

Procurement and preservation of evidence – loss of videotape evidence – whether real risk that applicant will not receive fair trial due to loss of evidence – whether application for judicial review made promptly – whether sufficient grounds for extending time to make application for judicial review – Rules of the Superior Courts 1986, *order 84, rule 21*

The applicant was charged with larceny of a filling station contrary to section 23 of the *Larceny Act 1916*. A videotape of the larceny in question was mislaid by the investigating garda. The applicant was aware in November 2002 of the existence of the videotape. He was informed that it was mislaid in November 2003. Three months after that, the applicant sought to restrain his prosecution on the ground that there was a real and serious risk of an unfair trial by reason of the failure of the state to preserve the videotape showing the commission of the crime. The applicant contended that the tape was relevant because it would establish whether or not the crime was committed in the manner alleged by two prosecution witnesses. He was granted leave to seek judicial review by the High Court (O'Neill J).

Quirke J refused the relief sought, holding that the applicant had failed to make the application for judicial review promptly within the meaning ascribed to that word by the provisions of order 84, rule 21(1) of the *Rules of the Superior Courts 1986*. As the applicant had not established that he would be exposed to the risk of an unfair trial due to the absence of the videotape, it followed that no ground existed for the exercise by the court of its discretion to extend the time limit limited by the *Rules of the Superior Courts 1986* within which an application for judicial review could be made.

***Manus Twomey v DPP*, High Court, Mr Justice Quirke, 21/7/2004** [FL9565]

Prejudice, sexual offences

Delay – right to expeditious trial – sexual offences – pre-trial publicity – prejudice – evidence of dominion – whether order of prohibition should be granted – whether real risk of unfair trial – Rules of the Superior Courts 1986

The applicant sought an order of prohibition to prevent a trial for sexual and assault offences from proceeding. The applicant claimed that the delay in the institution of the proceedings had prejudiced his defence, was inordinate and inexcusable, was unfair and unjust to the applicant, and violated his right to a fair trial. The complainant was a daughter of the applicant and made her first formal complaint to An Garda Síochána some 26 years after the date of the last alleged offence. The applicant also submitted that the lapse of time had deprived him of the chance to seek out witnesses or collate evidence in his defence. Psychological evidence was tendered as to the reasons for the complainant's delay in making a formal complaint. A preliminary issue arose as to whether the period within which the application should have been made should be extended pursuant to order 84, rule 21 of the *Rules of the Superior Courts*.

Gilligan J refused the relief sought. The period within which the application should have been made would be extended, given that no serious prejudice would result. On the evidence adduced, the complainant's delay in reporting the sexual abuse was

reasonable and explicable. Although there was some prejudice resulting to the applicant, it was not such that it had deprived him of a specific defence which otherwise would have been open to him. The trial judge would be well capable of giving the trial jury appropriate directions with regard to matters touching on the subject of delay.

***K(S) v Director of Public Prosecutions*, High Court, Mr Justice Gilligan, 26/2/2004** [FL9604]

SENTENCING

Appeal

Appeal against severity of sentence – factors to be applied in considering sentence – manslaughter – whether factors considered by trial judge in sentencing should be explicitly stated – whether trial judge erred in sentence imposed

The applicant pleaded guilty to manslaughter and was sentenced to 14 years' imprisonment by the Central Criminal Court. In his sentencing judgment, the trial judge referred only to the suffering of the victim's family and to the prevalence of knife attacks. He made no reference to the applicant's plea of guilty, to his personal circumstances or to any hope of rehabilitation. The applicant contended that the sentencing judge erred in failing to provide full or specific reasons for the heavy sentence he imposed and in failing to consider relevant factors and giving undue weight to the impact on the victim's family.

The Court of Criminal Appeal allowed the appeal and substituted a sentence of eight years for that imposed by the sentencing judge, holding that a sentencing judge was not under an obligation to give reasons for the particular sentence that he imposed but that public confidence in the criminal justice system was enhanced when reasons for sentence were clearly expressed. An appeal court should be able to ascertain from a sentencing decision whether the sentencing judge took into account such matters as a plea of guilty, the accused's previous record or other relevant circumstances. The sentencing judge had not properly considered the established relevant factors, such as an accused's immediate admission of guilt, whether he had previously committed violent offences, his expression of remorse or his likelihood of re-offending, which should be taken into account in imposing sentence, but was overly influenced by the presence in court of members of the victim's family. The trial judge had, moreover, erred in impliedly treating stabbing cases as a separate category of manslaughter, which had to be treated more severely.

***The People (Director of Public Prosecution) v Garrett Cooney*, Court of Criminal Appeal, 27/7/2004** [FL9546] G

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

Eurlegal

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

European Commission finds Microsoft has infringed article 82

Earlier this year, the European Commission adopted a negative decision, finding that the Microsoft Corporation, the US software giant, has abused its dominant position within the meaning of article 82 of the *EC treaty* (commission decision of 24 March 2004, case COMP/C-3/37.392). This marks the end of probably the highest profile DG Competition abuse of dominance investigation ever. However, it also represents the first step in what is likely to be a protracted series of legal battles between the commission and the world's largest software company.

In its decision, the commission found that Microsoft had committed two types of abuse:

- Refusing to supply interface information required to allow rival server operating systems to function as intended with Microsoft's *Windows* client personal computer (PC) and server operating systems, and
- Tying its *Windows media player* (WMP) with its *Windows* client PC operating system.

The commission imposed a fine of €497.2 million (the highest-ever fine on an individual company) and ordered Microsoft to take steps to end its anti-competitive behaviour.

This decision highlights the tension that often arises between competition rules and intellectual property rights. On the one hand, competition legislation seeks to promote consumer welfare through vigorous competition. On the other hand, intellectual property laws seek to encourage innovation and creativity by granting monopoly rights to innovators.

Relevant technology

A basic understanding of the relevant technology is necessary to understand the commission's condemnation of Microsoft's abusive behaviour. An operating system is the software that allows PCs to run applications (such as word-processing or spreadsheets). However, such applications may only run on PCs if they are compatible with the underlying operating system. An application is said to be 'interoperable' when it is written according to the relevant operating system's interfaces. These pieces of software are known as application programming interfaces or APIs. Microsoft's client PC operating system, *Windows*, has APIs that it does not disclose to competitors. Without access to these APIs, Microsoft's competitors allege that they cannot develop products to function effectively with the *Windows* operating systems. The second type of abuse stems from Microsoft's integration of its media playback software (WMP) in its client PC operating system.

Lengthy process

The commission's investigation of Microsoft was triggered by a 1998 complaint by the US company Sun Microsystems Inc. In August 2000, the commission issued a statement of objections (SO) to Microsoft for allegedly abusing its dominant position in the market for client PC operating systems by leveraging this power into the market for server operating systems. The following year, the commission sent a second SO alleging that Microsoft was tying WMP with its dominant *Windows* client PC operating system. In August 2003, the commission issued a final SO that refined the allegations contained in the two previous SOs. As well as the complainant, Sun, a number of interested third parties made submissions to the commission.

While the formal procedure continued, Microsoft discussed with DG Competition possible ways of resolving the commission's competition concerns. Following a widely-publicised oral hearing in November 2003, DG Competition circulated a draft negative decision. This draft met with approval from other commission departments and also from the representatives of the competition authorities of the EU member states taking part in the Advisory Committee on Restrictive Practices and Dominant Positions. Despite last-minute attempts to agree a settlement, the commission adopted its formal decision condemning Microsoft on 24 March 2004.

Proceedings in the US

The commission's probe into Microsoft has overlapped with the US anti-trust authorities' investigation of the same company. In 1998, the US Department of Justice (DOJ) and 20 individual states launched proceedings against Microsoft under the US *Sherman Act*. The plaintiffs focused on measures taken by Microsoft against Netscape's web browser and Sun's 'Java technologies'. In 2000, the US District Court found that Microsoft had engaged in anti-competitive behaviour – that is, monopoly maintenance, illegal monopolisation and tying. Controversially, this court ordered that Microsoft should be split into two, one company dealing with applications such as word processing, the other trading in operating systems.

On appeal, the US Court of Appeal found that Microsoft had protected its monopoly but rejected the District Court's finding that it had illegally monopolised the web browser market. It sent back the tying and remedy matters to the District Court for reconsideration. This decision convinced the DOJ and Microsoft to return to the negotiating table and, eventually, a settlement was reached in late 2001. A year later, the District Court essentially endorsed this settlement and rejected the remedy proposals of the nine 'non-settling states'. One of these non-settling states, Massachusetts, appealed this judgment. This appeal is pending. Although the DOJ case primarily focused on different issues to the commission, the US settlement has had an impact on Microsoft's commercial behaviour and thus was relevant to the negotiations between the company and the commission in the period prior to the March 2004 decision.

Article 82 of the *EC treaty*

Article 82 of the *EC treaty* prevents the abuse of a dominant position in the EU (or in a substantial part of it) that affects trade between EU member states. Accordingly, in order to establish whether a company has infringed article 82, the commission must first establish that this company has a dominant position. A dominant position is a

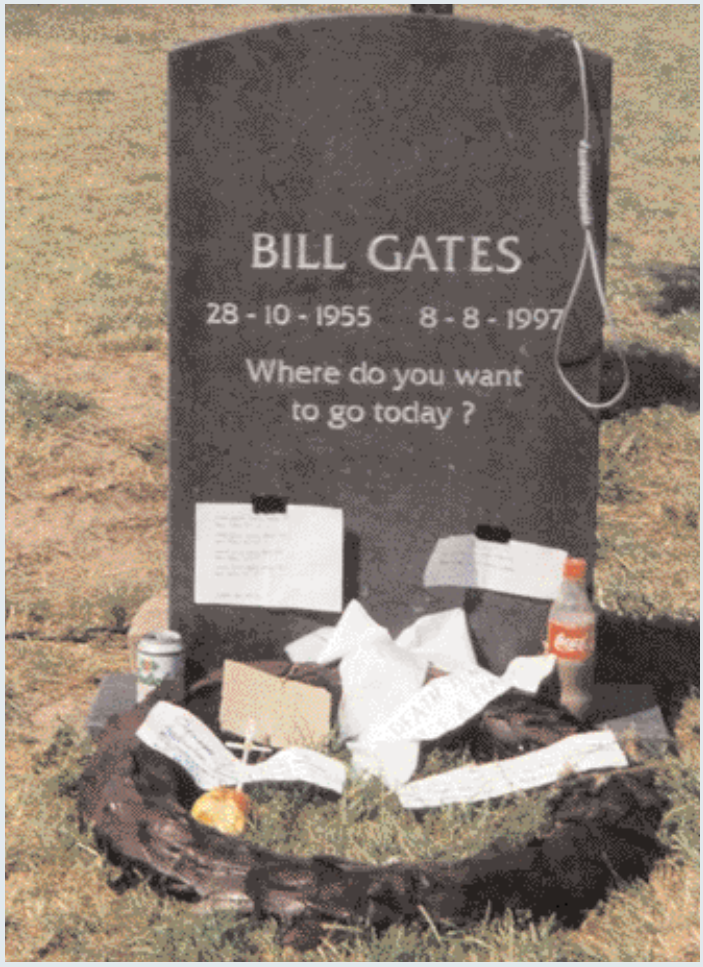
position of economic strength that allows a company to hinder effective competition being maintained on the relevant market by allowing it to behave, to an appreciable extent, independently of its competitors, customers and, ultimately, consumers. Dominance *per se* is not illegal, but dominant companies are under a special responsibility not to hinder effective competition in the market place.

Dominance

In light of a market share of over 90% since 2000 and high barriers to entry, the commission found that Microsoft has a dominant position on the market for client PC operating systems. The commission also suggests that this dominance presents 'extraordinary features' given the fact that Microsoft's client PC operating system, *Windows*, is the *de facto* industry standard.

The commission also found that *Windows*' success on the client side translates itself into success for Microsoft's server operating system, called *Windows server*, on the market for work-group server operating systems. (Work-group server operating systems are developed to deliver services such as sharing printers or files collectively to a relatively small number of client PCs linked in a small or medium-sized network.) The commission also considered that there are close associative links between the markets for client PC and server operating systems. Relying on the European Court of Justice (ECJ) decision in case C-333/94, *Tetra Pak II*, the commission considered that Microsoft's leading position in the market for work-group server operating systems, when linked to its dominance on the associated client PC operating system market, gave it a dominant position in the former market also.

The commission then considered whether Microsoft's refusal to supply interoperability information was abusive within the meaning of article 82 of the *EC treaty*.



Refusal to supply

Sun sought access to Microsoft's technical information required to achieve client/server interoperability. Microsoft indicated that it was not prepared to supply this information. The commission examined whether Microsoft's refusal to supply Sun with the information used by its work-group server operating system to provide certain services (such as printing) was an abuse of a dominant position.

In general, a company is free to determine its own business strategy. However, the ECJ has long recognised that a refusal to supply by a dominant undertaking may, in the absence of an objective justification, constitute abusive behaviour within the meaning of article 82. Moreover, in cases C-241/91 P and C-242/92 P, *RTÉ and ITP v Commission* (more commonly known as the *Magill* case), the ECJ found that the exercise of an exclusive right (for example, copyright) may, in exceptional circumstances, involve abusive conduct.

On the basis of its market enquiries, the commission found that, in the absence of access to interoperability information, competitors are prevented from developing better products for the consumer. Furthermore, Microsoft has an 'interoperability advantage' that drives customers towards the *Windows* work-group server operating system. In very basic terms, Sun's work-group server products were hampered because they did not function sufficiently well with Microsoft's products. Therefore, the commission found that Microsoft's refusal to supply risked eliminating competition in the work-group server operating market.

Microsoft supported its refusal to supply its proprietary interoperability information on the ground of intellectual property rights. The commission felt that this justification was insufficient and stipulated that an essential objective of intellectual property was that innovation be promoted for the public good. It stated that the exceptional circumstances of the case and the interests of consumers justified overriding Microsoft's intellectual property rights.

The ECJ in *Magill* (confirmed in case C-7/97, *Bronner*) identified certain aspects that constitute the 'exceptional circumstances' justifying a compulsory licence in the event of a dominant undertaking's refusal to supply. These include where the dominant firm's refusal prevents the appearance of a new product for which there is potential consumer demand. The commission held that Microsoft's refusal to supply was abusive without considering whether there is evidence of consumer demand for a new product.

Illegal tying

As established by the ECJ judgments in case C-53/92, *Hilti and Tetra Pak II*, illegal tying within the meaning of article 82(d) requires four elements. First, the firm concerned must be dominant in the tying product market. Second, the tying and tied goods must be two separate products. Third, the undertaking in question must not allow the tying and tied goods to be sold individually. Finally, the tying must restrict competition.

The commission stated that client PC operating systems and media players are separate products. WMP is always present on the *Windows* PC operating system. Thus, consumers may not obtain the latter without the former. Given the ubiquity of its client PC operating system, Microsoft is able to achieve the omnipresence of WMP by including this software with *Windows*.

The commission's market investigation showed that content providers and software developers choose to support the playback software that is most commonly available on client PC operating systems. In addition, consumers will tend to use the playback software that allows them to access the widest

variety of content. Given the 'superdominance' of Microsoft's client PC operating system, the commission held that the integration of WMP in *Windows* fosters its adoption by means other than competition on the merits. The commission stated that this tying thus restricts competition from other media playback software developers, such as Real Network Inc's *Real Player*. Accordingly, consumers suffer from the lack of free choice.

A controversial aspect of the commission's decision on tying relates to the issue of whether consumers are forced to use the tied product (that is, WMP). Microsoft would argue that consumers typically use many different media players. Moreover, the US settlement gives PC manufacturers the ability to remove end-user access to WMP, allowing them to promote an alternative media player. It remains to be seen whether the condemnation of the integration of WMP into Microsoft's client PC operating system will be held to be an unwarranted regulatory intervention.

Next steps

In order to restore the conditions of fair competition, Microsoft was ordered to offer *Windows* client PC operating system without WMP within 90 days and to make interoperability information available within 120 days. In early June 2004, Microsoft submitted an appeal against the commission's decision and subsequently sought interim relief against the remedies imposed. The commission has agreed not to enforce the remedies until the European Court of First Instance (CFI) has heard the interim relief proceedings. In order to succeed in its request for a suspension of the commission's demands, pending the CFI's verdict on the main action, Microsoft must prove that the remedies imposed would cause irreparable harm to its business model and also that it has a sufficiently strong *prima facie* case in its action for annulment of the commission's findings of infringement.

Microsoft's request for injunctive relief was heard by the CFI at the end of September. A judgment on whether the commission's remedies will or will not be suspended is expected by the end of 2004.

It is obviously beyond the scope of this article to examine the many interesting legal issues raised by the commission's condemnation of Microsoft. In brief, the case gives rise to two important questions. First, in what circumstances (if any) is a dominant firm legally obliged to license its proprietary technology and intellectual property rights to competitors? Second, when (if ever) does the incorporation of new features by a dominant company in a product constitute illegal tying? The answers to these questions are not only vitally important to Microsoft but also to all companies with a strong market position. The CFI's verdict on the main action is likely to take two to three years. It will therefore be some time before these important issues are potentially resolved. In the meantime, we await the CFI's judgment on interim relief with great interest. G

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

Recent developments in European law

COMPETITION LAW

Case T-313/02, *David Meca-Medina and Igor Majcen v Commission of the European Communities*, 30 September 2004. The applicants are two professional long-distance swimmers. During a World Cup competition, they tested positive for a prohibited substance. The International Swimming Foundation suspended them for four years. The Court of Arbitration for Sport reduced this to two years. The swimmers filed a complaint with the European Commission, challenging the compatibility of the International Olympic Committee's anti-doping rules with EC rules on competition and the free movement of services. The commission rejected that complaint and the applicants brought an action before the Court of First Instance. The CFI noted that sport is subject to EC law only insofar as it constitutes an economic activity. In relation to anti-doping measures, the CFI held that even if high-level sport has become an economic activity and such measures have economic repercussions for sports professionals, they do not pursue any economic objective. They are intended to preserve the spirit of fair play as well as the health of athletes.

CONSUMER LAW

Opinion of Advocate General Léger in case C-350/03, *Elisabeth and Wolfgang Schulte v Deutsche Bausparkasse Badenia AG*, 28 September 2004. The Schultes are a married couple. In 1992, they were approached by a financial services company, which offered them an investment proposal for the purchase of credit-financed property. This property was an old apartment in a residential building, built as social housing, which had been renovated. For tax reasons, the apartment had to be used by third parties and its acquisition had to be wholly financed by the loan. The Schultes took out the loan and signed a contract of sale with the owner of the building. They failed to meet their obligations under the loan and the lender instituted enforcement proceedings. In 2002, the Schultes cancelled the loan agreement on the basis of it having been concluded in a doorstop-selling situation. They then brought an action to oppose enforcement. Advocate General Léger noted that the directive on doorstep selling expressly states that it does not apply to contracts for the sale of immovable property. This remains true even if the contract forms part of a comprehensive financial transaction. The advocate general proposed that the reference from the German court be declared inadmissible, since the referring court had not explained why the obligation to repay the loan could be contrary to EC law.

INTELLECTUAL PROPERTY

Case C-329/02 P, *SAT 1 SatelliteFernsehen GmbH v Office for Harmonisation in the Internal Market*, 16 September 2004. SAT 1 applied to the Office for Harmonisation to register 'SAT 2' as a trademark for goods and services principally in the media and information sector. The office refused registration on the ground that the term was devoid of any distinctive character. SAT 1 brought an action before the Court of First Instance, which upheld its application in part. It had held that the term only had a distinctive character in relation to services with a connection to satellite broadcasting. SAT 1 appealed this decision to the ECJ. The ECJ held that the question as to whether a term has a distinctive character and can be registered as a trademark must be assessed on the basis of its overall perception by the average consumer. This overall analysis makes it possible to bring out the distinctive character of a trademark even when, considered singly, the elements may be devoid of this character. The ECJ annulled the decision of the office in its entirety. G

People and places

Advance and be recognised
Participants in the third annual *Advanced advocacy for solicitors* course pictured with director general Ken Murphy, CPD executive Lindsay Bond O'Neill, and the four tutors from the US-based National Institute for Trial Advocacy, John T Baker, James J Brosnahan, Jim R Carrigan and Sandra L Johnson. Successful participants in the course were Catherine Balfe, Danella Brady, Helena M Brady, Corinna Carrick, Geraldine Conaghan, Alan Doyle, David Fagan, Angela Farrell, Oliver Foley, John Gordon, John Hayes, Edward C Hughes, Anne Marie James, Emer Joyce, Ann Keating, Eamonn Kennedy, Giles Kennedy, Joseph Keyes, Catherine Kirwan, Michael McInerney, Eamon O'Brien, Patrick O'Connor, Edel Poole, Catherine Ryan, Ambrose Sharpe, Gabriel Toolan and Annie Walsh

Dinner is served
The Law Society recently hosted a dinner for the retired secretary general of the Department of Justice, Equality and Law Reform, the very distinguished public servant and solicitor Tim Dalton. His successor as secretary general, Sean Aylward, was among the guests. Seated *(from left)* are Law Society immediate past-president Geraldine Clarke, Tim Dalton, Law Society president Gerard Griffin, Sean Aylward, and director general Ken Murphy; standing *(from left)* are Sylda Langford, Caoimhin O hUiginn, Jimmy Martin, Pat Folan, Noel Waters, and deputy director general Mary Keane

The hills are alive
Solicitors and barristers in the Cork and Kerry area have organised hill walking for every Tuesday night during the summer. All members of the Southern Law Association are notified each Friday of the following week's walk. Pictured are participants in a walk in the Horse's Glen in July 2004

And it's even further to Budapest
Members of the Tipperary Solicitors' Bar Association met colleagues from the Hungarian Bar Association in October. Pictured in Budapest are *(back row, from left)* Tom Kelly, Brendan Hyland, Peter Reilly, Pat McDermott and Pat Derevan; *(middle row, from left)* Martin Hughes, Jacqueline Burke, John O'Connor, Maura Hennessy, Maura Derevan, Ronan Kennedy and Ruth Kennedy; and *(seated)* Dr Pal Hody, Dr Peter Szabo and Philip Joyce

Rights and wrongs
The Law Society and the Human Rights Commission (HRC) hosted a conference on human rights on 16 October. Pictured at the event are *(from left)* the HRC's Mary Ruddy, Dr Padraic McKenna of NUI Galway, HRC member Dr Katherine Zappone, Sean Barton of McCann FitzGerald, Charlotte Kilroy of Matrix Chambers, Prof Robert Wintemute of King's College London, UCC's Dr Ursula Kilkelly, ECHR task force chairman James MacGuill, Mrs Justice Susan Denham, Law Society parliamentary and law reform executive Alma Clissmann, and HRC chief executive Dr Alpha Connelly

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 5 November 2004)

Regd owner: Thomas Boland; folio: 1349; lands: townland of Tullig and barony of Moyarta; **Co Clare**

Regd owner: Peter Considine and Nora Considine; folio: 12051F; lands: townland of Liscannor and barony of Corcomroe; area: 0.1290 hectares; **Co Clare**

Regd owner: Kenneth Ahern and Deirdre Ahern; folio: 31521; lands: plots of ground being part of the townland of Mahon in the barony of Cork and county of Cork; **Co Cork**

Regd owner: James Byrne; folio: 48665; lands: plots of ground with a building thereon, situate on the south side of Friars Road in the parish of St Nicholas and in the county borough of Cork; **Co Cork**

Regd owner: John McCarthy; folio: 47620F; lands: plots of ground being part of the townland of Gowlane South in the barony of Muskerry East and county of Cork; **Co Cork**

Regd owner: Margaret O'Brien; folio: 52910; lands: plots of ground being part of the townland of Castletreasure in the barony of Cork and county of Cork; **Co Cork**

Regd owner: Thomas and Eileen Maher; folio: 48420; lands: plot of ground being part of the townland of Newtown in the barony of Fermoy and county of Cork; **Co Cork**

Regd owner: Thomas Deasy (deceased); folio: 16943; lands: plots of ground situate in the electoral division of Kilmaloda East, being part of the townland of Reengarrigeen in the barony of Carbery East (East Division) and county of Cork; **Co Cork**

Regd owner: Raymond Blake-Knox, Cecilia House, Cecilia Street, Temple Bar, Dublin 2; folio: 27979F; lands: Ballintra; **Co Donegal**

Regd owner: William John Gill, 13 St Columba's Avenue, Buncrana, Co Donegal; folio: 22197F; lands: Ardaravan; **Co Donegal**

Regd owner: John Kevin Houston, 8 Rosemount, Kilmacrennan, Co Donegal; folio: 30473; lands: Cottian; area: 15.1781 hectares; **Co Donegal**

Regd owner: Ian Adams and Barbara Killeen; folio: DN142880F; lands: a plot of ground known as site no 171, Glen Ellan Pines (to be known as 54 Glen Ellan Green) and situate in the townland of Glebe and Barony of Nethercross in the parish of Swords and in the town of Swords; **Co Dublin**

Regd owner: Irish Shell Limited (limited liability company); folio: DN9431; lands: a plot of ground situate on the west side of Malahide Road in the parish of Coolock, district of Coolock East and city of Dublin; **Co Dublin**

Regd owner: Bridget Canavan; folio: DN25900L; lands: property situate in the townland of Newbrook and barony of Coolock; **Co Dublin**

Regd owner: Jaak and Mariette Dehaene; folio: DN124324F; lands: property situate in the townland of Clonsilla and barony of Castleknock, known as 89 Castlefield Court; **Co Dublin**

Regd owner: Keith Duffy; folio DN149809F; lands: a plot of ground known as site 6 Killossery, Rollestown, situate in the townland of Killossery and barony of Nethercross; **Co Dublin**

Regd owner: Thomas Flynn; folio: DN95166F; lands: property situate in the townland of Kilbarrack Lower and barony of Coolock; **Co Dublin**

Regd owner: Catherine Gibbons; folio: DN9081L; lands: property situate in the townland of Burrow and barony of Coolock; **Co Dublin**

Regd owner: Sarah Keeling; folio: DN14931; lands: property situate in the townland of Ballymadrough and barony of Nethercross; **Co Dublin**

Regd owner: Simon Byrne; folio: DN86857L; lands: a plot of ground known as unit 6 Riverview Business Park, being part of the townland of Gallanstown and barony of Uppercross; **Co Dublin**

Regd owner: Joseph Burke; folio: 25084; lands: townland of Grange (Ed Annaghdown) and barony of Clare; **Co Galway**

Regd owner: Michael and Kathleen Nally; folio: 53677; lands: townland of (1) Tonacooleen, (2) Shrulegrove and barony of (1) and (2) Clare; area: (1) 28 acres, 2 roods, 15 perches and (2) 10 acres, 2 roods, 25 perches; **Co Galway**

Regd owner: Stephen Walsh; folio: 47164; lands: townland of (1) and (2) Beagh, (3) Coothagh and barony of (1), (2) and (3) Ballymoe; area: (1) 11.3564, (2) 0.4046, (3) 1.7806 hectares; **Co Galway**

Regd owner: John Young and Maureen Quirke Young; folio: 35575; lands: townland of Cloonalour and barony of Trughanacmy; **Co Kerry**

Regd owner: Patrick Power (deceased); folio: 16690 (property no 1 Co Kilkenny); lands: Granny and barony of Iverk; **Co Kilkenny**

Regd owner: Richard Fleming, junior; folio: 332; lands: Ballygowan (Posonby) and barony of Kells; **Co Kilkenny**

Regd owner: Roger Christopher and Bernadette Greene; folio: 37F; lands: Knocktopher Manor and barony of Knocktopher; **Co Kilkenny**

Regd owner: David Pim; folio: 1881F; lands: Srahleagh and barony of Tinnahinch; **Co Laois**

Regd owner: Charles Joseph Strong; folio: 5608, Co Laois; lands: Dangan and Tinnakill and barony of Portnahinch; **Co Laois**

Regd owner: Aidan Godfrey Rountree, Dromahaire, Co Leitrim; folio: 2956F; lands: Greenaun North; area: 4.8240 hectares; **Co Leitrim**

Regd owner: Grace Moore; folio: 6957F; lands: Tobermalug and barony of Clanwilliam; **Co Limerick**

Regd owner: Patrick Cassidy, Ballinamuck, Co Longford; folio: 1497; lands: Drumard; area: 16.3315 hectares; **Co Longford**

Regd owner: Sean and Rita Ryan, Rathmore, Ballymahon, Co Longford; folio: 4267F; lands: Rathmore; area: 2.630 hectares and 1.254 hectares; **Co Longford.**

Regd owner: Thomas Bellew, Main Street, Dunleer, Co Louth; folio: 831F; lands: Paughanstown; area: 5.4961 hectares and 6.4092 hectares; **Co Louth**

Regd owner: Geraldine Durkan; folio: 26011F; lands: townland of Magheraboy and barony of Costello; area: 0.199 hectares; **Co Mayo**

Regd owner: Ina and Patrick Heneghan, 19 Merrion Court, Montenotte, Cork and Moneyquid, Killeigh, Co Offaly; folio 15371F; lands: townland of Elly and barony of Erris; area: 0.5670 hectares; **Co Mayo**

Regd owner: Kathleen Tuohy, c/o BV Hoey and Company, Solicitors, Wellington Quay, Drogheda, Co Louth; folio: 2591F; lands: Lunderstown; **Co Meath**

Regd owner: John McAndrew, Main Street, Kilcock, Co Kildare; folio: 3673F; lands: Kilglin, area: 0.3161 hectares, **Co Meath**

Regd owner: Matthew and Alice Naughton, Rushwee, Slane, Co Meath; folio: 8665F; lands: Abelstown; area: 0.1412 hectares; **Co Meath**

Regd owner: the county council of the county of Monaghan, The Hill, Monaghan; folio: 4920F; lands: Cornamuckglass; **Co Monaghan**

Regd owner: Eilish Maher; folio: 13217F; lands: Derries and barony of Ballycowan; **Co Offaly**

Regd owner: William Roe (deceased); folio: 1073; lands: Ardan and barony of Ballycowan; **Co Offaly**

Regd owner: Geraldine Durkan; folio: 6826; lands: townland of Ballaghadereen and barony of Costello; **Co Roscommon**

Regd owner: Thomas McCormack; folio: 17383; lands: townland of Ardakillin and barony Roscommon; area: 26.7720 hectares; **Co Roscommon**

Regd owner: Thomas Joseph Parsons and Annette Parsons; folio: (1)

3374, (2) 13461F and (3) 28388; lands: townland of (1) and (2) Creggancor and (3) Caher, and barony of (1), (2) and (3) Castlereagh; area: (1) 2.5065 hectares, (2) 2.4210 hectares and (3) 3.6670 hectares; **Co Roscommon**

Regd owner: John J Benson (otherwise John Joseph Benson); folio: 23499; lands: townland of Mullanabreena and barony of Leyny; area: (1) 24 acres, 2 roods, 15 perches and (2) 5 acres, 3 roods, 5 perches; **Co Sligo**

Regd owner: Tom Johnson; folio: 1530F; lands: townland of Thurles Townparks and barony of Eliogarty; **Co Tipperary**

Regd owner: Michael Cullinan; folio: 5881; lands: plots of ground being part of the townland of Lackandarra Lower in the barony of Decies without Drum and county of Waterford; **Co Waterford**

Regd owner: James Joseph and Catherine Byrne, Hillcrest, Baylough, Athlone, Co Westmeath; folio: 13024; lands: Monksland; area: 0.0556 hectares; **Co Westmeath**

Regd owner: John Glennon (junior), Rathconnell, Mullingar, Co Westmeath; folio: 8202; lands: Macetown; area: 6.2271 hectares; **Co Westmeath**

Regd owner: Francis Kennedy; folio: 2479F; lands: Cherriestown and barony of Bargy; **Co Wexford**

Regd owner: Dermott McKenna; folio: 18054; lands: Grange and barony of Shelburne; **Co Wexford**

Regd owner: Stephen Nolan; folio: 18927; lands: Haresmead and barony of Shelmaliere West; **Co Wexford**

Regd owner: William and Charlotte Warham; folio: 13739; lands Killagoley and barony of Ballaghkeen South; **Co Wexford**

Regd owner: William and Charlotte Warham; folio: 13738; lands: Killagoley and barony of Ballaghkeen South; **Co Wexford**

WILLS

Bergin, Ann (deceased), late of Riverview Dangan, Thomastown, Co Kilkenny or Revanagh, Castlewarren, Co Kilkenny, date of death: 22 April 2004; **Bergin, Francis (deceased),** late of Revanagh, Castlewarren, Co Kilkenny, date of death: 5 January 2004. Would any person having knowledge of the whereabouts of a will made by either of the above named deceased, please contact Sheena Murphy, solicitor, Main Street, Gowran, Co Kilkenny; tel: 056 772 6900; fax: 056 772 6925

Cummins, Patrick (deceased), late of 10 Woodbine Drive, Grange Road, Raheny, Dublin 5. Would any person having knowledge of such a will made by the above named deceased, who died on 6 September 2004, please contact John P O'Malley, Solicitor, 38 Percy Place, Dublin 4; tel: 01 668 0661; fax: 668 0956

Kennedy, William (Billy) (deceased), late of Lismore, Toomevara, Nenagh, Co Tipperary. Would any person having knowledge of a will made by the above named deceased, who died on 29 September 2004, please contact James O'Brien & Co, Solicitors, 30 Castle Street, Nenagh, Co Tipperary; tel: 067 31218; fax: 067 33357

Leggett, Peter Joseph (deceased), late of Rathmore Terrace, Upper Dargle Road, Bray, Co Wicklow. Would any person having knowledge of the whereabouts of an original last will and testament made by the above named deceased, who died on 22 May 1978 at 9 Rathmore Terrace, Upper Dargle Road, Bray, Co Wicklow, please contact Neville Murphy Solicitors, Dargle House, 1 Lower Main Street, Bray, Co Wicklow; tel: 01 286 0639 (Mr Gene Murphy or Ms Caroline Murphy)

McGonigle, James (deceased), late of 55 Oak Court Lawn, Palmerstown, Dublin 20 and Cloontagh, Clonmany, Co Donegal. Would any person having any knowledge of a will made by the above named deceased, who died on 3 September 2004 in St James' Hospital, Dublin, please contact Patrick J O'Doherty & Co, Solicitors, Bridge Street, Carndonagh, Co Donegal; tel: 074 937 4129

Madden, Patrick (deceased), late of Clarmichel, Somerton Drive, Ballinlough, Cork. Would any person having knowledge of the whereabouts of a will of the above named person, who died on 5 September 1996, please contact Francis C Kelleher & Co, Solicitors, 1 Pearse Square, Cobh, Co Cork; reference CD/B.489; tel: 021 481 2300; fax: 021 481 2087; e-mail: cdaly@fkellehersolr.ie

Mangan, Kathleen Christina (Ina) (deceased), late of Headerley Nursing Home, Lawlors Cross, Killarney, Co Kerry and formerly of 3 Fair Hill, Killarney, Co Kerry. Would any person having knowledge of any will (apart from a will dated 10 December 1992) of the above named deceased, who died on 16 December 2003, please contact John O'Connor, Solicitors, 168 Pembroke Road, Ballsbridge, Dublin 4; tel: 01 668 4366; fax: 01 668 4203 or e-mail: info@johnoconnorsolicitors.ie

O'Donnell, Charlotte (deceased), late of Carnmore Road, Dungloe, Co Donegal. Would any person having any knowledge of a will made by the above named deceased, who died on 13 October 2000 at Dungloe Hospital, Co Donegal, please contact John M Spencer, Solicitor, Cudville, Nenagh, Co Tipperary; tel: 067 31622; fax: 067 31973; e-mail: spencer@eircom.net

Padayachee, Nalasegaran (otherwise Nanthoo) (deceased), late of 12 Millview Lawns, Malahide, Co Dublin. Would any person having knowledge of a will executed by the above named deceased, who died on 8 October 2004, please contact AF Smyth & Co, Solicitors, 21 Clare Street, Dublin 2; tel: 01 662 7780; fax: 01 662 9059

Pethers, Mary Ellen (deceased), late of 18 Archers Court, Loughboy, Kilkenny. Would any person having knowledge of a will made by the above named deceased, who died on 13 June 2003 at 18 Archers Court, Loughboy, Kilkenny, please contact Gerald Meaney, Solicitors, 17a William Street, Kilkenny; tel: 056 776 2664; fax: 056 776 4696

Sullivan, Patrick (deceased), late of Kilagoola, Moycullen, Co Galway. Would any person having knowledge of a will executed by the above named deceased, who died on 30 August 2003, please contact Messrs Smyth & Son, Solicitors, 30 Magdalene Street, Drogheda, Co Louth, tel: 041 983 8616; fax: 041 983 8954

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

Wanted: seven day on licence; details to Rogan & Moran, Solicitors, New Street, Caherciveen, Co Kerry; tel: 066 947 2465; fax: 066 947 2264

For sale – solicitor's practice in growing mid-west town. Sole practitioner. Old established firm – mainly conveyancing, probate and some litigation. Further details: **box no 91/04**

Mentor – solicitor in new start-up situation seeks experienced solicitor as mentor for occasional practical advice. Could suit retired solicitor. All replies treated confidentially. Please reply to **box no 92/04**

TITLE DEEDS

Lost title documents: Nolan Garrett (deceased), late of 27 Boghall Cottages, Boghall Road, Bray, Co Wicklow. Would any person having knowledge of the whereabouts of the title documents of the above mentioned property (unregistered), who died on 9 July 1987, please contact Brian McLoughlin & Company, Solicitors, 3 Herbert Road, Bray, Co Wicklow; tel: 01 286 8211; fax: 01 282 8143; e-mail: info@bmcllaw.com

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

Take notice that any person having interest in the freehold estate of the following property: all that and those the dwellinghouse situate on the west side of the Main Street in the town of Ballymahon, together with the out offices, yard and garden situate at the rear thereof, all of which said premises are situate in the parish of Shrule, barony of Rathcline and county of Longford and described in an indenture of lease dated 28 October 1876, Thomas Maxwell to Henry Scott Burd Junior.

Take notice that Gerald Daly intends to apply to the county registrar for the county of Longford for the acquisition of the freehold interest in the said property, and any party asserting that they hold a superior interest in the aforesaid premises or any of them are called upon to furnish evidence of title to the above mentioned to the below named within 21 days from the date of this notice.

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

Date: 5 November 2004
Signed: Mark Connellan, Connellan Solicitors, 3 Church Street, Longford

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 Bridget O'Reilly

Take notice that any person having an interest in the freehold estate of the property described in the schedule hereto ('the premises').

Take notice that the applicant intends to submit an application to the county registrar for the county of Cavan for the acquisition of the freehold interest in the premises, and any parties asserting that they hold a superior interest in the premises (or any of them) are called upon to furnish evidence of title to the premises

to the below named within 21 days of the date of this notice.

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

All that and those the shop, dwellinghouse and premises, together with the yard, out offices and garden thereto belonging, situate at 18 Holborn Hill in the town of Belturbet in the parish of Annagh, barony of Lower Loughtee and county of Cavan and known as the Ulster Bar.

Date: 5 November 2004

Signed: George V Maloney & Co (solicitors for the applicant), 6 Farnham Street, Cavan, Co Cavan

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 Fusano Properties Limited

Take notice that any person having an interest in the freehold estate of the following property: all that and those the premises known as 128 North King Street situate in the parish of St Paul and city of Dublin, together with the yards, outbuildings and appurtenances forming part thereof, being the land originally demised by the lease dated 23 April 1900 made between Richard Augustus Newcomen, Richard Ernest Mills, William Frederick Johnston and John Carolan of the one part and Patrick Smyth of the other part for the term of 90 years from 1 January 1900, subject to the yearly rent of £16.0s.0d thereby reserved and the covenants and conditions therein contained.

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

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

Date: 5 November 2004

Signed: Beauchamps Solicitors (solicitors for the applicant), Dollard House, Wellington Quay, Dublin 2

In the matter of the *Landlord and Tenant Acts, 1967-1994* and in particular the *Landlord and Tenant (Ground Rents) Act, 1967*, sections 8 and 17 and the *Landlord and Tenant (Ground Rents) (No 2) Act*, sections 9 and 10: an application by Charles Henry Brett, Basil Good and Christopher Bennett

Take notice that any person having an interest in the freehold estate of the premises known as no 1 Foley Street (formerly Montgomery Street) and 9 and 9a Corporation Street (formerly Mabbot Street) in the parish of St Mary and city of Dublin, being the property held under lease dated 10 April 1905 for the term of 100 years from 1 May 1905 at an annual rent of £75.

Take notice that Charles Henry Brett, Basil Good and Christopher Bennett intend 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 or parties asserting that they hold a superior interest in the aforesaid premises 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, Charles Henry Brett, Basil Good and Christopher Bennett intend to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the city of Dublin for directions as may be appropriate on the basis of the person or persons beneficially entitled to the superior interest including the freehold reversion in the aforesaid premises are unknown or unascertained.

Date: 5 November 2004

Signed: Rutherfords (solicitors for the said applicants), 41 Fitzwilliam Square, Dublin 2

In the matter of the *Landlord and Tenant Acts, 1967-1994* and in particular the *Landlord and Tenant (Ground Rents) Act, 1967*, sections 8 and 17 and the *Landlord and Tenant (Ground Rents) (No 2) Act*, sections 9 and 10: an application by Charles Henry Brett, Basil Good and Christopher Bennett

Take notice that any person having an interest in the freehold estate of the premises known as no 2 Foley Street (formerly Montgomery Street) in the parish of St Thomas and in the city of Dublin, being the property held under lease dated 14 July 1926 made between Peter Doyle of the one part and Mary J Hughes of the other part for the term of 100 years from 25 March 1926 at the annual rent of £6.

Take notice that Charles Henry Brett, Basil Good and Christopher Bennett intend 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 or parties asserting that they hold a superior interest in the aforesaid premises 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, Charles Henry Brett, Basil Good and Christopher Bennett intend to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the city of Dublin for directions as may be appropriate on the basis of the person or persons beneficially entitled to the superior interest including the freehold reversion in the aforesaid premises are unknown or unascertained.

Date: 5 November 2004

Signed: Rutherfords (solicitors for the said applicants), 41 Fitzwilliam Square, Dublin 2

In the matter of the *Landlord and Tenant Acts, 1967-1994* and in particular the *Landlord and Tenant (Ground Rents) Act, 1967*, sections 8 and 17 and the *Landlord and Tenant (Ground Rents) (No 2) Act*, sections 9 and 10: an application by Charles Henry Brett, Basil Good and Christopher Bennett

Take notice that any person having an interest in the freehold estate of the premises known as no 3 Foley Street (formerly Montgomery Street) in the parish of St Thomas and in the city of Dublin, being the property held under lease dated 14 July 1926 made between Peter Doyle of the one part and Mary J Hughes of the other part for the term of 100 years from 25 March 1926 at the annual rent of £6.

Take notice that Charles Henry Brett, Basil Good and Christopher Bennett intend to submit an applica-

tion to the county registrar for the city of Dublin for the acquisition of the freehold interest in the aforesaid property, and any party or parties asserting that they hold a superior interest in the aforesaid premises 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, Charles Henry Brett, Basil Good and Christopher Bennett intend to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the city of Dublin for directions as may be appropriate on the basis of the person or persons beneficially entitled to the superior interest including the freehold reversion in the aforesaid premises are unknown or unascertained.

Date: 5 November 2004
Signed: Rutherfords (solicitors for the said applicants), 41 Fitzwilliam Square, Dublin 2

RECRUITMENT

Experienced solicitor required for commercial and residential conveyancing and housing estate, to work with young, rapidly-expanding and dynamic practice. Excellent salary and prospects for right candidate. Apply in writing to principal. Catherine Allison & Co, Solicitors, Roden House, Roden Place, Dundalk, Co Louth; e-mail: callison@eircom.net; tel: 042 932 0854

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Locum solicitor required: Mullingar; general practice, four/six months, start January '05. Experience required. Contact Sally-Ann O'Donnell or Paddy Crowley at 044 408 87/8 or send CV to JJ Macken, Bishopsgate Street, Mullingar, Co Westmeath

Locum solicitor available. Experience in all areas of practice, available for full-time or part-time work. Munster area preferred. Reply to **box no 90/04**

Locum solicitor required for sole practitioner's general-practice office in north county Cork town from January to June 2005. Three-to-five years' post-qualification experience essential. Potential for full-time position after June for right candidate. Application by CV in strict confidence to: K Hyden, Competitive Resources, 18 St Patrick's Place, Wellington Road, Cork, or e-mail: khyden@competitiveresources.com, quoting reference number 4229 Closing date: 5pm, Friday 26 November 2004

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Traineeship required: enthusiastic, motivated, hard-working, with strong academic background, passed PPC1 course, extensive in-office training and experience in conveyancing/litigation/family law. Will qualify in April 2006. Excellent communication and IT skills. Any location considered. Please reply to: unit 127, 28 South Frederick Street, Dublin 2

Solicitor required for busy West of Ireland practice. Minimum two years' PQE. Enquiries to O'Malley & Co, Chartered Accountants, Chapel Street, Castlebar, Co Mayo

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LEGAL AID BOARD

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The Legal Aid Board is a geographically dispersed customer focussed public service organisation providing civil legal aid and advice, mainly in the area of family law, through a nation-wide network of 30 Law Centres.

Vacancies exist or may shortly arise in the following Law Centre locations:

- Dublin
- Wicklow
- Letterkenny
- Newbridge (temporary)

A panel will also be established from which vacancies (permanent and/or temporary) which may arise in other Law Centres in the coming months may be filled.

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Tel: 066 - 947 1000 Fax: 066 - 947 1036

Completed application forms must be returned no later than **5.30 p.m. on Friday 12th November 2004.**

The Legal Aid Board is an Equal Opportunities Employer

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For further information on the above or other opportunities, please contact Yvonne Keane or Gemma Allen for a confidential discussion at:

Brightwater

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Tel: 01 662 1000
Email: recruit@brightwater.ie
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A leading accountancy firm is looking for an Employment Solicitor for their extensive legal department. The role includes a broad range of areas such as unfair dismissals and discrimination, in addition to pensions and contracts. The role is a non-litigious position and a minimum of 1 years' contentious experience is preferable.

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A leading law firm currently seeks a Solicitor with up to 3 years' experience in the Banking or Financial Services area. The ideal candidate will have worked with and advised financial institutions on a broad range of issues including International taxation, securitisations, repackaging programmes and capital markets. The ideal candidate will be willing to work on their own initiative as well as part of a team. This is an excellent opportunity to join this expanding and dynamic department

Medical Negligence
Ref: RC011492 €65k

A top tier law firm requires a Solicitor with 2 years' relevant experience in the medical negligence field. This comprises of representing Plaintiffs, Defendants and Clients. Although exposure to all of these aspects is preferable, experience in Defence is essential.

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Ref: RC011739 €65k

A Commercial Lawyer is sought for a top 5 Law firm. The ideal candidate will be a communicative and personable individual with 2-4 years' experience in mergers and acquisitions, joint ventures and share purchase agreements. They will also be looking for the opportunity to join an expanding department with excellent career prospects.

Commercial Property
Ref: SR009569 to €90k

Top tier practice seeks senior solicitors with at least 5 years' experience in property investment, taxation, commercial leases, property lending, property development, planning and environmental law.

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Ref: SR010735 to €70k

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Ref: RC012117 to 60k

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Top tier firm is looking for a senior commercial lawyer with strong M&A transaction experience. Working with an impressive client base this role will offer excellent career progression for the right person. 3-5 years' PQE Ref: CR1315

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This reputable and growing boutique practice with a strong international reputation requires contract specialists with excellent drafting and negotiation skills for domestic and international clients. 2-4 years' PQE. Ref: CR1316

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