Law Society Gazette

Regulars

COVER PIC: roslyn@indigo.ie

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

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

Volume 98, number 8
Subscriptions: €57.15

NATIONWIDE
News from around the country

DUBLIN

Annual general meeting

The annual general meeting of the Dublin Solicitors' Bar Association (DSBA) will be held in Blackhall Place at 6pm on Wednesday 27 October. There will be an election for ten places on the council and nominations will be invited from the floor.

'This is an association of Dublin solicitors', says DSBA honorary secretary Kevin O'Higgins. 'It can and does play an important role in our working lives. Come along and have your voice heard'.

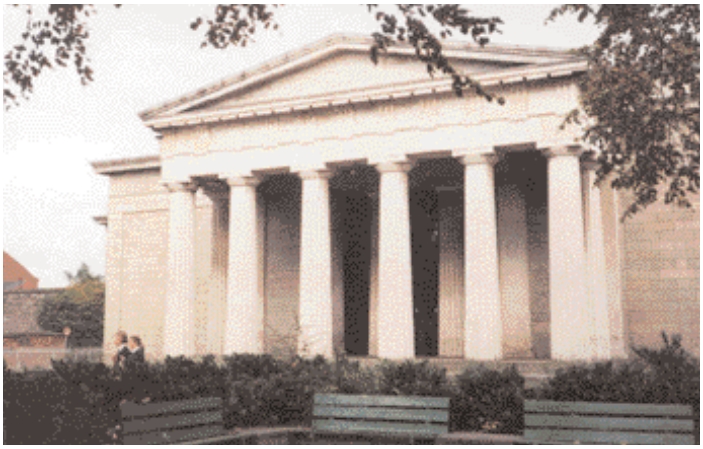
PIAB: we still have a major role

A recent seminar on the Personal Injuries Assessment Board was very well attended. Law Society president Gerard Griffin attended the meeting. He told colleagues that it was important that we inform ourselves on the new reality. He also reminded solicitors that we still have a major role to play in litigation.

Guardians of the peace

Five officers and members of the DSBA recently met the senior garda in charge of gardaí in the greater Dublin area. President John O'Connor, vice-president Orla Coyne, secretary Kevin O'Higgins, programmes director John O'Malley, and former president James McCourt spoke to assistant commissioner Al McHugh about issues of common interest between Dublin solicitors and the gardaí.

The meeting, which was amicable and constructive and for which there was no agenda, ranged from the past and present interface between solicitors and gardaí to the day-to-day role of solicitors in the criminal justice system in the protection of the rights of those accused of crime. They also found time to enjoy a meal.



Dundalk's newly refurbished courthouse

Continuing education

Planning is hugely important in its own right and increasingly so in conveyancing. An important seminar on planning law will be held at the Westbury Hotel, Dublin 2, on Monday 18 October. Rory O'Donnell, founder and chairman of O'Donnell Sweeney and former vice-president of the Law Society, will speak on the difficulties that arise with certificates of compliance with planning permission and the building regulations. He will also talk generally on the precautions that solicitors should take in advising clients on planning matters.

The seminar will also be addressed by Brendan Slattery of Arthur Cox on the *Planning Acts* in general and the practical implications of buildings erected with no planning permission. The final speaker will be Alan Doyle of Barry Doyle & Co, who will speak on the prosecution of cases in the High Court for breaches of environmental law.

A further seminar for the diary is on 8 November at the Conrad Hotel, Dublin 2, on the obligations of suppliers under consumer law. The seminar will consider relevant extracts from the *Consumer Credit Act, 1995*, the *Sale of Goods and Supply of Services Act, 1980*, the *Package Holiday and Travel Trade Act, 1995*, the *EU distance selling regulations* and finally the *European Communities (unfair terms in consumer contracts) regulations 1995*. Problems and pitfalls likely to be encountered by solicitors will be examined.

ROSCOMMON

The Roscommon Bar Association recently welcomed Judge Geoffrey Browne to District Court area no 4. The area covers a significant region and includes sittings in Ballaghadereen, Ballyhaunis, Carrick-on-Shannon, Castlerea and Claremorris. A spokesman for the association said that it looked forward to a happy and constructive working relationship with the new judge and that it wished him good fortune in his new position.

Here, too, continuing professional development is becoming an on-going aspect in the working lives of solicitors. Before year-end, seminars will be held for local solicitors on PIAB, probate, company law and legal costs. From responses so far, the association is confident that local solicitors fully appreciate the importance of continuing professional development and realise that it helps the individual practitioner, the profession, our clients and the community at large.

LOUTH

Old photos anyone?

The Bar Room in Dundalk's new courthouse is being fitted out by solicitors with photographs, old and new. Niall Lavery, honorary secretary of the Louth Bar Association, said that it was important to link the past with the present, particularly in their splendid new courts building.

'The walls of the Bar Room are already adorned with photos, some of them showing partners in firms 50 years ago', he said. This will become a great way of looking up what solicitors practised in the area over the years. Local solicitors with photos and mementos should consider installing them in the room. He added that it was important that their new facilities also reflect the local history of the profession.

MAYO

New courthouse

Solicitors in Castlebar have been getting familiar with their new surroundings since their four-court building was opened. 'We now have a courthouse that properly reflects the importance of the law and also makes the stressful lives of practitioners that bit less stressful', commented Evan O'Dwyer of the Mayo Bar Association.

The official opening by justice minister Michael McDowell was attended by county registrar Fintan Murphy and court officials, gardaí and solicitors. There was a general view that it was necessary that there be separate courtrooms for the District Court and the Circuit Court, and also a separate court for family law cases and, finally, a fourth large court room available when needed. G

Nationwide is compiled by Pat Igoe, principal of the Dublin law firm Patrick Igoe & Co and chairman of the Gazette *Editorial Board.*

‘The best regulation of any profession in these islands’, says McDowell

Justice minister Michael McDowell paid a remarkable tribute to the excellence of Law Society regulation in an address to 300 people at a parchment ceremony in Blackhall Place on 2 September.

‘In my view, the regulation by the Law Society of Ireland is the best regulation of any profession anywhere in these islands’, the minister declared.

McDowell departed from his script to make the comment, and repeated his views in conversation with members of the society after the parchment ceremony. As justice minister, he has taken a close interest in the regulation of solicitors by the Law Society, and for the last two years has attended and spoken at press conferences publicising the annual reports of the independent adjudicator, Eamon Condon.

Director general Ken Murphy and justice minister Michael McDowell just prior to McDowell’s remarkable tribute to the society

Although there were journalists present to cover the first-ever speech by a minister for justice at a Law Society parchment ceremony, McDowell’s remark was not reported in any newspaper the following day. ‘Perhaps not surprisingly, this exceptionally strong tribute, from an authoritative and well-informed source, did not suit any news agenda and went unreported’, said director general Ken Murphy.

‘As the minister clearly knows’, added Murphy, ‘the society’s regulation of the solicitors’ profession is a sophisticated, multi-layered, transparent system that is suffused throughout by external oversight from non-lawyer committee members – one of whom this year is the director of consumer affairs – and others to guarantee that it operates in the public interest’.

‘Everyone involved in the society’s regulation of the profession, indeed everyone in the profession, should take pride in this public declaration of confidence from someone who is not known for throwing bouquets’.

EMPLOYMENT LAWYERS' AWARD LAUNCHED

The European Employment Lawyers' Association has inaugurated an annual award of €5,000, open to law students and practising lawyers of less than five years' standing, 'who aspire to a career in labour and employment law'. The prize will be awarded for an article on an aspect of employment law to be delivered to EELA no later than 31 December 2004. Terms and conditions can be found on the EELA website at *www.eela.org*.

PRACTICE MANAGEMENT SEMINAR

Outsource is running its annual practice management and profitability conference on Friday 19 November in the Law Society. Topics being covered include law firm management, market developments, benchmarking profitability, economic outlook, recruiting and retaining key staff, managing your balance sheet, growth areas and valuation and assessment of legal practices. Further details can be obtained from Outsource on tel: 01 678 8490 or at *www.outsource-finance.com*.

Society protests at exclusion from new legal costs group

The Law Society has written to justice minister Michael McDowell complaining that solicitors have been omitted from his newly-established group to examine legal costs. McDowell announced the creation of the new group at the end of last month, saying that he 'attached the highest priority to reducing legal costs'.

The group is chaired by Paul Haran, outgoing secretary general of the Department of Enterprise, Trade and Employment, and it includes representatives from the departments of finance and justice, IBEC, the Consumers' Association, Courts Service and senior counsel John McBratney.

In his letter to the minister, director general Ken Murphy said: 'We cannot understand why there should not be a solicitor in private practice as a member of this group and I write to ask you to review your decision in this regard. How could it be other than helpful to

this group to have among its members a solicitor in private practice who has first-hand knowledge of civil litigation and the existing system through which costs are incurred, assessed and recovered? Such a practising solicitor would also have firsthand knowledge of the staff, information technology and all other cost overheads involved in running a solicitor's practice today.

'Can it really be feared that a single practising solicitor, in a group which already comprises 12 individuals, would somehow unbalance the group?

'Why do you appear to consider it important that the group should not contain a practising solicitor but that it should contain a practising barrister?

'We would like the solicitors' profession to be constructively and co-operatively engaged in the work of this group. To this end we would ask that you now appoint a solicitor in private practice to be a member of this group'.

No more Law Society diaries

The Law Society has decided to discontinue the production of both 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 and desk diaries are available at most stationers.

ONE TO WATCH: NEW LEGISLATION

Civil Liability and Courts Act, 2004

This act was signed into law on 21 July 2004 and a few provisions came into effect immediately. A further batch was brought into effect on 20 September 2004 by SI 544/04, which also identified a third batch that will come into effect on 31 March 2005. No date has as yet been set for the coming into effect of the remaining sections, which deal with the eventual establishment of a register of personal injury actions and valuation of property for the purposes of court jurisdiction.

Provisions brought into effect on 21 July 2004

Section 4 provides for service of notices. A notice may be served:

- By delivery in person
- By leaving it at the normal address or address for service
- By sending it by post by registered letter.

The *PIAB Act, 2003* is amended to permit the board to require any person, including a minister or statutory body, to provide it with information, and there are other minor technical amendments (ss31 and 32). Chapter 1, part 3 provides for the release of dormant funds of suitors, to be used for providing, managing and maintaining court buildings. Section 49 provides for the issuing of summonses electronically, and section 56 provides for an increase in numbers of High, Circuit and District Court judges.

Provisions brought into effect on 20 September 2004

- Most of the provisions apply only to actions instituted after the commencement of the provision, but there are some exceptions in relation to swearing a verifying affidavit, giving false evidence and taking fraudulent actions. Changes to the rules regarding collateral benefits in the assessment of damages and undeclared income will not apply to causes of action accruing before commencement of the relevant section (s6)
- A plaintiff in a personal injury action is required to write a letter of claim within two months, or as soon as practicable thereafter, stating the nature of the wrong alleged. If he fails to do so, the court may draw inferences and penalise the plaintiff by denying or reducing legal costs
- In a personal injuries action, the court may direct evidence to be given by affidavit, although a party's right to cross examine is preserved (s19)
- On appeal of a personal injuries case to the Supreme Court, the court may invite persons to make submissions in relation to liability or damages that it considers to be of exceptional public importance, if the action is one of a class where such issues arise. The court may do this on its own initiative or if requested by a party or non-party. A person may decline to make submissions, but must

Huge increase in trainees is 'a vote of confidence'

The number of trainees entering the profession has jumped by 56% in two years, according to the latest figures from the society's law school. Last month, 555 new students began the professional practice course part 1 in Blackhall Place. This compares with 355 who entered the law school in 2002.

Speaking at a recent parchment ceremony, Law Society president Gerry Griffin said that the society had never before experienced such a huge leap in numbers. 'The attractiveness of the profession, which has been high for many years, seems to be growing again', he noted.

He pointed out that the society had unreservedly accepted from as far back as the 1980s that it has no role to play in controlling the numbers entering the profession and that it did not operate a quota system or any other mechanism to restrict entry to the profession. Griffin said that this year there had been a surge in the number of one and two solicitor firms around the country taking on trainees.

Griffin: 'no quotas'

And he added: 'The decision by a firm, particularly a small firm like my own, to take on a trainee is in part a statement of confidence in the economic future for the firm and for the profession generally. The collective effect of these decisions is also a substantial indication of confidence in the national economy which should, perhaps, be recorded in some national economic barometer'.

NOMINATIONS FOR LAW SOCIETY ELECTIONS

Nominations for election to the Law Society Council closed on 27 September. The following is the list of candidates. Peter M Allen, Donald Binchy, Anne Colley, Orla Coyne, Colin Daly, Gerard J Doherty, Gerard F Griffin, Edward C Hughes, Michael G Irvine, Philip M Joyce, James MacGuill, James B McCourt, Simon J Murphy, Michelle Ní Longáin, Daniel E O'Connor, TC Gerard O'Mahony, John P O'Malley, Michael Quinlan, Marie Quirke, John P Shaw and Fiona Twomey. There are 21 candidates vying for 16 seats on Council. The successful candidates will be declared at the annual general meeting on 11 November.

WOMEN LAWYERS HOLD THEIR AGM

The Irish Women Lawyers' Association is holding its annual general meeting on 30 October 2004 at 10am in the Distillery Building, 145-151 Church Street, Dublin. The AGM is open to all members of the Irish Women Lawyers' Association and will be followed at 11am by a seminar on work/life balance. This seminar is open to everyone. The entrance fee to the seminar is €30 for non-members, €15 for members and €10 for apprentices, devils and students.

There is no need to pre-book. Registration will take place at 9.45am for the association's annual general meeting and from 10.30am for the seminar.

CHANGE OF ADDRESS FOR FIRE BRIGADE

Dublin Fire Brigade has changed its address for licence renewals, but it appears that not every solicitor is aware of this. The new address is Dublin Fire Brigade, 165/169 Townsend Street, Dublin 2.

do so in writing, giving reasons (s21)
- The book of *quantum* is to be taken into account by a court when assessing damages, but other matters also may be considered (s22)
- Giving false evidence in a personal injuries action is an offence, and this applies to actions brought on or after commencement of this section, and pending on the commencement date (s25)
- If a plaintiff is behind false or misleading evidence in a personal injuries action, the court is required to dismiss the action unless, for reasons stated by the court in its decision, to do so would result in injustice being done. This section also applies to actions brought on or after commencement, and pending at the commencement date (s26)
- Offences on indictment warrant a penalty of a fine up to €100,000 and/or up to ten years' imprisonment. On summary conviction, the penalty is a fine up to €3,000 and/or imprisonment for up to 12 months (s29)
- Interest on legal costs does not become payable until either costs are agreed between the parties or they are taxed. Thereafter, interest will be payable at a rate to be specified from time to time (s41)
- Sections 42, 43 and 44 concern administrative matters for the Courts Service
- If a party so requests a court in a personal injuries action, the court may direct that a witness shall not attend the trial until he is required to give evidence, and may give directions to prevent him communicating with other witnesses or receiving information which might have an effect on any evidence he might give. This, however, does not apply to expert witnesses (s54)
- Section 55 amends section 46 of the *Courts and Court Officers Act, 2002*, which provides for the establishment of a register of reserved judgments in each of the court jurisdictions (supreme to district). Judgments not delivered within two months are to be listed before the judges concerned, and listed thereafter every two months until judgment is delivered. When listed, the judge must indicate when he proposes to deliver judgment, and the date is to be registered in the register. Note, however, that section 46 of the 2002 act has not yet been commenced.

Provisions due to come into effect on 31 March 2005

A large number of significant provisions of the act are due to come into effect in six months' time, and will be summarised in a future issue. G

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

Legal IT's Case Management Systems are handling some of the largest builders estates in the country, delivering daily reports to their satisfied clients.

Legal IT,
10 Harrison Row, Rathgar Dublin 6.
Tel: 01 490 6654 Fax: 01 490 6657

Enterprise House, Mary Street., Cork.
Tel: 021 4321 829 Fax: 021 4321 841
Email: info@legalit.ie

For more details visit our new website: www.legalit.ie

legal I.t.

Technology for Lawyers - All over Ireland

HUMAN RIGHTS WATCH

Degrading treatment in prison

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

Last April, Lord Bonomy of the Scottish Court of Session decided in *Robert Napier v The Scottish Ministers* ([2004] ScotCS 100) that a prisoner had been treated in a degrading manner contrary to article 3 of the *European convention on human rights* ('no-one shall be subjected to torture or to inhuman or degrading treatment or punishment'). The decision is under appeal by the Scottish prison authorities.

It has particular relevance in this jurisdiction because one of the factors that was important to the petitioner's success was the absence of in-cell sanitation and the resulting need to slop out, which, of course, still exists in some Irish prisons.

The *Napier* decision restates the principle that a sentence of imprisonment extends only to the restriction of liberty, that a prisoner's human dignity must be respected, that the way his sentence is served should not subject him to distress or hardship greater than what is inherent in the deprivation of his liberty and that, given the practical demands of imprisonment, his health and well-being should be adequately secured. If Irish prisoners follow Mr Napier's lead, it will be very interesting to see what exactly Irish prisoners suffer above and beyond their deprivation of liberty.

The facts

For the 40 days that Robert Napier spent on C Hall of Barlinnie Prison in Glasgow, he was a remand prisoner. He had failed to show for trial on charges of assault, robbery and abduction, and was further charged with attempting to pervert the course of justice in

connection with other charges, including attempted murder. This was not his first time in detention.

The petitioner complained of overcrowding, slopping out and an impoverished regime, which he alleged together combined to cause him a severe outbreak of eczema and a mental disorder. Two prisoners were commonly assigned to cells designed for one, the toilet and washing facilities and system for their use were disgusting, and prisoners were usually confined to their cells for 20 hours out of 24, with an extremely restricted programme of activities. The cells were badly lit and ventilated. No adjustments were made to take account of increases in prisoner numbers.

The judgment

There was little disagreement between the parties on the physical conditions, and the judge's summary makes riveting reading. The judge found that the conditions had an effect on the petitioner's physical and mental health, though not amounting to a mental disorder. He found that the petitioner's second attack of eczema, after his request for removal to better conditions had been refused, was caused by the stress of the living conditions in the prison. He found that the petitioner had suffered from inhuman and degrading treatment and had been subjected to conditions of detention 'such as to diminish his human dignity and to arouse in him feelings of anxiety, anguish, inferiority and humiliation'. He awarded him £2,450 as just satisfaction. He also found a violation of article 8.

On the question of whether the conditions in the prison amounted to degrading treatment, Lord Bonomy considered the views of government ministers, inspectors, academic experts and international bodies and concluded: 'this is an impressive body of consistent, informed opinion about the demeaning nature of slopping out as practised in prisons in the United Kingdom, including C Hall at Barlinnie, particularly when associated with overcrowding and little time out of cell'.

Article 3 jurisprudence

The judge considered a number of cases decided by the ECtHR in Strasbourg under article 3, starting with the most recent case of *Yankov v Bulgaria* (11 December 2003), in which the principles were summarised. In that case, the court held that the forced shaving of a prisoner's hair before his confinement in an isolation cell was very likely to result in a feeling of inferiority, as his physical appearance was changed against his will. Other cases that the judge found of assistance were *Dougoz v Greece* (6 March 2001) and *Peers v Greece* ([2001] 33 EHRR 57).

In *Dougoz*, an illegal alien was detained for 17 months, pending his expulsion, in overcrowded accommodation without proper sleeping facilities (benches but no mattresses). Adjacent washing and sanitary facilities were described as 'appalling'. The court held that the conditions and the inordinate duration amounted to degrading treatment contrary to article 3.

In *Peers*, the prisoner could leave his cell during the day. His single cell held two and became very hot, including at night when he was locked in. It had minimal ventilation and the prisoner was badly affected by the heat and airlessness. There was a floor toilet in the cell, unshielded by a screen, which he and his cellmate had to use. The court found that the conditions amounted to degrading treatment in violation of article 3.

In Lord Bonomy's opinion, while the overall conditions in *Peers* were worse than those experienced by Napier, in some respects they were better: there was running water to flush away waste and Peers was not confined to his cell during the day. He added: 'it is also notable that the court reiterated that a finding of degrading treatment may be made where the conditions give rise to feelings of anguish and inferiority which might foreseeably be capable of humiliating and debasing the particular individual and possibly breaking his physical or moral resistance and does not depend on proof that he was in fact subjectively humiliated and debased or that his physical or moral resistance was actually broken'. G

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

McDowell: lawyers 'should not

On 2 September, for the first time ever, a minister for justice addressed a Law Society parchment ceremony. Michael McDowell urged the profession to look to the future with confidence. This is an edited version of his address

I am very pleased and honoured to have been invited to attend this ceremony and to address you on this very important occasion in the lives and careers of those who are receiving their parchments today. In doing so, I think it is appropriate for me to acknowledge that the Law Society has always been committed to the aim of educating solicitors of the highest standard who will compare favourably with lawyers of any other jurisdiction.

The development of this modern Education Centre is an example of the commitment of the society in this regard. The society has, furthermore, laid great stress on the importance of continuing education for solicitors, something that can scarcely be overemphasised given that new developments continue to abound in all areas of the law.

McDowell: 'Irish solicitors compare favourably with lawyers of any other jurisdiction'

Central role

For those of you who intend to practise law, as distinct from following one of the other avenues of work open to qualified solicitors, you have a central role to play in our democratic society through advising, representing and facilitating persons in their quest for justice. Your role means that clients will take you completely into their confidence in relation to family, personal, business and other matters. You will be the custodian of their interests in many situations and, generally, be the person they trust implicitly, often at a time of great stress and trauma in their own life. To purport to play such a role, the solicitor must be a person of outstanding integrity, honesty and competence, because the consequences for the client and for society of the absence of these qualities are very serious indeed.

Those who need legal services must be able to access them at the best possible price for a quality service. This question has caused concern to the government on a number of fronts. Among these are the legal overheads attending the taking or defending of court proceedings, particularly as it affects personal injuries litigation, and the costs associated with tribunals of inquiry.

The *Arbitration Act, 1954*: a g

On 19 December, it will be the 50th anniversary of the *Arbitration Act, 1954*. Klaus Reichert makes the case for its speedy repeal and offers some suggestions for avoiding its worst effects

When does the 1954 *Arbitration Act* apply? The answer is found not in the act itself but in the later *Arbitration (International Commercial) Act, 1998*. That act contains Ireland's international arbitration law, and applies if:

'a) The parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states, or

b) One of the following places is situated outside the state in which the parties have their places of business:

i) the place of arbitration if determined in, or pursuant to, the arbitration agreement

ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected, or

c) The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country'.

If any of these tests are passed, then the arbitration clause in the contract is governed by the 1998 act, otherwise the 1954 act applies.

The 1954 act does not provide a sound legal basis for domestic arbitration in Ireland for a number of reasons.

Extensive court intervention in the arbitration process is possible. In sections 35 to 40 inclusive, extensive powers are conferred upon the High Court to intervene in an arbitration, such as by case stated and so on. The essence of a properly functioning arbitration process is that there should be no such powers conferred on the courts. If one looks at the UNCITRAL model law, which governs international arbitration here, no such interventionist powers are conferred upon the courts. Why then should such powers of intervention continue to be available in the domestic arbitration context?

Notwithstanding the strong support for arbitration that the courts have shown, the powers contained in sections 35-40 are a charter for those intent on delay, mischief or obstruction. The courts have

fear a reform agenda'

In particular, since I am addressing this gathering, I should say that the Law Society engaged in a co-operative way with me when I was preparing the *Civil Liability and Courts Bill*, and I am grateful for their input on that. I tried to meet the society's concerns in a constructive and honest spirit and I appreciated the society's approach, which was in a similar vein.

Valued input

Another initiative that I am taking is the establishment of a group to examine the issue of legal costs. The group will examine how fees and costs in civil litigation arise and are calculated, and the group will examine the system in place in relation to the taxation of costs. The group will make recommendations for initiatives or changes in this area that can lead to or assist in a reduction of costs and provide for greater transparency. A recent report of the Denham Committee on Court Practice and Procedure stressed the need for such transparency and recommended an independent study of costs.

In relation to any reform that may be under consideration and which affects your profession, or in relation to which you can make an input, I will ensure that the society is consulted. As the regulatory and representative body for the solicitors' profession, the society's input is highly valued by me as it is by my government colleagues.

Key principles

For my part, I believe that there are a number of key principles that should guide us in the process of reform and modernisation:

- There can be no closed shops
- There must be a new emphasis on cost transparency, value for money and competitive economic pricing of legal services by both branches of the profession
- Specialisation must be based on the objective common good – the distinction between solicitors and barristers can only be defended if it demonstrably delivers a better quality of service and a fairer system of access on equal terms to justice, at a cost that is competitive with any alternative fused profession
- There can be no restrictive practices or artificial barriers in access to or delivery of legal services
- Self-regulation must deliver the highest standards of professional integrity and protection for the interests of clients and the public – otherwise there will be a case for external regulation.

From what I have been saying up to now, some might conclude that the future is doubtful for those receiving their parchments today! I do not believe that to be the case. Our society is becoming ever more complex and prosperous. Our legal system has changed dramatically over recent decades and this has been reflected in constantly growing numbers at practice in both branches of the profession. I do not expect this trend to be reversed.

Modernisation project

I take this opportunity to mention a joint project that my department is undertaking, together with the Law Reform Commission, to radically reform and modernise land law and conveyancing law. The project, which has been underway since the start of the year, will repeal over 100 pre-1922 statutes – the earliest of which date back to the 13th century. The aim is to replace them, where necessary, with a modern law of property that will meet the needs of the 21st century.

To conclude, given the track record of those of you receiving your parchments today in getting to this point, and having regard to the legal and business environment that you face, I believe that you can look forward with confidence to the future. G

olden opportunity for reform

shown a strong support for arbitration and do not readily interfere with cases. The problem does not lie with the judicial attitude to arbitration; rather, it is the delays inherent in getting an arbitration-related application before the court that causes problems. It is quite easy to imagine how up to 18 months' delay could be bought by a party bent on causing trouble, particularly if that party has the resources to do so (and does not mind adverse costs orders). Such tactics can have a profound impact on the other party to the arbitration, who may have less resources (though a good case), and rather than wait for the court application to be dealt with, accepts a reduced sum in settlement.

The arbitrator's powers expressly conferred by the 1954 act are painfully few in number. Unless the parties to the contract have incorporated a set of comprehensive arbitration rules into their agreement, there is little in the 1954 act to assist the arbitrator. Apart from being given the power to administer oaths, order specific performance, make interim awards, correct slips in awards, and award costs and interest, nothing else is present. This is in marked contrast to the UNCITRAL model law, which includes the power to determine jurisdiction, order interim measures of protection, and fix the rules of procedure absent agreement of the parties, among many others. The 1954 act conspicuously fails in this regard.

The duties of the arbitrator set out in the 1954 act are equally patchy. The 1954 act is silent as to, first, independence/impartiality; second, the requirement to treat the parties equally; and, third, the nature of the award.

Under the 1998 act, an express requirement is that the arbitrator is independent or impartial. This obliges the arbitrator, in advance of accepting an appointment, to disclose any circumstances that are likely to give rise to justifiable doubts as to his/her impartiality or independence. This obligation assists with the transparency of the arbitrative process and ensures that the parties are on notice of anything that may be of interest to them. The 1954 act fails in this regard.

As to the requirement of equal treatment, this is expressly set out in article 18 of the UNCITRAL model law and is a mandatory provision that each side is given a full opportunity of presenting its case. While it could be said that an arbitrator under the 1954 act was under

an implied obligation to ensure equal treatment, it is quite another thing for it to be set out in stark, statutory terms.

Finally, other than directing an arbitrator to proceed with the reference and the making of the award with all reasonable dispatch, the 1954 act says nothing else. That is in contrast to the UNCITRAL model law, which requires the award to be reasoned. Such a provision eliminates bare awards, akin to awarding a sum to one party, or 'splitting the baby'. A fundamental requirement of any adjudication process is that each side knows exactly why it won, lost or drew.

Keeping up with the Joneses

It is a matter of regret that, while Ireland has a fine international arbitration law, it has a seriously flawed domestic statute. As domestic arbitration is the principal day-to-day form of this process here, it is a matter of urgency that the 1954 act be attended to. Indeed, one can look with some envy to Northern Ireland and its 1996 *Arbitration Act*, which is a modern and well-formed law.

What can be done now to alleviate, insofar as is possible, the situation? Ideally, replace the 1954 act as soon as possible. Otherwise, perhaps changes could be made to the *Rules of the Superior Courts* dealing with arbitration applications and place all arbitration applications (other than those to stay court proceedings) immediately in the commercial list of the High Court, regardless of monetary value. This would immediately cut off any foot-dragging possibilities. As arbitration is an essential aspect of well-functioning commerce, the benefits of assigning such applications to the commercial list would be readily apparent.

Parties can help themselves by choosing a set of arbitration rules in their contract. This will not exclude the intervention powers of the court under sections 35-40, but the chances are that it will minimise the risk of such applications. Also, a good

set of arbitration rules will confer powers upon the arbitrator to properly run the arbitration. Apart from the main institutional arbitration rules, such as the LCIA, ICC, or ICDR, a very good formula is found in the *UNCITRAL arbitration rules*, which reflect much of the UNCITRAL model law. These rules, while intended for international arbitration, are equally useful for straightforward domestic arbitration and can be incorporated into a domestic contract quite easily.

If one wants to exclude completely the possibility of being caught up in case stated, and so on, it is relatively simple to frame one's contract to take advantage of Northern Ireland's *Arbitration Act*. Thus, two parties from this jurisdiction, who are about to sign a contract to do something or other in this jurisdiction only, can provide for arbitration to be governed by Northern Irish law, yet have the substantive rights and obligations under their contract governed by Irish law.

Further, under section 34 of the NI *Arbitration Act 1996*, the arbitrator or the parties can decide to hold the hearings wherever they want. Thus, there would be no need to travel to Northern Ireland but, as a matter of law, the arbitration would be taking place there. Indeed, there is no need for any party to the agreement or the arbitrator to have any connection with Northern Ireland. Such an arbitration agreement could be framed quite simply. One would not require an arbitrator (or lawyers) from Northern Ireland for the arbitration. Again, there is no impediment in the 1996 NI act to any of this. Any award arising from such an arbitration would be easily enforceable under the *New York convention* or chapter VIII of the UNCITRAL model law.

Finally, if one needed to get an injunction pending the outcome of the arbitration, one could still go to the High Court in Dublin to get orders in aid of a 'foreign' arbitration.

This is an assured way of definitively getting around the failings of the 1954 act, but only serves to emphasise the need to overhaul that act as soon as possible. G

Klaus Reichert is a Dublin-based barrister.

Letters

Dating the certificate of title

From: Patrick Dorgan, chairman of the Conveyancing Committee

I refer to the letter in the August/September issue of the *Gazette* (page 12) from Mr John Lanigan in relation to the Conveyancing Committee's practice note *Dating of certificate of title* (published in the July issue, page 39).

There is no question that a solicitor should retain loan funds until registration is completed. By the time the certificate is being delivered to the lending institution, all of the documents as listed in the third schedule will be available to be handed over.

This position is agreed with the lenders, and has been so for many years, and the committee takes this opportunity to reiterate again that the proper date of a certificate of title is the date of parting with the loan funds.

It takes little imagination to see the difficulties that could be caused if the certificate were to be dated after registration was completed, possibly years later, when the client might have, unknown to his solicitor, had judgments against him, become bankrupt or carried out unauthorised extensions to the dwellinghouse.

Start spreading the news

From: JVP Cresswell, Kilternan, Co Dublin

One of the earliest plays staged in the Abbey Theatre 100 years ago this December was the one-act *Spreading the news* by Lady Gregory.

One of the characters in the play is described as a 'removable magistrate' (see *The comedies of Lady Gregory*, edited by Ann Saddlemeyer, published by Colin Smythe in 1979).

Can any of your readers explain the significance of the word 'removable' in this context?

Nowadays, the procedure for the removal from office of a member of the judiciary seems to be very complex. Was it a simpler matter in Lady Gregory's day?

What are words worth?

From: Niall Farrell, Patrick J Farrell & Co, Newbridge, Co Kildare

I returned the call recently of a solicitor's secretary. She wanted to know when her office would receive a contract in a particular case. I told her I was very surprised as I thought that I had sent it. I duly checked the file and confirmed that I had. She apologised for the error and, by way of explanation, told me that 'it wasn't actioned in my tasks'. What have we become?

DUMB AND DUMBERER

From: Patrick J Cowhey, O'Callaghan Cowhey, Solicitors, Dun Laoghaire, Co Dublin

I recently received a letter from a colleague acknowledging receipt of the 'original pulmonary summons'. Clearly the solicitor in question was putting his heart and soul into his work.

From: John G Murphy, John A Sinnott & Co, Enniscorthy, Co Wexford

The following actually happened today, 1 September 2004. My colleague at the office here, Donal O'Connor, solicitor, just became the proud father of a new son. I was just in his room getting a precedent when I overheard him finishing dictation to a bank, and he said: 'Could you please let us have the documents as a matter of urgency so that we can prepare the contractions'.

We have given him the rest of the week off!

Congratulations to John G Murphy, who wins the bottle of champagne this month. And congratulations also to Donal O'Connor, who probably deserves it more!

BLOOM

The recent flurry of interest in the centenary of the day on which James Joyce's *Ulysses* was set focused on the elements of Dublin society in 1904 from which the book drew its people and places. But little mention was made of Dublin's legal fraternity, even though it is a thread running through the novel. Brian McMahon gives you the guided tour

MAIN POINTS

- James Joyce's *Ulysses*
- Dublin in 1904
- Legal encounters in the book

James Joyce's *Ulysses* is set in Dublin on 16 June 1904 and its two principal characters are Leopold Bloom and Stephen Dedalus. Bloom is the novel's hero and his journey around Dublin echoes Odysseus' journey in Homer's *Odyssey*.

The novel opens in the Sandycove Martello Tower near Dun Laoghaire, and it is on Stephen's journey back to the city, when he calls into the Irishtown house of his uncle, Richie Goulding, that the first legal reference occurs. Richie Goulding is a legal cost drawer who works for the firm Collis and Ward, a name to which he adds his own on his legal costs bag. When Stephen calls, he is sitting in bed drafting bills for masters Goff and Shapland Tandy.

Thom's directory, 1904 *shows that the firm of Collis and Ward was located at 31 Dame Street and two of the taxing masters then working at the consolidated taxing office of the Supreme Court were James Goff and Shapland Morris Tandy.*

Cockles and mussels

Leopold Bloom, after breakfasting at home in Eccles Street, walks across the city to Irishtown to join the funeral procession of Paddy Dignam. On the journey back across the city to Glasnevin cemetery, Martin Cunningham tells those in the carriage, including Bloom, how Reuben J's son tried to commit suicide by jumping into the Liffey but was saved by a workman who was rewarded with a florin.

The Irish Worker *of 2 December 1911 reported a very similar incident in which Reuben J Dodd, son of Reuben J, jumped into the Liffey and was saved by a workman who, as a consequence, got sick and missed work. When his wife sought money from Reuben J, he reluctantly gave her 2s 6d. When Joyce was a child, his father had to sell property to pay off debts to Reuben J, a money lender and costs drawer, starting the family's descent into poverty. The young Joyce knew the young Reuben J Dodd but disliked him for obvious reasons.*

Reuben J Dodd became a solicitor in 1901. When the BBC broadcast this extract from Ulysses *in the 1950s, Dodd successfully sued for defamation, saying he had jumped into the Liffey after his hat.*

When leaving Glasnevin, Bloom briefly meets Paddy Dignam's employer, John Henry Menton, solicitor.

Thom's directory, 1904 *lists a solicitor named John Henry Menton practising from 27 Bachelor's Walk.*

After the funeral, Bloom goes to the offices of the *Evening telegraph* in Abbey Street, now gone but marked by a plaque outside Eason's. He joins the conversation in which JJ O'Molloy, a once-promising young barrister now fallen on hard times, and Professor MacHugh discuss the prosecution of hawkers in the Phoenix Park.

The Freeman's Journal *of 9 June 1904 reported the prosecution of seven people for hawking wares in places forbidden by public notice before Mr Mahony, divisional magistrate in the Northern Police Court. The wares were sold at the site of the murder by the Invincibles of the chief secretary and under-secretary to the lord lieutenant in 1882, and were postcards memorialising this event. The seven were convicted and fined 2s 6d and costs each.*

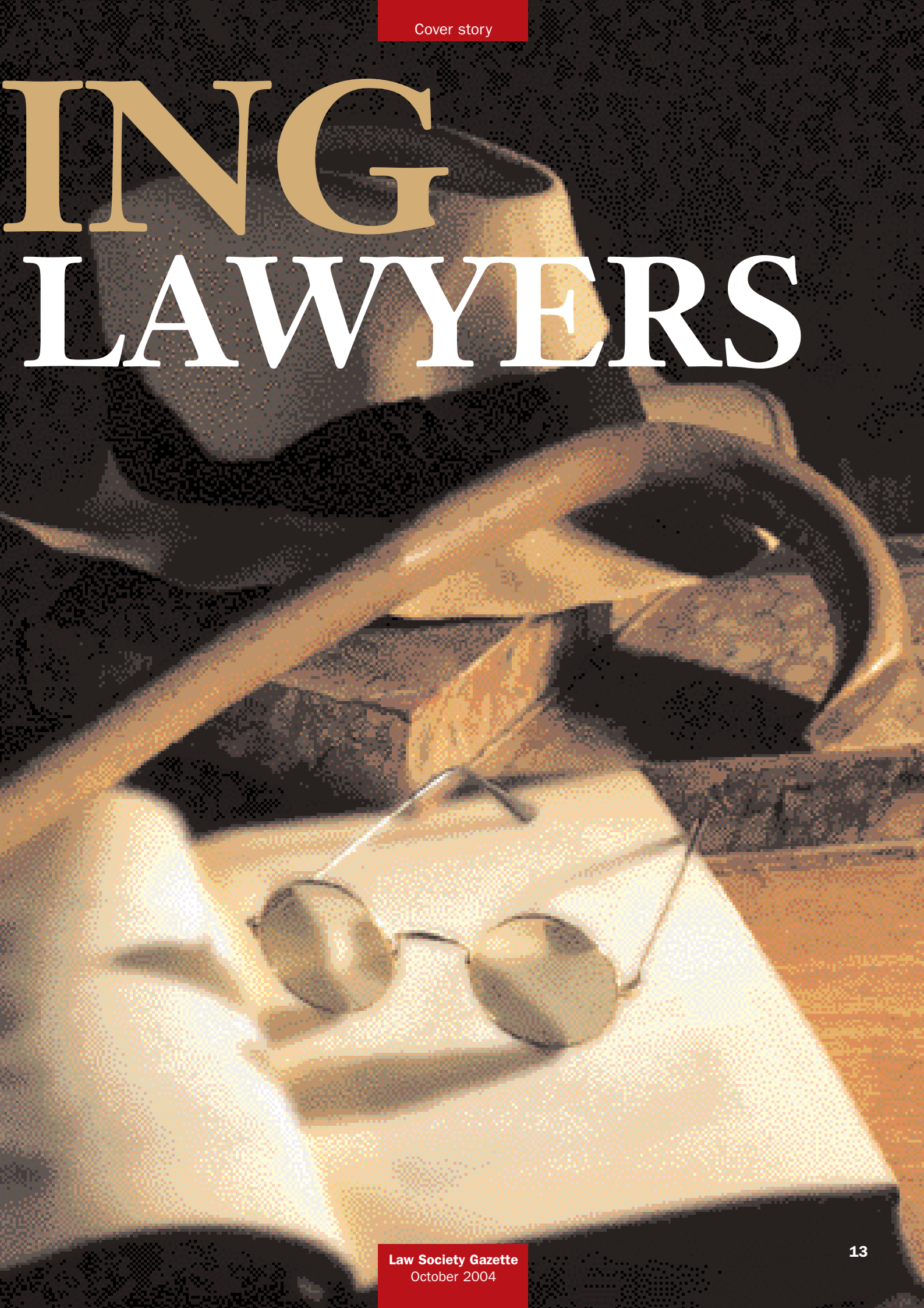
The oul' triangle

JJ O'Molloy then begins praising the speech of Seymour Bushe KC in the Childs murder case. When his name is mentioned, the editor confuses him with Charles Kendall Bushe, and Professor MacHugh alludes to the scandal that prevented his appointment as a judge.

Seymour Bushe was one of the foremost barristers of his day and a great orator. He was the great grandson of Charles Kendall Bushe, chief justice of the King's Bench, Ireland, from 1822 to 1841. At that time, the King's Bench and Common Pleas had a chief justice each, Exchequer a chief baron and Chancery a lord chancellor. Seymour Bushe missed judicial appointment because of involvement in an adulterous affair. In a trial held in October 1899, attended by James Joyce, Bushe successfully defended Samuel Childs of the murder of his 76-year-old brother at 36 Bengal Terrace, beside Glasnevin cemetery.

JJ O'Molloy then begins to tell a story about the famous Chief Baron Christopher Palles, chief judge in the Court of Exchequer in 1904, but unfortunately is cut short. The conversation returns to oratory, and mention is made of Mr Justice

ING LAWYERS



Fitzgibbon's style of discourse and his speech to the Trinity College Historical Society.

In 1904, Gerald Fitzgibbon was a judge of His Majesty's Court of Appeal. His son would go on to be a judge of the Supreme Court of the Irish Free State.

In the early afternoon, the setting is the National Library of Ireland, where Stephen is setting out his theory on *Hamlet* to others in the librarian's office. In the course of the conversation, John Eglington refers to Judge Barton's search for clues that Shakespeare was Irish, and the librarian, just before leaving to deal with a query from Bloom, refers to Mr Justice Madden's *Diary of Master William Silent*.

Sir Dunbar Plunkett Barton was a justice of the King's Bench. He was a cousin of Seymour Bushe and wrote a number of studies of Shakespeare. Dodgson Hamilton Madden was also a justice of the King's Bench: his book was an elucidation of Shakespeare using his knowledge of hunting in the west of England. Ironically, the National Library does not have a copy of that book now but does have many of Madden's legal works.

'Irish people are fortunate that their enjoyment of Ulysses is enhanced by the fact that it is a depiction of a day in their capital city's history, and Irish lawyers are more fortunate still that this depiction extends to their profession'

The strawberry beds

In the mid-afternoon, while Bloom is browsing in a bookshop, an elderly lady leaves the Four Courts having heard the cases *In lunacy of Potterton*, *Owners of the Lady Cairns v the Owners of the Barque Mona*, and *Harvey v Ocean Accident and Guarantee Corporation*.

This elderly lady is, perhaps, based on the lady litigants famous in the Irish courts prior to 1919 who, though unable to practise as lawyers, could prosecute cases in which they were concerned.

The Legal diary *for 16 June listed* In lunacy of Potterton *to discharge queries and vouch account.*

The Lady Cairns *case concerned a collision between the two vessels off the Kish Light in March 1904. There was an application in it on 16 June to fix time and mode of trial, and the matter was eventually heard from 21 to 23 June before the King's Bench. The court, disagreeing with the Board of Trade report, held that the* Lady Cairns *was to blame for the accident. The action was dismissed with costs and judgment was entered for the defendant on the claim and their counterclaim. The solicitors for the owners of the* Lady Cairns *were D&T Fitzgerald, a very influential firm in their day. In the scene in the* Evening telegraph, *it is remarked that they used to brief JJ O'Molloy.*

Harvey v Ocean Accident and Guarantee Corporation *involved a Mr Charles Meade Harvey, who purchased life assurance which provided that, if he should sustain any bodily injury by accident from an outward, external and visible means or cause, and die solely from the effect thereof, the corporation would pay his personal representatives £1,000. The unfortunate man's body was found floating in the River Lee. On 15 June 1904, the appeal of William Harvey, the administrator of the estate, from an order of the King's Bench following a decision against the estate on a special case stated, concluded and judgment was reserved.*

The elderly lady travels down the quays and is about to enter the offices of Reuben J Dodd – at 34 Ormond Quay Upper in 1904 – when she changes her mind and retraces her steps past King's, the law stationers (then at 36 Ormond Quay Upper), and smiles credulously at the vice-regal cavalcade.

The cavalcade had earlier passed and been ignored by Dudley White BL, who Maurice Healy, in his memoirs, described as a clever mimic and who practised from 29 Kildare Street in 1904. The cavalcade would later be spotted by Gerty MacDowell from outside Roger Greene's solicitors, whose offices were at 11 Wellington Quay in 1904.

Leaving the bookshop, Bloom, pondering where to eat, meets Richie Goulding and they go to the Ormond Hotel. While they are there, George Lidwell comes in.

George Lidwell is the solicitor Joyce consulted in his disputes with the publisher of Dubliners, *and some of the consultations occurred in the Ormond Hotel near his office at 4 Capel Street. Lidwell advised Joyce that, while Dublin's vigilance committee might press for Joyce's prosecution for the language used in the story 'Ivy Day in the committee room', the advisors to the Crown would not notice the story.*

After dining, Bloom leaves the Ormond Hotel and walks by 12 Ormond Quay Upper, noting that it is the address of 24 solicitors, a fact *Thom's directory, 1904* confirms.

The rare oul' times

At five in the afternoon, Bloom makes his way to Barney Kiernan's pub on Little Britain Street and joins the company of the citizen, Alf Bergman, and others. When JJ O'Molloy and Ned Lambert enter, they all discuss the alleged libel of Denis Breen by publication of 'U.p:up.' on a postcard. Breen had travelled with his libel from Collis and Ward to John Henry Menton and is sent as a prank to the sub-sheriff's office on 20 Ormond Quay Upper. JJ O'Molloy cites *Sandgrove v Hole* (2 KB 1 [1901]) and opines that the words are capable of defaming Breen. Their meaning remains a subject of debate among Joyce scholars. O'Molloy then discusses the 'Canada swindle' case, first mentioned by him in the *Evening telegraph* office, with Ned Lambert and tells him that the accused was remanded.

The Freeman's Journal *of 17 June reported the prosecution of James Wought, his sweetheart and her brother before Mr Swift KC in the Southern Police Court for obtaining by false pretences £1 from Benjamin Zaretsky, and 10 shillings from Henry Crown, and defrauding Jacob Cohen of £1 by pretending to be emigration agents who could arrange passage to Canada. Wought had several aliases, including Richards, Sparks, Saphero and Charles & Co. Wought was convicted on 11 July, though his co-accused were acquitted, and was sentenced to 12 months' imprisonment with hard labour by the recorder.*

In the novel, Alf Bergman then recalls the threat of the recorder to imprison Reuben J for taking a debt collection action, and he and Ned Lambert mock the recorder's gullibility.

In 1904, Dublin's recorder was Sir Frederick Falkiner. His court was just around the corner from Barney

Kiernan's in Green Street courthouse, and it was there that James Wought was sentenced to 12 months' hard labour. Sir Frederick was also chairman of the quarter sessions, County Dublin. He was known as a poor man's judge and his biography records his reputation for humanity, though the reputation may have been more for gullibility. Dublin, along with other Irish cities of the time, had a Recorder's Court. Following independence, its jurisdiction was transferred to the Circuit Court by the Courts of Justice Act, 1924 *and the then recorder was appointed to the High Court.*

Mention is then made of Arthur Courtenay and a case before Mr Justice Andrews.

The former was master of the King's Bench division and the latter a judge of it who was notorious for the severity of the sentence he imposed.

Take me up to Monto

Bloom leaves Barney Kiernan's in haste and, after visiting Paddy Dignam's widow and Sandymount strand, meets up with Stephen Dedalus in Holles Street hospital and they end up in Dublin's notorious red light district of Monto.

Following an altercation with soldiers in the Monto, Bloom and Stephen walk to the cabman's shelter under the loop line bridge. *En route*, Bloom warns Stephen of the dangers of the red light district and, in particular, of winding up before Mr Tobias in the Bridewell.

In fact, Matthew Tobias was not the judge but the prosecuting solicitor to the Dublin Metropolitan Police, of 4-7 Eustace Street. Indeed, he prosecuted James Wought.

Bloom realises his mistake, corrects himself and refers to Thomas Wall, chief magistrate of the DMP.

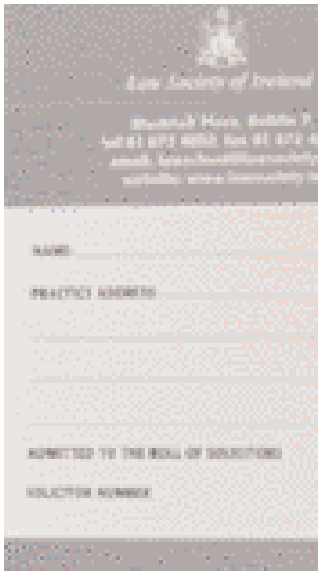
After leaving the cabman's shelter, Bloom and Stephen go to Bloom's Eccles Street home, where the flowing of water from the taps causes mention of the case taken against South Dublin Guardians for the over-consumption of water by Ignatius Rice, solicitor to Dublin Corporation.

Such cases were a common occurrence in then drought-stricken Dublin. The Freeman's Journal *reports the corporation's case against the guardians as adjourned on 7 and as settled on 8 June, with the guardians agreeing to pay 4d per gallon of water in excess of their permitted amount.*

Joyce's *Ulysses* is enjoyed by millions around the world who know very little of Dublin city or its history. Irish people are fortunate that their enjoyment of *Ulysses* is enhanced by the fact that it is a depiction of a day in their capital city's history, and Irish lawyers are more fortunate still that this depiction extends to their profession. G

Brian McMahon is a solicitor with An Post's solicitors' office.

CPD: ARE



As the continuing professional development cycle reaches its halfway point, Alison Egan answers the most common queries raised by practitioners

As we near the end of 2004, there are 15 months left to complete the 20-hour requirement for continuing professional development (CPD). The current CPD cycle ends on 31 December 2005. During this cycle, you are required to complete 20 hours of CPD – 15 hours of group study, and five hours of self-study. While most practitioners are aware of their CPD requirement, many do not realise that 25% of the required time is to be spent on management and professional development.

Management and professional development is a broad heading, and can include courses such as:

- Professional ethics
- Financial and business management
- Human resource management
- Budget control
- Computer skills
- Language training relevant to your legal practice
- Time and stress management courses
- Personal development and practice skills such as interviewing, advocacy, mediation, negotiations, communications and client care.

This list is designed to be illustrative, and is not exhaustive. These skills are at the very core of how you conduct your professional practice and are relevant whether you are dealing with clients or staff.

So, you have completed some hours of training to date, but you are not sure how to record them. Does the Law Society provide a form to note hours of training for the CPD scheme?

In May 2003, all solicitors were issued with a personalised CPD record card and explanatory booklet. Since the implementation of the scheme, over 80% of the enquiries have been from practitioners who need a replacement record card. If you still need a record card, if you have misplaced one or never received one, please contact the CPD executive, who will provide it for you. An A4 version of the record card can also be downloaded from the CPD section on the Law Society website.

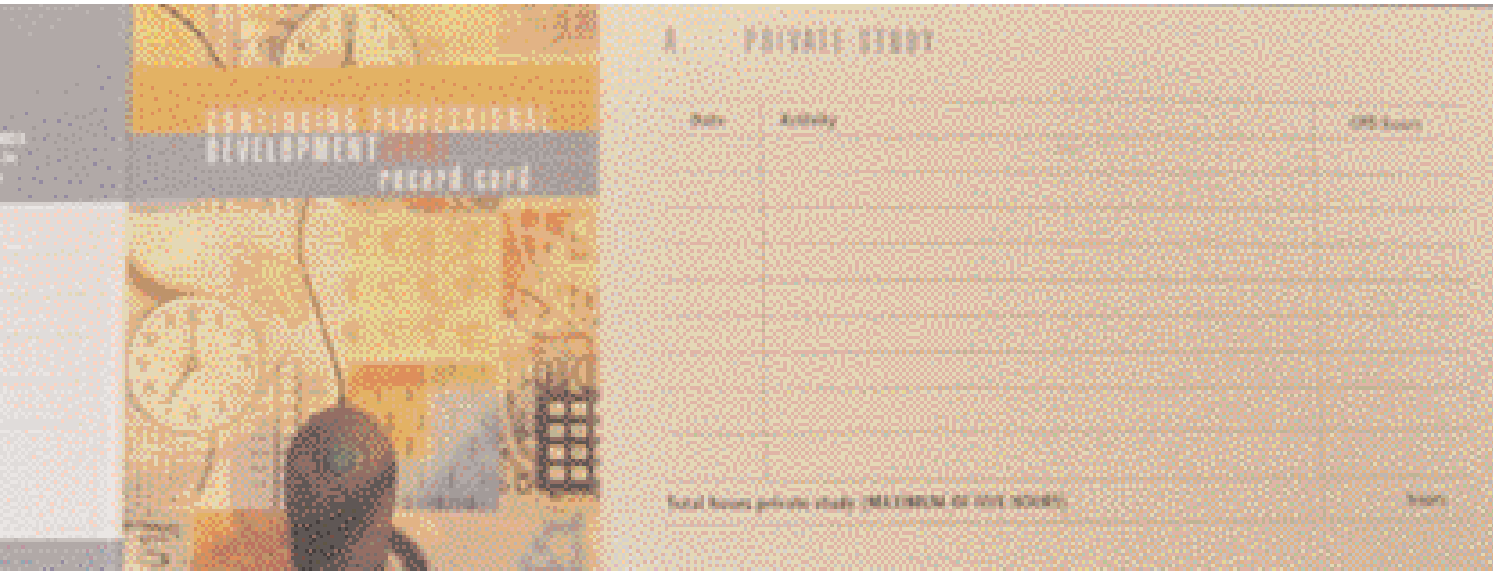
Once you have your record card, it should be completed carefully, noting your hours of attendance at various CPD events. These completed record cards can be returned to the Law Society by the end of December 2005, on application for your practising certificate. Please do not return record cards to us in December 2004.

As the scheme is one of self-certification, the record card is the only form of record that will be accepted. When the record cards are audited, further proof of attendance at courses will be sought. We will then ask for certificates of attendance from providers, or a letter confirming attendance at a course.

How do I fill out the record card?

The record card is a small driving-licence-sized record of attendance. Hours spent at training events should be noted by the individual solicitor. At the end of the cycle, the declaration is signed and the record card returned on application for your 2006 practising certificate.

YOU ON TRACK?



Section A: private study
Under this heading, hours spent on private or self-study should be noted. Private study can include such activities as:

- Reading the *Gazette*
- Reviewing case law
- Reading new acts or statutes
- Distance learning by correspondence or on-line learning courses
- Writing relevant articles.

This list is illustrative only. Note the date of the private study, the nature of it, and how many hours were spent. Simply total the hours spent on private study at the end of section A of the record card. A maximum of five hours only can be spent on private study.

Section B: group study – management and professional development
This heading should note hours spent on management and professional development (group events). Group study is defined as a group of three or more people. Under section B, note the date of the seminar/event, the title of the course, and include details of the course organiser. Calculate the amount of hours spent at these courses, excluding coffee breaks, lunch and registration time. Total the amount of hours spent at the end of section B. A minimum of five hours should be spent on management and professional development.

Section C: group study – general
This section is where hours spent at general CPD courses should be noted. The courses noted here should include lectures, tutorials, workshops, seminars, video-conferenced lectures, and relevant diploma and certificate courses. Under this section, again, note the date of the course, the title, format and nature of the seminar and details of the course organiser. Note the total number of hours spent under section C.

Signature
On the last page of the record card, practitioners should total the amount of hours spent on each type of activity included in sections A, B and C. This total should not be less than the 20-hour minimum requirement. The record card must be signed by the practitioner, and dated. Once the card has been completed, it can then be returned by the end of the current cycle, 31 December 2005.

If you have any enquiries about the CPD scheme, please contact me in the Law School on 01 672 4802. There is also a comprehensive CPD section on the Law Society website at *www.lawsociety.ie*

Alison Egan is the Law Society's CPD executive.

MAIN POINTS

- **20-hour requirement**
- **Cycle ends 31 December 2005**
- **Your questions answered**

SCHOOL OF

Your school days are not always the happiest days – particularly if you sit on the board of management. A recent English case concerning the expulsion of a secondary school pupil might have implications for schools in this country. Murray Smith has been swotting up

MAIN POINTS

- Expulsion of students
- Right to education
- Relevant statutes and case law

The English case of *R (on the application of L) v Governors of J School* ([2003] 1 AER, 1012) involved the expulsion of a pupil from a school, followed by his reinstatement. Threatened with industrial action by the teachers, the school set up a regime where he was taught separately from other students. The case eventually came before the House of Lords, based on whether this regime really amounted to 'reinstatement'.

The lords found in favour of the school. While there has not yet been an equivalent Irish case, it is possible – given our constitution, statute law, and case law – that a similar decision might be reached here.

Concrete jungle

A serious assault, involving pupil L, took place at J School. The head teacher expelled him, a decision later upheld by the school's governing body. L's parents then appealed to an independent panel, which ordered his reinstatement.

The reasons for that decision were given in Lord Bingham's judgment:

'There had been significant deviations from recommended investigative procedures; there was concern that other pupils involved in the incident had not been permanently excluded, raising a question whether pupils had been treated equally; there were discrepancies and inconsistencies in the evidence; the evidence did not suggest that L had been involved to the same degree as other excluded pupils; on the balance of probabilities, the appeal panel concluded that L had not been guilty of the specific behaviour of which he had been accused in the head teacher's letter (kicking the victim several times); permanent exclusion was not an appropriate response'.

Also, '[L] had no record of fixed-term exclusions and the head teacher believed him normally to be an honest pupil'.

The teaching staff, through their unions, voted for industrial action short of a strike, refusing to teach or supervise L. The pupil's parents threatened legal action against the school following a meeting between them and the head teacher, when he told them of the forthcoming teachers' ballot but added that L was reinstated on the school roll.

L later returned to the school, but he was not brought back into mainstream classes; rather, he was taught and supervised separately and on his own during the school day by a retired maths teacher who was not a union member. Other teachers set him work, which they marked. He was to stay in the room during the day, except for toilet breaks, and he was not to speak to or associate with any other pupil (except for another student who joined him, excluded for the same incident and also successful on appeal), or any staff member save his supervisor or those who wanted to visit him. Provisions were made for transport to and from school and for lunch.

This regime lasted for 30 days, ten before the end of the Easter term, and 20 before the students went on study leave. L sought judicial review of the school's actions, arguing that this regime was not 'reinstatement'. The lords found, by a three-to-two majority, in favour of the school. Of the majority judges, Lord Hobbhouse held:

'It is obvious that a pupil who has committed a serious disciplinary offence for which he was thought to merit permanent exclusion may, when that solution is found to be not available, still have to receive special treatment. Trust may have been destroyed; the capacity and inclination to disrupt may be undiminished; the risk of physical injury to others may still exist. Factors such as these may not unreasonably lead to responses from the teaching staff which, unless accommodated, put at risk the education of some or all of the other pupils of the school'.

Goodbye, Mr Chips

Lord Scott also concluded that the school did reinstate the pupil, emphasising 'the facts of the case', which was that the end of the school year was approaching and the time was imminent for the pupils to concentrate on their exams. In his opinion, the head teacher's adoption of the regime was 'a permissible response'.

Lord Walker said that one needed to take account of the teachers' threat of industrial action, which was legal. While calling the regime 'undoubtedly severe'

HARD KNOCKS

and its severity 'ill-advised', he rejected the suggestion that it was 'humiliating or degrading'. He pointed out that the regime was of short duration, that the pupil had, on his own admission, participated in serious violence, and that the head teacher and board had acted in good faith.

He concluded that the decision was 'not so extreme or so disproportionate as to go beyond the limits of their managerial and pastoral discretion … I would take that view even if the teachers had not made their threat of industrial action'.

While the teachers' action in putting pressure on the governors and head teacher 'threatened to frustrate the decision of the independent appeal panel', the action was 'in itself lawful'. Also, 'it was a risky and irresponsible course … But in the event it did not, in my view, lead to unlawful action by the governors or the head teacher'.

Bingham and Hoffman made reference to another case heard by the court, *P v NAS/UWT* ([2003] 1 All ER, 993). In that case, a pupil at a school was found by teachers to be disruptive in class and violent and

CLASS ACT

In terms of relevant statutory provisions, section 9 of the *Education Act, 1998* contains the provision that recognised schools should:

a) Ensure that the educational needs of all pupils, including those with a disability or other special needs, are identified and provided for
b) Ensure that the education they provide meets the requirements of education policy as determined from time to time by the minister, including requirements as to the provision of a curriculum as prescribed by the minister in accordance with section 30.

Section 29 of the same act says that if a board of management expels a student or suspends him for a prescribed period, the student (if over 18) or the parents can appeal the decision to the secretary general of the Department of Education and Science, where the appeal will be heard and determined by a committee appointed by the minister.

By contrast, while section 14(4) of the *Education (Welfare) Act, 2000* states that a pupil will not be expelled from a recognised school before the passage of 20 school days following the receipt of a notification to expel by the educational welfare officer, section 14(5) says that sub-section (4) is 'without prejudice to the right of a board of management to take such other reasonable measures as it considers appropriate to ensure that good order and discipline are maintained in the school concerned and that the safety of students is secured'.

Section 7(2) of the *Equal Status Act, 2000* prohibits discrimination by an educational establishment in terms of:

- The admission or conditions of admission of a person as a student
- The access of a student to any course, facility or benefit provided
- Any other condition of participation in the establishment by a student, or
- The expulsion of a student from the establishment or any other sanction against the student.

However, this discrimination only operates on nine grounds: gender, marital status, family status, sexual orientation, religion, age, disability, race and membership of the travelling community.

abusive in the playground. The headmaster directed that he be expelled from the school but the pupil appealed to the governors, who directed that he be reinstated. The headmaster instructed the teachers to take him back into their classrooms.

The teachers complained to their union, which directed that a ballot on industrial action be held. A case later taken against the union by the pupil led to the finding that a lawful trade dispute existed, as the dispute concerned the teachers' contractual obligations to teach him and therefore concerned their terms and conditions of employment.

'The Supreme Court held that the state's obligation was to "provide for" such education, not to supply it'

School around the corner

While there are no Irish cases like *R v Governors of J School*, there have been judgments regarding the admission, non-admission, suspension or expulsion of pupils that can illuminate the attitude Irish courts might take to such a segregationist policy, if practised in this jurisdiction.

The first was the Supreme Court case of *Eilis Crowley, Kathleen McCarthy and Others v Ireland, the Minister for Education, the Attorney General and Others* ([1980] IR 102). The case arose out of a strike involving all teachers (except one) in three national schools in a parish over the appointment of a principal of one of the schools. Not only did the teachers' union (the INTO) call a strike, it issued a directive to members in the schools adjoining the relevant parish not to enrol pupils from the strike-affected schools. After a period, the Department of Education provided school buses to bring children from the affected schools to other schools in adjoining parishes.

A number of pupils affected by this sued the first three parties for failing to properly provide them with free primary education, invoking the provisions of article 42.4 of the constitution.

Article 42.4 states: *'The state shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation'.*

The pupils also sued the INTO and the members of that union's executive committee, looking for an injunction to withdraw the directive, saying that it was part of a conspiracy to deprive them of their constitutional rights.

In the High Court, McMahon J held for the plaintiffs, saying that the article 42.4 conferred by implication a corresponding right to receive such education. Also, he held that the INTO directive was an unlawful means of depriving the relevant pupils of their constitutional right, even if the union's purpose was lawful. He held the state to be in default of its obligation to provide free primary education from 1 April 1976 to 31 December 1977, before it provided school buses.

The INTO did not appeal this ruling, but the first three defendants did. The Supreme Court held that the state's obligation was to 'provide for' such education, not to supply it, and that the state had discharged this obligation. The plaintiff's action against those three defendants was dismissed.

This case gave rise to others in which former pupils successfully sued the INTO for damages alleging breach of the right to receive primary education, such as *Liam Hayes v Ireland, the Minister for Education, the Attorney General, INTO and Others* (High Court, [1987] ILRM 651) and *Fiona Conway, John Sheehan, and Mary Lou Hurley v INTO and Others* (Supreme Court, [1991] 2 IR 305).

Bully for you

While these cases did not relate to the suspension or expulsion of a pupil, some do. In *The State (Derek Smullen and Declan Smullen) v Duffy and Others* ([1980] ILRM 46), the High Court upheld a principal's decision, after carrying out an immediate investigation, to suspend a number of pupils who were involved in a fight outside the school, including

the two plaintiffs, one of whom had stolen an iron bar from the school to use in the fight, and the other being wounded in the leg. He informed their mother that she could appeal the decision to the board of management within a certain period.

After discussing the principal's report, the board decided to suspend the plaintiffs until the end of the school year. The court said that the general scheme of discipline in the draft articles of management and put into practice by the principal and board was 'fair and wise'. The principal was entitled, after a *bona fide* investigation, to 'make an immediate suspension of one or more pupils in order to maintain peace and discipline within the school'. Because a 'proper and reasonable opportunity' had been given to the mother of the pupils to challenge the decision, it could not be challenged on the basis of unfairness, despite the refusal to permit the mother to be legally represented at the board's meeting.

Later cases include *Student A and Student B v Dublin Secondary School* (unreported, 25 November 1999). After two pupils were caught using cannabis, the headmaster told their parents that they had been expelled as part of the school's zero tolerance policy towards drugs, specified in its code of conduct. In subsequent meetings, he refused to change his mind, although he told the parents that they could appeal his decision to the board of governors. While correspondence and an account of the representations made on behalf of both boys was passed to the board by the headmaster, no meeting took place between either the parents or pupils and the board before it confirmed the expulsions.

The pupils sought from the High Court an interlocutory injunction to restrain the school from expelling them, alleging a breach of fair procedures and that the severity of the penalty imposed was disproportionate.

Kearns J held that one matter was a 'cause for concern': the expulsions being put in place before 'either the students or their parents had an opportunity of making representations prior to the imposition of the most severe penalty to be imposed by a school … This is an essential element of fair procedures'. He decided to adjourn the matter for a week in order to allow the plaintiffs and their parents to address the board before a final decision was made in terms of penalties. The board could still suspend or expel the plaintiffs, if, after hearing the submission, it felt that it was the 'proper and appropriate course of action to adopt'.

Teacher's pot

Another case is *James Wright and Alexander Wright v The Board of Management of Gorey Community School* (High Court, unreported, 28 March 2000). Both plaintiffs were suspended from school pending investigation into allegations regarding drugs, alleged to have been bought by the first plaintiff and delivered to the school by the second. The first plaintiff had previously been suspended for admittedly bringing cannabis to the school. The board of management then, on the evidence provided, decided to expel one and suspend the other for a specified time.

They took a case against the board, alleging that it acted in violation of fair procedures and, in advance of the trial of their case, sought an interlocutory injunction for immediate reinstatement in the school until then.

O'Sullivan J ruled against the two, holding that the balance of convenience favoured the refusal of their reinstatement. If he were to order reinstatement, 'enormous damage will have been done to the authority and policy of the defendant school'. But if he were to refuse the injunction sought, and the plaintiffs eventually won their case, they will 'in all probability in the meantime have had access to appropriate schooling'. Also, they were not facing watershed examinations, and if they won, 'their reputations can be vindicated'.

In *McKenna (a Minor) v O Ciarain* (High Court, unreported, 30 November 2001), Ó Caoimh J granted an order of *mandamus* directing the principal of a vocational school to readmit a pupil to that school. The applicant and others had initially been suspended by the principal and then expelled from the school by the board of management for smoking cannabis, but the board later decided to reinstate them. The principal had refused to comply with the direction to reinstate the applicant, even though the VEC endorsed the board's decision.

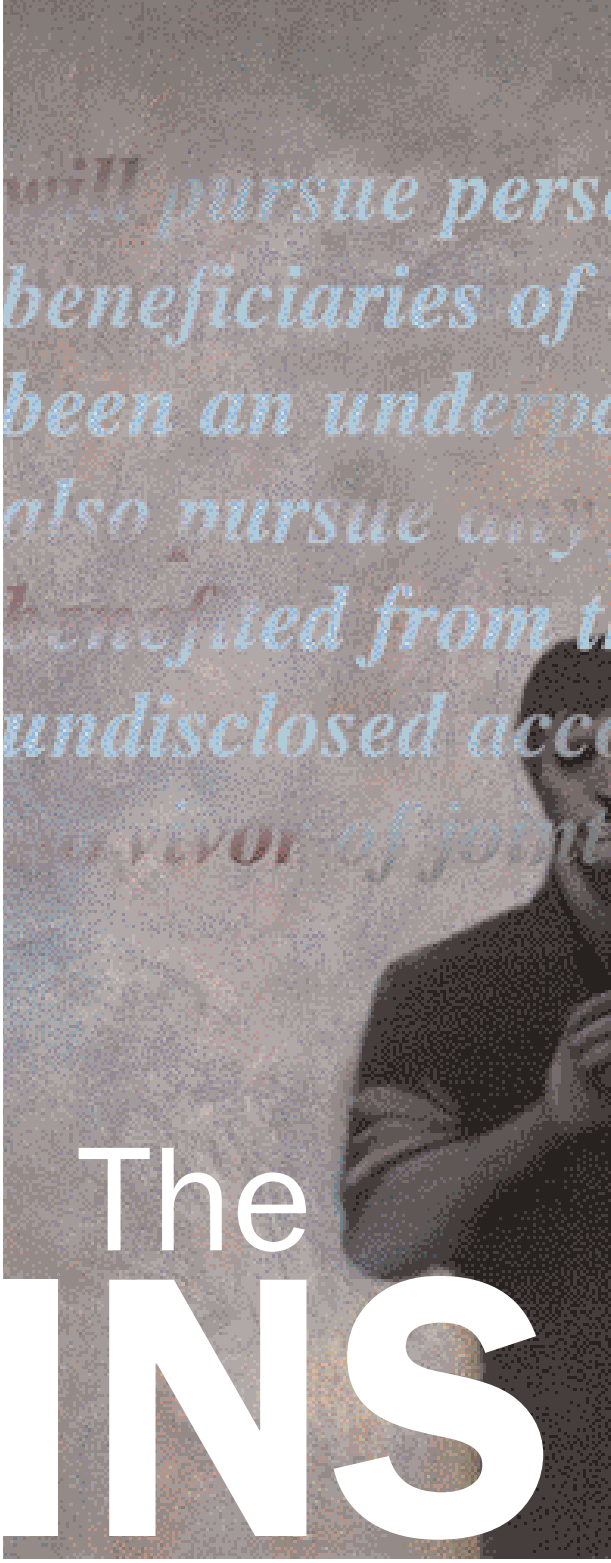
Dangerous minds

What could an Irish school do if, after following fair procedures, it expels a pupil who is violent and abusive, and reinstatement is then ordered – whether by a court order or by a recommendation of an appeals committee to the secretary general – and the teachers, via their union, decide after a lawful ballot not to supervise or teach the pupil? Can the school, invoking section 14(5) of the *Education (Welfare) Act, 2000*, set up a scheme of segregation similar to that in the case of *R v Governors of J School*?

It is possible that an Irish court might find in such a school's favour, but only on certain grounds. First, all reasonable efforts would need to be taken to keep the pupil's education up to prescribed standards. Second, the segregation would have to be of a short duration.

Even in the circumstances of the English case, J School's policy was only upheld by a small majority. G

Murray Smith is a Dublin-based barrister.



The SINS

Last year, the Revenue Commissioners issued 7,000 registered letters on a speculative basis in cases involving deceased holders of bogus non-resident accounts. Julie Burke explains the legal and tax issues that arise in such cases and provides guidelines for solicitors or their clients as personal representatives

MAIN POINTS

- Taxation of a deceased person's estate
- Tax liability on bogus non-resident accounts
- Responsibilities of the personal representative

On 20 February 2004, the Revenue stated on RTÉ's *Morning Ireland* that: '*If somebody has not declared their taxes, they are liable or their estate is liable for those taxes, and we seek to collect those taxes from the estate or those people who have benefited from the estate – that is the position in a nutshell. This is the case irrespective of when the deceased died or any other mitigating circumstances*'.

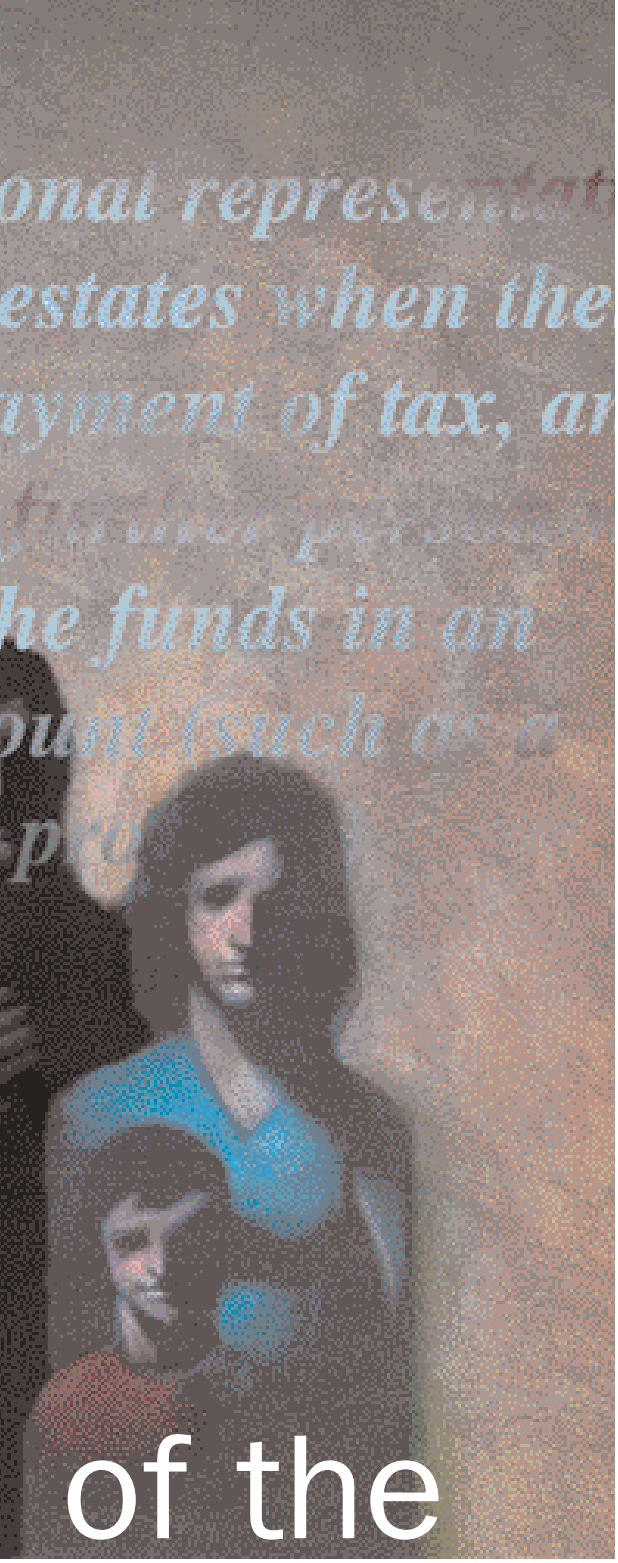
This is not an accurate reflection of the legal and tax position. Where the account holder is alive, it is usually possible to determine the underpaid tax liability (if any) and the resultant charge to interest and penalties. However, where the original account holder is deceased, the estate fully wound up, assets distributed and (in many cases) the account closed, the position is far from straightforward and gives rise to a number of very complex legal and taxation issues for both personal representatives and beneficiaries. These issues and the associated practical difficulties arising from a lack of information (as most of the accounts span over a period of 20 years or more) means that such cases are fraught with difficulty.

The position is made more difficult by the hard-line approach currently being adopted by the Revenue. Very often, beneficiaries or personal representatives only become aware of the undisclosed account on receipt of a registered letter from the Revenue. It appears that the Revenue is prepared to use scare tactics, such as the threat of legal proceedings, to induce payment, irrespective of whether or not it is lawfully entitled to do so. The situation is further exacerbated by the fact that, in most cases, correspondence from the Revenue is initially being sent to one of the most vulnerable groups in our society, namely the elderly, who are easily pressurised and frightened by the Revenue.

These cases will be particularly relevant to solicitors who have acted as executors in estates where the deceased was the holder of a bogus non-resident account and the estate has been fully wound up. In such cases, the solicitor/executor will normally be totally unaware of the existence of such an account until correspondence is received from a relevant bank or the Revenue.

Who is liable?

The Revenue's view, published in November 2003, indicates that it '*will pursue personal representatives and beneficiaries of estates when there has been an underpayment of tax, and will also pursue any further*



of the PARENTS

person who has benefited from the funds in an undisclosed account (such as a survivor of joint property)'.

In the Revenue's opinion, there are no statutory limitations on its right to recover underpaid tax, interest and penalties from personal representatives or beneficiaries in this type of case under relevant legislation. Following discussions with various professional bodies in February 2004, the Revenue confirmed that '*where a personal representative has acted properly in all respects, and all assets in an estate have been distributed when the liability on the account is discovered, they will* ***not seek to initiate proceedings*** *against the personal representative in his or her personal capacity to recover the tax. However, in order to recover tax from a beneficiary, it may be necessary to join a personal representative in proceedings to progress such a claim*'.

The Revenue statement is of limited benefit to a personal representative where he or she will, of necessity, be joined in any proceedings for the recovery of unpaid tax. Also, a personal representative is likely to experience difficulties in the recovery of the incumbent costs when (as in most cases) the estate is fully wound up.

The Revenue has indicated that, irrespective of the various defences available to personal representatives that may exist, its mandate is to collect the underpaid liability. No account will be taken of passage of time, lack of knowledge or intent on the part of the relevant parties. My experience to date indicates that, in many cases, the mere threat of Revenue proceedings has induced payment, regardless of whether or not an enforceable liability exists. Clearly, this may give rise to an exposure for personal representatives in cases where tax, interest and penalties may have been overpaid. It is advisable in these circumstances for all relevant parties to consider what remedies are available to claim a refund.

Key issues for a personal representative

There are a number of points that should be noted:

- Where an estate is in the course of administration, the personal representative has a legal duty to pay the debts of the deceased (including any underpaid tax liability) with due diligence. Any unpaid tax liability falls to be discharged in accordance with the general rules set out in section 46 of, and the first schedule to, the *Succession Act, 1965*. Part 1 of the first schedule sets out the rules as to application of assets towards payment of debts where the estate is insolvent and part 2 of the first schedule sets out

the rules where the estate is solvent
- The assessable person under section 1048 of the *Taxes Consolidation Act, 1997* (TCA) is the executor/administrator and not any other person, such as a beneficiary or a joint account holder with the deceased
- No liability is created or due until such time as an assessment is raised
- The underpaid tax is a debt due from the estate and is payable only out of assets of the deceased. Therefore, joint property that passes by survivorship does not form part of the estate of the deceased and so is not available to meet the deceased's outstanding tax liabilities at date of death. As provided in section 10(4) of the *Succession Act, 1965*, property to which a deceased is entitled for an estate or interest that ceases on his death does not pass to his personal representatives and does not form part of his assets for the payment of debts, liabilities and any legal right, as defined in section 45(1) of the act
- Personal representatives should always ensure that enquiries concerning the entitlement to joint property are made at the beginning of the administration period, because in certain cases joint property can be deemed to be held upon a resulting trust for the estate and in this instance would be so available for debts (*Lynch v Burke*, [1995] 2IR 159)
- Section 10 of the *Conveyancing Act 1634* provides that any conveyance of property (real or personal) with intent to 'delay, hinder or defraud creditors and others of their just and lawful debts, rights and remedies' is 'void' as against any person who is prejudiced as a result (*Re Moroney*, [1887] 21 LR IR 27). The Revenue Commissioners, being creditors in respect of unpaid tax on income, could apply to the court to have any such conveyance voided. In order to succeed in having a conveyance voided in this way, it is essential that an intention to defraud creditors be established by the applicants (in these cases, the Revenue), and the onus of proof rests on the person seeking to have the conveyance voided (*Bryce v Fleming*, [1930] IR 376; *Re O'Neill*, [1989] IR 544; *Myers v Duke of Leinster*, [1814] 7 IR Eq R 146). Even where a conveyance of property is fraudulent and appears to fall under section 10, section 14 of the 1634 act provides that a conveyance of property will not be voided where it is conveyed on 'good' consideration to a person with no notice of an intention to defraud creditors (*Bryce v Fleming*).

Can the Revenue assess personal representatives in respect of the unpaid income tax, interest and penalties on the funds held in the accounts during the lifetime of a deceased person?
Yes. Section 1048(2) of the TCA imposes a strict time limit on the assessment of executors and administrators in respect of underpaid tax of the deceased. The limit is the same as if the deceased person were still alive, but is restricted to three years after the year of assessment in which the person died in a case in which the grant of probate or letters of administration was made in that year, and to two years after the year of assessment in which the grant was made in any other case.

Can the tax time limit in section 1048(1) of the TCA be extended?
Sub-sections 1048(2)(a) and (b) provide for an extension to the time limit in section 1048(2) of the TCA in circumstances where there has been a material error/omission from the Inland Revenue affidavit filed in the estate of the deceased. These sub-sections extend the time for raising an assessment to two years after the year of assessment in which the corrected affidavit is delivered. Within that time, the Revenue may raise an assessment for which one could have been made on the deceased if he were still alive.

There are certain cases where it may be argued

MAJOR QUESTIONS TO CONSIDER

- Does the personal representative have a personal obligation to act, even though the estate is fully wound up?
- Could he be potentially personally liable for unpaid taxes of the deceased?
- Is there a legal requirement to respond to communications from the Revenue?
- What is the status of a letter from the Revenue sent to a personal representative?
- Is an assessment required prior to discharge of any historic tax liability?
- What is the personal representative's position if he knew that such an account was omitted from the Inland Revenue affidavit filed in the estate?
- What is the personal representative's position if a tax claim that transpires to be unenforceable or excessive is discharged?
- How can a personal representative determine whether tax has been paid on the income earned on funds contributed to the account?
- Are interest and penalties payable in respect of underpaid tax by a deceased?
- How can the personal representative determine whether the deceased availed of a tax amnesty in respect of the account?
- What are the limitations imposed on the Revenue's right to recover underpaid tax from the estates of deceased persons or from personal representatives or beneficiaries?
- Can a personal representative be the subject of a criminal prosecution by the Revenue in cases of this type?
- What defences are available to a personal representative where the estate is fully wound up?
- What is the time frame for a response from the Revenue following the making of a submission? Will the Revenue issue a letter of clearance to personal representatives?

that the exclusion of an account from the Inland Revenue affidavit will not fall within the category of 'error or omission' and in such cases the Revenue is not entitled to extend the initial time limit – for example, where no account existed at date of death and it was not the subject of a prior taxable gift.

Where the Revenue is clearly entitled to extend the time limit under this sub-section, the onus will be on the Revenue to require that an additional affidavit be filed for the purposes of capital acquisitions tax to record the funds that existed in the accounts at the date of death. The Revenue is of the view that this gives it the right to re-open the time limit without limitation.

Is the Revenue entitled to recover penalties from the estates of deceased persons?

Section 1060 of the TCA permits the Revenue to assess penalties in respect of unpaid tax of a deceased person.

However, the case of *AP, MP & TP v Switzerland* (71/1996/690/8802) held that the penalty for tax evasion imposed on the heirs of a deceased person under Swiss law was contrary to the *European convention on human rights*. Since the convention has now been implemented into Irish law by the *European Convention on Human Rights Act, 2003*, it can now be argued that the Revenue is not entitled to recover penalties in respect of unpaid tax from the estates of deceased persons.

What defences are available to personal representatives when the estate is fully administered and all funds distributed?

On the basis that the personal representative acted in good faith, it can be claimed that the estate has been fully administered in a proper manner known as *plene administravit*. The Revenue should not be able to overcome this defence by pleading *devastavit*, provided that the personal representative has acted *bona fide* at all times. If he has failed to act properly, then he may be personally liable.

The effect of successfully pleading *plene administravit* in the context of the Revenue as a creditor is that the personal representative will be relieved from liability and the Revenue, as is the case with any other creditor, must seek out the beneficiaries and request payment from the inherited assets or the investment of those assets in the hands of the beneficiaries. The equitable remedy of tracing the assets of the deceased into the hands of the beneficiary is a matter that may only be dealt with by the courts. The Revenue is likely to be faced with a number of practical difficulties in making its claim, and beneficiaries will be entitled to use equitable defences to resist that claim.

Where the estate is fully wound up and the Revenue is not entitled to extend the time limits, then the personal representative should immediately advise the Revenue of the position and advise it that, if sued in respect of underpaid tax, he will be pleading *plene administravit*.

Dublin Castle: home of the Revenue

A further protection is afforded to personal representatives where notice to creditors has been published in accordance with section 49(1) of the *Succession Act, 1965*. This section protects personal representatives from being found personally liable to persons with claims against the estate (which would include the Revenue) in respect of the assets where, at the time of the distribution, they were unaware of the claim against the estate.

Section 3(2) of the *Statute of Limitations Act, 1957* provides that:

'This act shall not apply to:

a) Any proceedings for the recovery of any sum due in respect of a tax or duty which is for the time being under the care and management of the Revenue Commissioners, or interest thereon, or

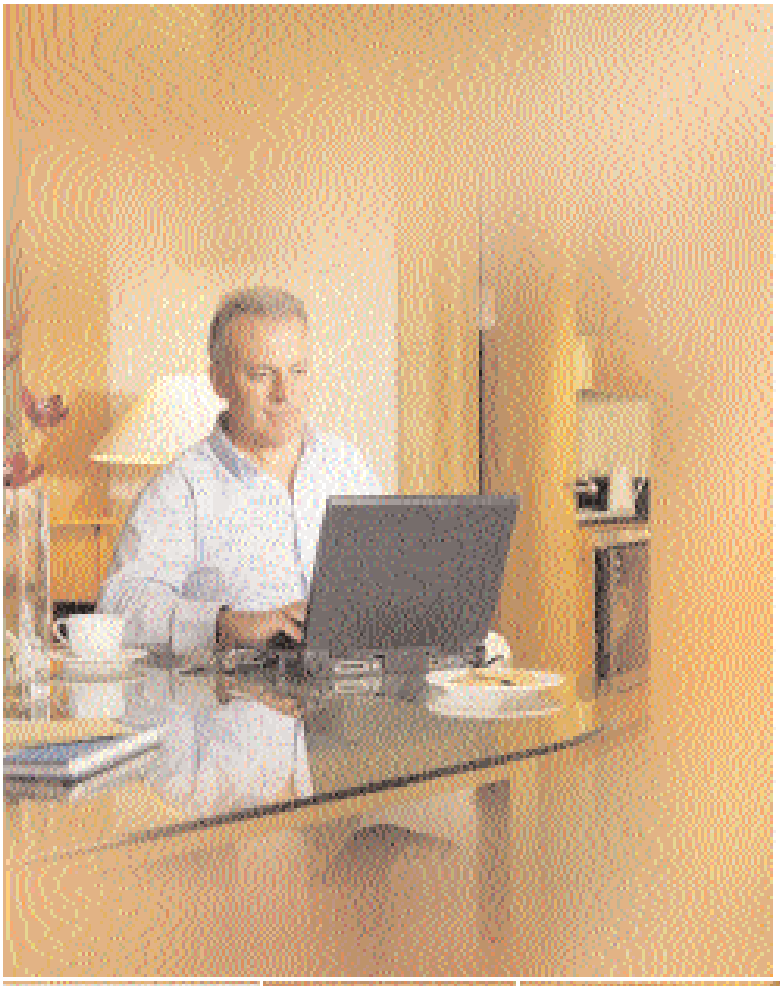
b) Any proceedings for the recovery of any fine, penalty or forfeiture incurred in connection with any such tax or duty, or

c) Any forfeiture proceedings under the Customs Acts *or the acts which relate to the duties of excise and the management of those duties'.*

Thus, the limitation periods set out in the statute do not apply in the case of actions taken by the Revenue Commissioners for the recovery of outstanding tax liabilities.

Although the *Statute of Limitations Act, 1957* is specifically disapplied for the purposes of recovery of unpaid taxes under the TCA, commentators have argued that the Revenue will be subject to time limits imposed by section 9 of the *Civil Liability Act, 1961*, which provides that:

'No proceedings shall be maintainable in respect of any cause of action whatsoever that has survived against the estate of a deceased person, unless either proceedings have commenced within the normal limitation period and were pending at the date of his death or are commenced within the normal limitation period or within two years after his death, whichever period first expires'.

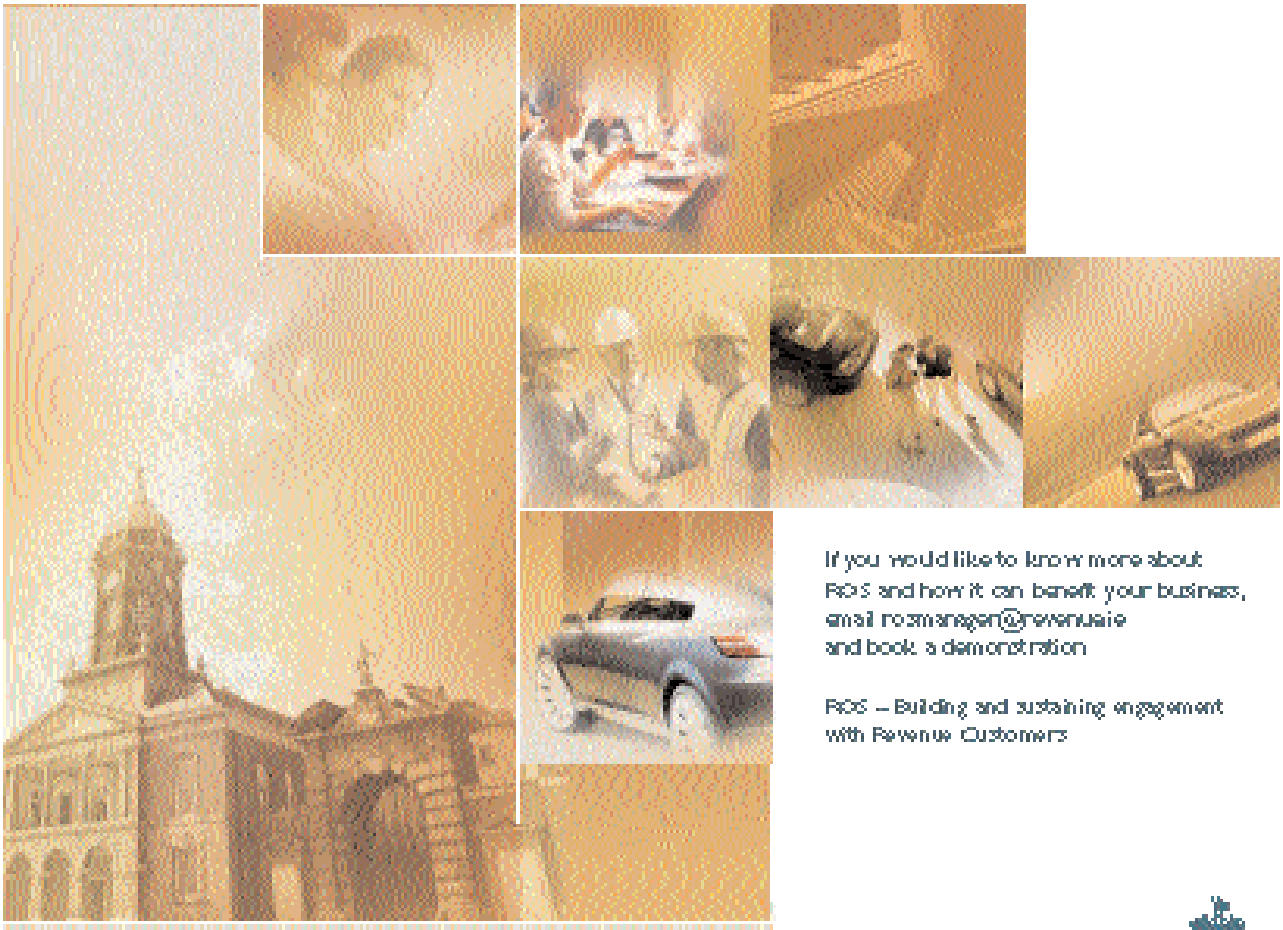


ROS

Revenue On-Line Service

Revenue Users Blog

- Instant access to tax details 24 hours a day
- Speedier processing of business tax returns
- Instant acknowledgement
- Effective and efficient use of time and resources
- Safe, secure and confidential
- On-line calculation facilities
- Speedier repayments
- Facility to seamlessly transmit data, from third party software packages, direct to ROS



If you would like to know more about ROS and how it can benefit your business, email rosmanager@revenue.ie and book a demonstration

ROS – Building and sustaining engagement with Revenue Customers

Revenue

www.revenue.ie

Is there a legal obligation to make a voluntary disclosure to the Revenue?

There is no legal requirement on a personal representative to make an unprompted voluntary disclosure to the Revenue. However, insofar as the estate is in the course of administration, the onus is on the personal representative to ensure that all proper tax liabilities of the deceased are discharged and a letter of tax clearance obtained.

A personal representative risks being personally liable for the deceased's debts, including tax, where he has failed to discharge all known liabilities, all proper enquiries having been made and a letter of tax clearance obtained prior to distribution.

Where the estate has been fully wound up, the position is more complicated. Professional advice should be obtained to determine whether there is an enforceable liability. If so, it would be prudent to consider making a voluntary disclosure. Having first obtained agreement/indemnity from beneficiaries, an unprompted voluntary disclosure will substantially reduce the risk of criminal prosecution and will normally facilitate the minimisation of penalties.

What is the risk of criminal prosecution?

Section 1078 of the TCA provides that a person who *'knowingly or wilfully delivers any incorrect return, statement or accounts or wilfully furnishes any incorrect information in connection with the tax is liable to a penalty punishable by a fine of €3,000 and/or 12 months' imprisonment on summary charge in the District Court or €126,970 and/or five years' imprisonment on trial on indictment in the Circuit Court'.*

It is most unlikely that a personal representative will knowingly or wilfully file false tax returns in the estate of the deceased person, this being the standard of proof required for a criminal sanction. However, caution should be exercised where a personal representative may act in a dual capacity, such as where he may have been jointly assessed with the deceased taxpayer for income tax purposes or as a joint account holder with the deceased.

It should be noted that if a voluntary disclosure is made by a personal representative in relation to an account and provided it is accepted by the Revenue, it is normal practice that an assurance will be given by the Revenue that the case will not be considered for investigation with a view to a criminal prosecution. G

Julie Burke is principal of the Dublin firm of JM Burke Solicitors. She is a fellow of the Irish Taxation Institute and editor of the Irish tax review.

Negotiating t

The development of alternative dispute resolution techniques to some extent reflects the real or perceived shortcomings of legal negotiations. But perhaps legal negotiations as a particular method of dispute resolution could be enhanced, argues Kevin Liston

MAIN POINTS

- Alternative dispute resolution
- Legal negotiations
- Development of the justice system

Traditionally, the parties in adversarial litigation, through their legal representatives, determine the form, content and pace of proceedings. The trial could be described as a private contest engaged in before a public official. The judge, as arbiter, having heard the competing testimonies and submissions as presented to the court, exercises his judicial decision-making authority with a measure of impartial detachment and thereby justice is done. If proceedings are compromised, the settlement may be reached at any time, including on the day fixed for the trial of the action.

Judicial case management and ADR

In all the major common-law jurisdictions, two particular developments in recent years have had a significant impact on civil litigation – namely, judicial case management and the availability of alternative dispute resolution systems.

Lord Woolf in the UK has defined judicial case management as: 'the court taking the ultimate responsibility for progressing litigation along a chosen track for a pre-determined period during which it is subjected to selected procedures which culminate in an appropriate form of resolution before a suitably experienced judge. Its overall purpose is to encourage settlement of disputes at the earliest appropriate stage; and, where trial is unavoidable, to ensure that cases proceed as quickly as possible to a final hearing which is itself of strictly limited duration'.

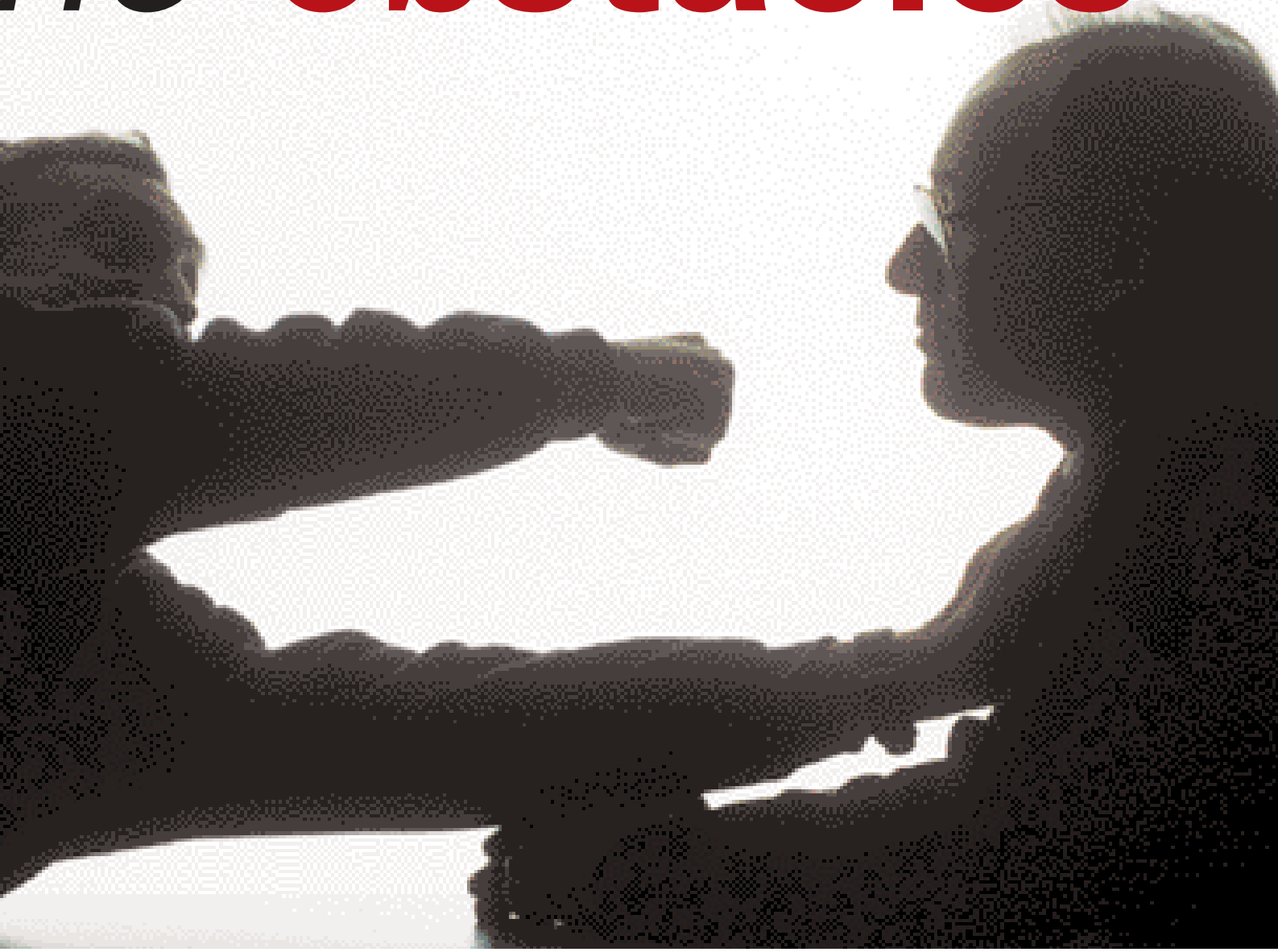
Successful judicial case management helps to eliminate unnecessary delay, drift, confusion and complexity in civil proceedings and enables the cost of proceedings to be independently monitored.

The range of, and the demand for, alternatives to litigation have expanded greatly in recent years. The concept of alternative dispute resolution, commonly known as ADR, began to develop initially in the United States about 25 years ago as an attempt to avoid the shortcomings of the litigation and arbitration processes, arbitration having been criticised for being litigation by another name. As a method of dispute resolution, arbitration has been around for centuries.

ADR is generally understood nowadays to refer to methods of resolving disputes other than litigation or legal negotiations. ADR continues to take on a growing importance and to be given increasing recognition both by legislators and by the courts in the major common-law jurisdictions. ADR has also developed in many continental European countries.

In England and Wales, under the *Civil procedure rules* (CPR), the main body of which came into force on 26 April 1999, the courts have, in the discharge of their judicial case-management function, encouraged the use of ADR. Under the new rules, a failure to

he **obstacles**



Trevor suddenly realised that the negotiations weren't going well

seriously consider the possibility of ADR procedures when encouraged by the court to do so can, in due course, be relevant to the issue of costs. Furthermore, ADR is now considered to be at the heart of today's English justice system, in which litigation has to some extent come to be seen as the option of last resort.

Legislative provisions for ADR

Provision for ADR, particularly in the form of mediation, has been made in various pieces of Irish legislation in recent years. In the area of family law, it is provided for in the *Judicial Separation and Family Law Reform Act, 1989*, the *Family Law (Divorce) Act, 1996* and the *Children Act, 1997*. Each act imposes a legal obligation on solicitors to discuss with their clients the possibility of engaging in mediation as an alternative to contentious family law proceedings. In relation to proceedings in the new Commercial Court (see **panel,** page 30), a judge may, on application to the court or by his own motion, adjourn the proceedings for up to 28 days to facilitate a reference of the dispute to mediation, conciliation or arbitration. The court cannot compel the parties to engage in ADR, but an unjustified failure to give it due consideration may have costs implications. Section 15 of the *Civil Liability and Courts Act, 2004* will, when the section becomes operative, enable a court in a personal injuries action (upon the request of any party to the proceedings) to direct the parties to attend a mediation conference with a view to attempting to settle the proceedings.

THE COMMERCIAL COURT

SI no 2 of 2004, constituting order 63A of the *Rules of the Superior Courts*, which came into effect on 12 January 2004, established the Commercial Court as a new division of the High Court. Rules 14 and 15 make provision in appropriate cases for the judicial case management, in the form of a case-management conference, of commercial proceedings. The case-management conference is chaired and regulated by a judge. The general purpose of such conferences, as set out in rule 14(7), is 'to ensure that proceedings are prepared for trial in a manner which is just, expeditious and likely to minimise the costs of proceedings'. Every case, whether the subject of case management or not, has a pre-trial conference at which the judge establishes what steps remain to be taken in preparation for the trial.

Section 16 provides that a party who fails to comply with the court's direction may at the conclusion of the proceedings be penalised in costs.

Legal negotiations

In a landscape in which sweeping changes are taking place (see **panels**), relatively little attention has been given, at least in Ireland, to how legal negotiations as a method of dispute resolution might be enhanced. Indeed, the development of ADR to some extent reflects the shortcomings, real or perceived, of legal negotiations. But is it not somewhat curious that mediators and other ADR specialists who are not lawyers should by choice be called upon to help resolve disputes for which there are legal remedies? Surely, lawyers ought to be better equipped than non-lawyers at bringing about the settlement of such disputes? But perhaps ADR specialists have acquired a particular expertise with which lawyers as legal negotiators are by and large unfamiliar. Perhaps legal negotiations as a particular method of dispute resolution could be enhanced by lawyers developing a greater awareness of the strengths of various ADR systems.

So why is there relatively little attention given to legal negotiations as a method of dispute resolution?

ALPHABET SOUP: PIAB AND PRTB

More radical recent ADR developments have taken place with the establishment of the Personal Injuries Assessment Board (PIAB) and the Private Residential Tenancies Board (PRTB). PIAB was established as a statutory body following the coming into force on 28 December 2003 of the *Personal Injuries Assessment Board Act, 2003*. As is now well known, the principal function of PIAB is to assess the compensation to be paid in respect of civil personal injuries claims (and damage to property claims if caused by the same wrong) in any case in which there are no legal issues, including that of liability. The act applies to most categories of civil action other than civil actions arising from medical negligence (and a further limited number of categories).

The Private Residential Tenancies Board, also a statutory body, has recently been established pursuant to the *Residential Tenancies Act, 2004*. The act makes provision for a new dispute-resolution service in relation to all disputes between landlords and tenants of dwellings to which the act applies. The service, when part 6 of the act becomes operative, will be provided through the PRTB and will comprise mediation or adjudication and tenancy tribunal hearings. The PRTB's dispute-resolution function will, by and large, replace the role currently exercised by the courts in relation to such disputes.

One possible explanation is that legal negotiations are not seen by lawyers as a dispute resolution system with an identity that is separate from that of litigation. This is hardly surprising, given that legal negotiations frequently constitute an attempt to compromise proceedings and frequently take place at the door of the court.

Gratuitous confrontation

There is undoubtedly an interconnection between litigation and contentious legal negotiations, and sometimes it is necessary to have legal proceedings instituted because of the other party's preceding failure to deal in earnest or at all with the matters in dispute. Nonetheless, there is a fundamental difference between adversarial litigation and legal negotiations. Adversarial litigation constitutes a contest *inter partes*. The purpose of legal negotiations, on the other hand, is to achieve a consensual outcome to the dispute. However, this essential difference between litigation and contentious legal negotiations can be obscured when aspects of the litigation process make an unfavourable impact on the negotiations. For example, if the negotiations take place in an effort to compromise proceedings, they may be conducted against a background of diametrically opposed and mutually incompatible one-sided assertions of fact in relation to past events having been set out in the pleadings. When negotiations take place against such a confrontational background, the adoption of extreme bargaining positions is more likely, with the result that the goal of a consensual outcome to the negotiations will be more difficult to achieve.

But even before the possibility of a consensual resolution of the issues has been explored, it would seem – perhaps because of the presence of the adversarial mindset – that parties are often unwittingly positioned for a contest. It is not unusual for a solicitor's initial letter of claim to conclude with a paragraph such as this:

'We hereby inform you that our client holds you fully responsible for the loss and damage that he has sustained. We now call on you within the next 14 days to admit liability for the said loss and damage and to compensate our client in full, failing which proceedings will be instituted against you without further notice'.

An initial letter of claim that is perceived by its recipient to be gratuitously confrontational and which makes no reference to a desired or possible consensual outcome to the matters in dispute is not conducive to the creation of a favourable negotiating environment.

Frame of reference

Litigation as a means of resolving legal disputes involves an elaborate process. Legal negotiations, in contrast, do not have a given procedural and regulatory framework. In view of the fundamental difference between the two and the influence of the adversarial mindset, legal negotiations, in my view, would benefit from having their own framework.

Furthermore, in as much as there are certain procedural differences in litigation depending on the nature of the claim, there ought to be differences in the make-up of the negotiating framework depending on the nature of the matters in dispute.

An independent framework for legal negotiations composed of a process and set of ground rules would result in a higher rate of settlement, and also better quality and speedier settlements. A negotiation process could be designed, where appropriate, to promote a problem-solving approach to the issues. Problem solving usually involves the development of settlement options and the search for a creative and imaginative resolution of the matters in dispute. Option development is a valuable exercise when there is, as with a typical family law case, more than one way of resolving the issues in dispute.

The establishment of an independent negotiation framework ought to give rise to progressive developments in the justice system designed to promote legal negotiations. Take, for example, disclosure of documents as an area of dispute resolution in which such developments might take place. Orders for discovery are currently only available in the course of on-going proceedings. It is not possible to bring an action for discovery *simpliciter*. But if an independent framework for legal negotiations gave rise in due course to the availability of an action for discovery in the context of on-going structured legal negotiations, parties might, in appropriate cases, agree to provide in the ground rules for the negotiations that, in the event of the negotiations running into difficulties over the issue of disclosure of documents, the issue could be referred to the court. The position would then be that, following the expeditious judicial determination of the issue, negotiations could promptly be resumed. Currently, if such difficulties arise, a full-scale action is required.

PRE-ACTION PROTOCOLS

In England and Wales, in addition to the changes brought about by the development of judicial case management and by the promotion of ADR, another area of change that has made a significant impact on the handling of contentious civil cases is the establishment under the CPR of what are called pre-action protocols for particular areas of civil litigation. Pre-action protocols are codes of sensible practice that the parties are expected to follow as soon as the possibility of litigation has been identified. These codes are designed principally to promote meaningful negotiations by endeavouring to ensure, first, the prompt exchange of relevant information and, second, the making of realistic offers to settle *before* the commencement of proceedings. There are now pre-action protocols in force in various areas of litigation, such as in the areas of personal injuries, professional negligence and judicial review. Under the CPR if, as a result of one party not complying with the applicable protocol, proceedings are commenced that otherwise would not have been necessary, or costs are incurred that otherwise would not have been incurred, the court will try to put the other party into the position he would have been if the protocol had been complied with. According to the *Civil procedure (white book) 2003* (Sweet & Maxwell, London), new litigation post-CPR has reduced by 80% in the High Court and by 25% in the County Court.

Some of the legislative changes that have taken place in Ireland recently have not been welcomed by the legal profession. However, changes in the manner in which legal negotiations might be conducted could, with the support of court rule-making committees, be shaped to a large extent by the profession itself. At the root of such changes should be, firstly, the idea of legal negotiations in appropriate cases being promoted as the preferable first option in the resolution of legal disputes and, secondly, the idea of the lawyer as a problem solver. G

Kevin Liston is the managing solicitor of the Gardiner Street Law Centre, Dublin, and author of the forthcoming Family law negotiations, *to be published by LexisNexis.*

Tech trends

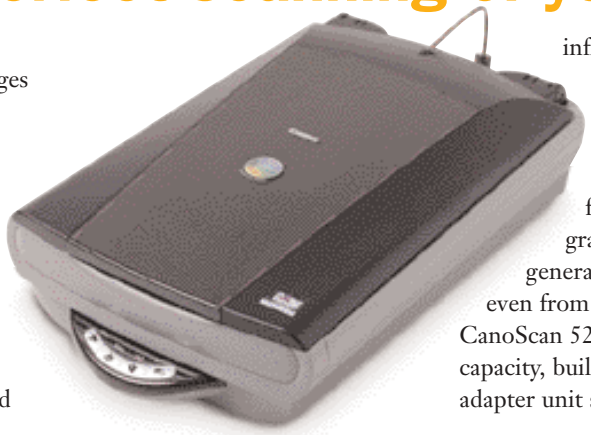
Projecting the right image

If making presentations is part of your job, then you might be interested in the new multimedia PT-LM1E projector from Panasonic. Weighing in at just 1.6kg, the machine has a footprint slightly smaller than the average magazine, so it won't take up much room on your desk. The PT-LM1E projects 1,200 lumens of brightness, promising sharp, crisp images (Panasonic claims that it uses 'artificial intelligence' to 'instantaneously adjust the brightness of the lamp to optimise on-screen imaging'). And, like most projectors these days, it can be used with a wireless remote control and can also be used to play DVDs and videos.

The PT-LM1E costs around €1,200 and is available from office suppliers nationwide.

Picture perfect scanning of your old snaps

We haven't featured a scanner on these pages for a while, so what better way to make up for it by introducing you to the new CanoScan 5200F. This flatbed scanner from Canon claims to be able to automatically remove dust and scratch marks from film being scanned, using an advanced infrared process.



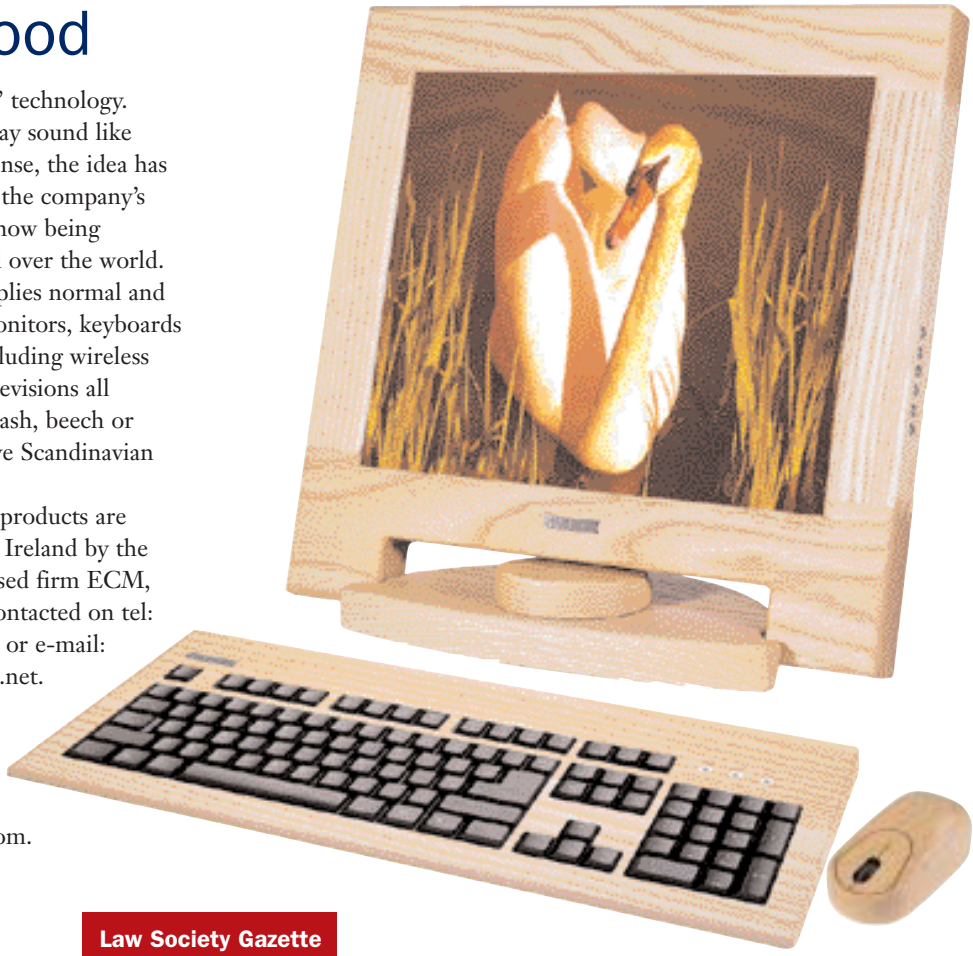
Canon's new FARE level 2 technology can recolour faded films and correct grainy films, generating perfect scans even from damaged film. The CanoScan 5200F features a high capacity, built-in 35mm film adapter unit so you can capture high-quality images direct from your 35mm slides and negatives – up to six frames in one operation. If you care about your photographs and you're thinking of buying a scanner, then look no further than this.

The CanoScan costs around €225 (including VAT). For more information, contact Canon on tel: 01 205 2496 or visit www.canon.ie.

Of peckers and wood

Following the abrupt end of his naval career, the Duke of Wellington's flagrantly gay younger brother, Edmund, was redeployed to the British East Indies, with a stern warning ringing in his ears: 'Keep your hat on at all times, young man, for woodpeckers are plentiful in these parts'. Ignoring this advice, Edmund received regular concussions and earned from his men the affectionate nickname 'peckerhead'. Had he lived to the ripe old age of 357, he would surely have marvelled at the prospect of a computer made out of wood. Since 2000, SWEDX has been building and developing computer hardware that is embedded in natural wood. The Swedish company believes that people are tired of plastic and want to turn to a more 'human' technology. While that may sound like Nordic nonsense, the idea has taken off and the company's products are now being distributed all over the world. SWEDX supplies normal and flat-screen monitors, keyboards and mice (including wireless mice), and televisions all embedded in ash, beech or sapele, a native Scandinavian wood.

SWEDX's products are distributed in Ireland by the Drogheda-based firm ECM, who can be contacted on tel: 041 983 4111 or e-mail: ecml@eircom.net. *To see the full range of SWEDX's products, visit* www.swedx.com.



Mixing business with pleasure

Motorola has a smart new mobile device coming your way in the next couple of months. The company describes the MPx 220 as 'the ultimate device for globe-trotting professionals and busy people who want to stay connected without compromising style or high-tech phone features'. We'd probably call it a classy alternative to the Nokia Communicator, the hinged mobile phone with the QWERTY keyboard that has dominated the top end of this market for a number of years. The MPx weighs just over six ounces and is a cross between a laptop computer and a mobile phone. It boasts all the usual telephony, e-mail and word-processing functions that you'd expect from a PDA, and it also has a camera, a colour screen and a speakerphone. Not surprisingly, for such a cutting-edge device, it uses the latest Wi-Fi, Bluetooth and Java technology. No, I don't know what that means either. Motorola says that the MPx will be available in the final quarter of this year, but can't yet say how much it will cost.

For further information, call Motorola on tel: 01 797 1000 or visit www.motorola.com.

Sites to see

Blogging thoughts (*http://belmontclub.blogspot.com*). This is what's known as a web log, or 'blog' – an on-line diary of sorts, where people post their opinions, thoughts and occasional rants for anyone, if they can be bothered, to see and comment on. This example is more thoughtful and intelligent than most: it is serious journalistic commentary and analysis, frequently updated, on the on-going situation in Iraq.

Comedy news (*www.bobfromaccounting.com*). One of the many comedy 'news' sites on the web, this one is, like all the others, a matter of personal taste. Stories include 'Liberal accuses last friend of being fascist', 'Palestinians finally run out of rocks', and 'Bush challenges NASA to put man on sun within decade'. The site itself says: '*Bobfromaccounting* is comedy. If you are offended, get over it!'

Political chicanery (*www.impeachblair.org*). Some British MPs want to impeach Tony Blair for misleading them over the justification for invading Iraq. This site supports them, and includes a legal opinion on the impeachment process by Rabinder Singh QC and Prof Conor Gearty. All in all, it seems to be less of a serious attempt to impeach the PM than it does an attempt to get him to answer questions that the Speaker might otherwise over-rule.

The game of (desk-bound) kings (*www.isc.ro*). Ever wanted to meet new people and impress them with your command of vocabulary, but never got around to buying those tickets to Peru? Well, now you don't even have leave your desk. This is the ultimate, real-time, on-line scrabble site. Log in, search for someone who wants a game, and wordsmith away for a time-period you yourself set. Of course, it could be a load of hyperbolics.

Book reviews

Evidence

Ruth Cannon and Niall Neligan. Round Hall Sweet & Maxwell (2002), 43 Fitzwilliam Place, Dublin 2. ISBN: 1-85800-276-1 (paperback), 1-85800-306-7 (hardback). Price: €74 (paperback), €149 (hardback).

The law of evidence in Ireland (second edition)

Caroline Fennell. LexisNexis (2003), 26 Ormond Quay Upper, Dublin 7. ISBN: 1-85475836-5. Price: €99.35.

Irish laws of evidence

John Healy. Thomson Round Hall (2004), 43 Fitzwilliam Place, Dublin 2. ISBN: 1-85800-380-6 (paperback), 1-85800-381-4 (hardback). Price: €120 (paperback), €198 (hardback).

It is fortunate to be asked to review three excellent recent Irish books on evidence at the one time. It shows the growing research and analytical skills of the young lawyers and law teachers with which this country is blessed.

It is difficult to find time to read law books and to evaluate them. Having received these books at the end of July, it was obviously expected that I should take them on my holidays. I did not, as I was working almost full time during the time allowed for review. It was fortunate that my work during that period related to a matter where a central issue was unconstitutionally obtained evidence. Perhaps unfairly, I have assessed the merits of the three books basically with regard to this problem. I did so in respect of their content, citation of case law, and the comments of the authors on the state of law.

Cannon and Neligan deal with this matter, starting at page 232 (chapter 15):

'Unlawfully obtained evidence may be divided into two parts. On the one hand, there is evidence obtained in breach of the constitution. Such evidence is normally inadmissible. On the other hand, there is evidence obtained in breach of statute or the common law. Such evidence is normally admissible, subject to a discretion on the part of the trial judge to exclude it.

'… Evidence obtained as a result of a direct and conscious breach of constitutional rights is automatically excluded under Irish law in the absence of extraordinary excusing circumstances. This rule was first developed in the context of real evidence in People (Attorney General) v O'Brien *([1997] IR 336)'.*

In the space of less than 20 pages, the authors give a clear and concise statement of the law, which I found very helpful. It was a well thought-out exposition.

Fennell's *The law of evidence in Ireland* deals with the issue at chapter 4, page 116:

'The yardstick by which the Irish courts determine admissibility of illegally obtained evidence is The People (AG) v O'Brien. *The search warrant used in* The People (AG) v O'Brien *contained an error in relation to the name of the street. The search was deemed illegal – so incorporating a discretion on the part of the trial judge to admit or exclude the evidence. A distinction was drawn by the court between "mere illegality" which could facilitate admissibility, and a breach of constitutional rights which would exclude evidence'.*

Later in that chapter, in paragraph 4.33, there is the following, referring to the case of *Trimbole v Governor of Mountjoy Prison* ([1995] ILRM 465 at 484).

*'Finlay CJ (Henchy, Griffin, Hedermann JJ concurring): I am satisfied that from those decisions (*State (Quinn) v Ryan, *(1965) IR 70;* People (AG) v O'Brien, *(1965) IR 342;* People v Madden, *(1977) IR 336;* People v Lynch, *(1982) IR 64) certain principles can be deduced. They are: The courts have not only an inherent jurisdiction but a positive duty:*

i) To protect persons against the invasion of their constitutional rights

ii) If invasion has occurred to restore as far as possible the person so damaged to the position in which he would be if his rights had not been invaded, and

iii) To ensure as far as possible that persons acting on behalf of the executive who consciously and deliberately violate the constitutional rights of citizens do not for themselves or their superiors obtain the planned results of that invasion.

'… I am satisfied that this principle of our law is of wider application than merely to either the question of the admissibility of evidence or to the question of the punishment of persons for contempt of court by unconstitutional action'.

This got you to the central issues. Again, Ms Fennell devotes 20 pages to the subject but, I would have thought, less clearly than Cannon and Neligan from a general practitioner's view. Her approach is more academic, which was in a way helpful to my particular problem. I had a look at her first edition and she has certainly improved the quality of her book.

Chapter 11 of Mr Healy's *Irish laws of evidence* deals with evidence obtained unconstitutionally and illegally. The first portion of that chapter is headed 'The exclusionary rule' and reads as follows.

'The judgment of Walsh J in People (Attorney General) v O'Brien, *the Supreme Court's first authoritative analysis on the matter, has become the* locus classicus *for determining the admissibility of evidence obtained in violation of a constitutional right of the accused.*

'The courts in exercising the judicial powers of government of the state must recognise the paramount position of constitutional rights and must uphold the objection of an accused person to the admissibility at his trial of evidence obtained or procured by the state or its servants or agents as a result of a deliberate and conscious violation of the constitutional rights of the accused person where no extraordinary excusing circumstances exist, such as

the imminent destruction of vital evidence or the need to rescue a victim in peril'.

In the 25 pages that follow, the author deals with both unconstitutionally obtained evidence and illegally or improperly obtained evidence. Also, in the appendix, he gives the texts of the leading judgments, such as *O'Brien*, *Shaw*, *Buck*. In his footnotes and the end of the chapter, he gives a large number of references and further reading, which I will have to tackle some time in the future.

Isn't it wonderful to have such well-presented and researched books? All of them have good indices. Each covers the subject matter extensively and it really is a matter of choice or taste in coming to a judgement which is the best.

I think Cannon and Neligan is the clearest but the shortest. Fennell's has a strong academic bent that is useful in the many grey areas – I frankly admit after 40 years to still not fully understanding 'hearsay' and its ramifications. Healy is particularly useful for its further reading, footnotes and the case text in its appendices.

Incidentally, all three deal extensively with 'hearsay'. Reading them shows how a simple rule has been clouded by exceptions and 'refinements'. In practice, I think the rule has a strong tendency to depend on the 'chancellor's foot rule' or non-rule!

Buy all three and compare them on a particular subject. I know as an author that it is important that young authors be encouraged to continue. I don't know the prices, as they only have these wretched bars on them. However, they are all likely to be under €100, and so cheaper than a counsel's opinion! Also, I find a client is very impressed if you give him a photocopy of a few pages of a book about his problem – I suppose that is in breach of copyright! Even lawyers are now in a tangled web in dealing with the law. G

Robert Pierse is partner in the Kerry law firm Pierse & Fitzgibbon and is the author of Road traffic law (2004).

Constitutional law (second edition)

Michael Forde. FirstLaw (2004), Merchant's Court, Merchant's Quay, Dublin 8.
ISBN 1-904480-19-5 (hardback), 1-904480-15-2 (paperback). Price: €130 (hardback), €90 (paperback).

Bunreacht na hÉireann 1937, as amended, proscribes acts by government that are inconsistent with the constitution. Hence, in a sense, governmental action may depend on an interpretation of the constitution. The sovereign will, in terms of amendment of the constitution, rests with the people.

The power of the state in Ireland is under the law. As the constitution is a written document regulating, among other things, the powers of the state, somebody must interpret the constitution in a definitive sense. Who interprets the constitution? The judges. So cases are brought before the judges arguing, among other things, that the state has acted in some way incompatible with the constitution. In one sense, the judges are the trustees of the constitution; their words hold sway.

As the constitution itself does not provide for how it is to be interpreted, we look to the judges and scholars – the interpretation of the constitution is based on principles that are, in effect, external to the constitution. Hence, the importance of judicial decisions, commentary and critical analysis. This is where Dr Michael Forde, the author, makes a significant contribution to the understanding of our fundamental law.

Mr Justice Brian Walsh, in his foreword to the first edition, describes Dr Forde's book as 'excellent'. One of the gifts of the writer is his ability to provide comparative analysis with other national constitutions and international conventions. Judge Walsh's introduction to the book reads as well today as it did when it was first written in 1987.

In his preface to his second edition, Dr Forde submits that he has been emboldened by experience and so has become somewhat critical of the outcomes or reasoning in many cases. Whether or not we agree in all instances with Dr Forde's analysis is not a matter of concern: what is of significance is the critical eye of the author in relation to the interpretation of the fundamental law of the land.

Dr Forde has written a balanced and insightful analysis of the constitution of Ireland. His book is lucid, eloquent and impressive – a book of enormous authority. Extensively researched, Dr Forde SC fleshes out the main judgments, concepts and relevant debates that govern the fundamental law of Ireland. G

Dr Eamonn Hall has been chief examiner of constitutional law at the Law Society of Ireland since 1982.

Jordan's Irish company secretarial precedents

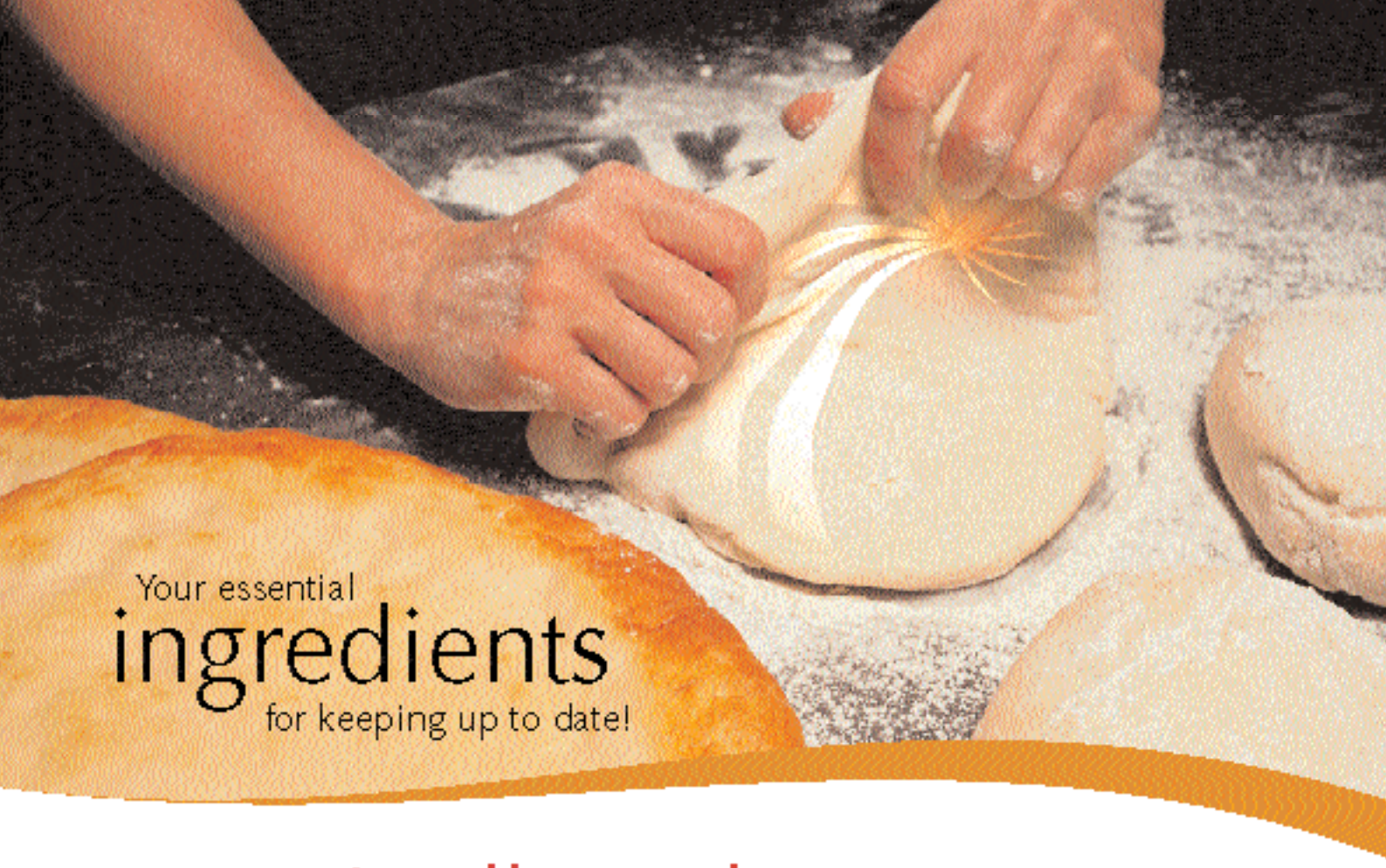
Liam Brazil, Paul Egan and Paula Phelan. Jordan Publishing (2004), 21 St Thomas St, Bristol, England. ISBN: 8-85308-844-6. Price: stg£110.

This is not a book that you will bring home for the weekend to read. A page-turner it is not. But it is a book that every solicitor who does company work should have. It may be primarily aimed at accountants, auditors and company secretaries, but is also extremely valuable (indeed, I would say necessary) to solicitors with a company law practice – even if you only have half-a-dozen corporate clients. *Especially* if you only have a half dozen corporate clients.

Written by practitioners for practitioners, this 494-page volume provides precedents across the range of functions of a company from incorporation to dissolution and beyond. Because, unlike for natural persons, there is life after death for a company if it's done right.

If a company has been struck off within the previous 12 months, the *Companies (Amendment) (No 2) Act, 1999* provides the procedure required for restoration to the register of companies. The precedent forms for filing with the registrar of companies follow from page 409. But the procedure is more complicated if the company is more than 12 months off the register. This requires an application to the High Court. The precedents are all there.

This is now a well-established publication. Of the three authors of this edition, Paul Egan and Liam Brazil are solicitors and the



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

The NEW edition of this highly regarded textbook will bring you right up to date with all aspects of the legal framework relating to the area of intellectual property law, making sure you're well informed!

Incorporating all legislative and case law developments since the last edition was published in 1997, this new edition covers all the main aspects of intellectual property law including:

Copyright • Trade marks • Patents • Design law

This new edition of *Intellectual Property Law in Ireland* deals with topics such as passing-off and the law of confidence. It also includes full coverage of the Trademarks Act 1996.

In particular, this new edition covers the far-reaching changes introduced by the Copyright and Related Rights Act 2000, and the Industrial Designs Act 2001. Written by the leading experts in this area, it should prove invaluable to all IP practitioners and students.

Product Code: CSIP2
ISSN: 1854752340
Price: €140.00
Publishing Date: August 2004

LexisNexis

third, Paula Phelan, is a chartered secretary; all are with Mason Hayes & Curran, Solicitors, in Dublin.

The authors do not offer their work as a textbook on private limited companies. They specifically say that it is not. Its aim is 'to provide precedents to cover situations faced by a company secretary or professional advisor in relation to the management of a limited company'. It is a precise objective. And one that is well achieved.

Precedents are of limited use if it is not explained when and how to use them. This the authors do with short notes and explanatory guides. The authors also make clear that they do not attempt precedents for complicated situations nor do they cover precedents that apply solely to public limited companies.

It is important to bear in mind that this is not a legal textbook or professional advisor. Nevertheless, the authors do advise on when the precedents are applicable and the various precise statutory timescales.

Dip into, say, page 170 and there are precedents on the delicate issue of financial assistance by a private company for the acquisition of its own shares. The explanatory introduction starts with the obvious point that there is a strict prohibition on a company providing any financial help for the purchase of their own shares. The section 60 procedure is explained clearly and well and the precedents are listed on page 172 and are provided in the following pages. But there is a health warning – 'great care should be taken to ensure that any proposed transaction falls within the exemptions'.

The book's chapters start with explanations on, and the forms required in, incorporation of a company. The authors then go through the various secretarial and procedural requirements and the forms and time deadlines that apply across a wide range of issues. These include alterations to the memorandum or articles of association, share allotments, increases in share capital borrowing and debentures, annual returns, dividends, directors and their appointment, dismissal, re-election and so forth, meeting of shareholders and then winding-up and dissolution of a company.

This third edition is more important than ever. This is because its precedents, minutes and drafts of forms take into account the important changes introduced by the *Companies (Amendment) (No 2) Act, 1999* and the *Company Law Enforcement Act, 2001*. Of course, the 2001 act established the Office of the Director of Corporate Enforcement, which has extensive and intensive powers to enforce company law, including criminal sanctions.

If you do company law, you should have this book – and the CD-ROM that comes with it. As American Express might say, don't draft a precedent without it. G

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

Sanctuary in Ireland: perspectives on asylum law and policy

Ursula Fraser and Colin Harvey (eds). Institute of Public Administration (2004), 57-61 Lansdowne Road, Ballsbridge, Dublin 4. ISBN: 1-904541-04-6. Price: €35.

Irish asylum law and policy has moved from an international law study of little interest to the majority to a hotly-debated, fast-moving political and legal topic in Ireland. Asylum law is based in international human rights law. It is applied by each state individually but, in particular in the European Union, states take many decisions collectively. This book of essays by distinguished authorities in their field is a measured and reflective look at several aspects of Irish law and practice.

The book sets out the framework in which asylum law operates. Colin Harvey explains the international law context, supplemented by Suzanne Egan's essay on the European Court of Human Rights. The Irish legal framework is set out by Ursula Fraser and is complemented by Peter O'Mahony's article on the practical supports available to asylum seekers. Cathryn Costello ably condenses many of the EU laws and policies as they affect Ireland. The setting for the analysis of law and practice is then the fundamental, universal human right to seek asylum.

This law and policy has been shaped in many ways. The courts, public perception, the media, administrative action, government directives, co-operation with the UN High Commissioner for Refugees and the work of NGOs have all affected the asylum law and policy we have today. One essay is correctly devoted to the role of judicial review, the primary access route of asylum seekers to the courts. Siobhan Stack BL and Bill Shipsey SC discuss the particular approach to judicial review required in asylum cases and bring us through the development of the tests by which decisions are judged. They also find that special provisions designed to speed up the conclusion of asylum claims in fact slow them down. Similarly, in her contribution on accelerated procedures, Siobhan Mullally finds that such procedures actually divert resources into appeals and court applications.

Progress has been made in constructing an asylum system. Pia Prutz Phiri, the UN High Commissioner for Refugees' representative, credits Irish government support for the UNHCR generally and finds the Irish asylum system to be a functioning one, performing more efficiently than a number of other EU asylum systems. Knotty problems remain. Ursula Fraser highlights the widely acknowledged need for complementary protection for those at risk who do not qualify on refugee grounds. Peter O'Mahony reminds us that certain categories of asylum seekers – victims of torture, children, women – may need particular support. He is one of the contributors who reminds us that integration of refugees is crucial for the well-being of the whole society.

This book is useful and informative. The perspectives of contributors differ, but all approach the topic from a human rights perspective. This makes the book a good point of reference and a valuable contribution to the debate on asylum law and policy, recently started, but set to continue. G

Noeline Blackwell is principal of the Dublin law firm Blackwell & Co.

Through the years, you've built your practice by building relationships of trust – identifying what each client needs and providing first class advice and expertise.

And that's how we like to do business too.

To find out how we can put our unique range of business services to work for you, call to any AIB branch or visit: www.aib.ie/professionals.

be with AIB

Terms and conditions apply. Allied Irish Banks, p.l.c. is regulated by the Irish Financial Services Regulatory Authority.

Report of Law Society Council meeting held on 3 September 2004

Motion: Education regulations

'That this Council approves the Solicitors Acts, 1954-2002 (apprenticeship and education) (recognition of qualifications) regulations 2004 *and that the Council regulations be amended to delegate the implementation of these regulations to the Education Committee without reference to the Council.'*

Proposed: Donald Binchy
Seconded: Stuart Gilhooly

Donald Binchy explained that the purpose of the regulations was to introduce a regulatory structure to deal with applications to the society, following the decision of the European Court of Justice in the *Morganbesser* case, which required the society to give appropriate recognition to vocational training already undertaken by trainee solicitors within the EU to the extent that that training was equivalent to the vocational training undertaken by trainee solicitors in Ireland. The Council approved the regulations, as circulated.

New procedures being adopted by insurance companies

The Council noted the contents of a newspaper article published on 29 August 2004, which indicated that a named insurance company had introduced a new policy whereby it had ceased to deal with solicitors in relation to personal injury claims, even where solicitors were on record and proceedings had issued, and would deal only with claimants themselves.

The Council discussed the dangers for accident victims inherent in direct approaches by insurance companies, where claimants would clearly be placed in an unfair bargaining position. Several Council members expressed the view that solicitors should act to protect the interests of their clients, should inform their clients that they were likely to be approached directly by insurance companies and should warn their clients of the dangers inherent in such approaches.

Examples were given of instances where settlement cheques were offered to accident victims 'on their doorstep' within days of their accident and before the insured had even completed a form detailing the circumstances surrounding the accident. It was noted that vulnerable people could be pressurised to accept settlement amounts that made no allowance for future losses or for pension entitlements.

It was noted that public statements by the society on the matter would probably be characterised as self-interest, but it was agreed that these types of accusations were inevitable in any case.

Appointment of society representatives

The Council approved the nomination of Patrick Dorgan, chairman of the society's Conveyancing Committee, as the society's representative on a working group established by the minister for justice, equality and law reform to review the auctioneering profession.

The Council approved the nomination of Eamonn Hall and Malachy J O'Kane to serve on a sub-committee working with the National Archives Advisory Council to develop a standard protocol for the transfer of documents and records from solicitors' offices to the National Archives.

The Council approved the appointment of Andrew Cody as one of the society's representatives on the Law Clerks Joint Labour Committee.

Competition Authority notice concerning legal representation

The Council discussed a notice issued by the Competition Authority on 4 August 2004, together with newspaper coverage and correspondence from members of the profession. By way of press release and without any consultation, the Competition Authority had published guidelines that purported to 'resolve any potential conflicts of interest in relation to the legal representation of those attending before the authority'.

Deep concerns were expressed by a number of Council members in relation to any attempts to restrict freedom of choice of legal representation.

The view was expressed that no other state authority would seek to impugn the integrity of a solicitor in this manner and that the notice issued by the Competition Authority was a collective smear against the profession. There were strong views that any person who was subject to scrutiny by the Competition Authority was entitled to have the legal advisor that he or she wished. However, it was agreed that the society could assure the authority that any complaint about a solicitor acting in a conflict of interest situation would be thoroughly investigated by the society.

Personal Injuries Assessment Board

The Council congratulated Ward McEllin, chairman of the PIAB Task Force, together with Roddy Bourke, Michael V O'Mahony, Stuart Gilhooly and Aidan O'Reilly for the preparation of the guidelines and precedents on PIAB, which were of immense assistance to the profession.

Study on competition in the solicitors' profession by the Competition Authority

The Council noted, with approval, the contents of a supplementary submission to the Competition Authority, which addressed each of the issues raised by the authority in its recent meetings with the society.

Special task force to review professional indemnity insurance

The Council approved the appointment of a new task force, with the following terms of reference:

'To fundamentally review the law and policy underlying the provision of professional indemnity insurance to solicitors in Ireland, having regard to best practice in other jurisdictions and including an examination of the current regulations, procedures and systems, and to make recommendations arising from such review'.

The Council approved the membership of the task force, as follows: Joe Brosnan (chairman), James MacGuill, Michael Irvine, Ken Murphy, Mary Keane, John Elliot and Rosemary Fallon, with the power to co-opt. It was confirmed that the task force would also retain independent professional expertise.

Conference on the law of privacy

Stuart Gilhooly outlined the programme for a special conference on the law of privacy, being organised by the society's PR Committee, which would be held on 9 October 2004. G

Committee reports

PROBATE, ADMINISTRATION AND TAXATION

Revenue on-line tax clearance facilities

On-line application for tax clearance certificates

Arrangements have been introduced to allow taxpayers to apply on-line for a tax clearance certificate. This facility is available through the Revenue's website *www.revenue.ie/services/taxclearance.htm*. The Revenue will continue to accept written applications.

On-line verification facility

Using this new procedure, it is possible to confirm electronically that a person holds a tax clearance certificate. The facility is secure and may only be accessed with the permission of the person who holds the tax clearance certificate. The taxpayer may give permission to confirm his or her tax clearance status by quoting the customer number and tax clearance certificate number.

Transfer of tax clearance function to local Revenue districts

Local Revenue districts now deal with the processing of tax clearance applications. The contact names, addresses and telephone numbers of the various Revenue districts are available on the Revenue website at *www.revenue.ie*.

Queries regarding on-line tax clearance facilities may be directed to Olive Donoghue, tel: 061 488 223 or e-mail: oldonogh@revenue.ie. Queries on tax clearance in individual cases should be addressed to the relevant local Revenue district office.

Probate, Administration and Taxation Committee

CRIMINAL

***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 on-line 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 NOTE

TAXATION OF SETTLEMENTS AND AWARDS IN EMPLOYMENT CASES

From 4 February 2004, an exemption from income tax compensation paid to an employee or former employee under employment protection legislation is available, in limited circumstances. This is provided for in section 7 of the *Finance Act, 2004*, which inserts a new section 192(A) into the *Taxes Consolidation Act, 1997*.

The exemption only applies where:

a) The settlement or award relates to a 'relevant act'. This means employment legislation which contains provisions for the protection of employees' rights and entitlements or where there is an obligation for employers towards their employees
b) The compensation is paid in accordance with a recommendation, decision or determination of a rights commissioner, the Equality Tribunal, the Employment Appeals Tribunal, the Labour Court, the Circuit Court, or the High Court (a 'relevant authority')
c) The payment is paid in accordance with a settlement arrived at under a mediation process provided by legislation which contains provisions for protecting the rights of employees
d) 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 dealing with employment law by a relevant authority (other than the Circuit Court or the High Court)
e) The compensation must not relate to loss of salaries or wages or to the loss of office or change in function of an employee. For example, the new relief will not apply in unfair dismissal claims. Existing reliefs are not affected.

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

There are certain steps which the employer must put in place, namely:

1) The employer will have to investigate the case fully
2) The employer will have to decide if the claim is valid
3) The employer will have to be satisfied that the claim would be one likely to succeed
4) The employer must determine what amount is reasonable. What is meant by 'reasonable' is the sum that would 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 which can be awarded, the maximum which will be exempt for tax purposes is that which would be granted by a rights commissioner, the director of equality investigations, the Employment Appeals Tribunal or the Labour Court
5) The employee must put their claim in writing
6) An employer and the employee must enter into a written settlement
7) 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:

a) 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
b) The employer must make copies available for inspection by the Revenue Commissioners when requested.

The legislation specifically provides that a payment, however described, in respect of remuneration including arrears of remuneration, will be and continues to be taxable.

A number of issues have been identified arising out of the new legislative provisions which the society believes will require discussion with/clarification from the Revenue. The society's Probate, Administration and Taxation Committee representatives on the Revenue Tax Administrators' Liaison Committee will take these matters forward.

A detailed article on the application of the new provisions and their effects for practitioners will appear in the next issue of the *Gazette*.

Probate, Administration and Taxation Committee/Employment and Equality Law Committee

LEGISLATION UPDATE: 17 AUGUST – 24 SEPTEMBER 2004

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

SELECTED STATUTORY INSTRUMENTS

Circuit Court Rules* (Personal Injuries Assessment Board Act, 2003) *2004
Number: SI 542/2004
Contents note: Insert new rules in orders 5, 15, 36 and 64 of the *Circuit Court Rules 2001* (SI 510/2001) to prescribe Circuit Court procedures in respect of applications under the *Personal Injuries Assessment Board Act, 2003*
Commencement date: 16/9/2004

Civil Liability and Courts Act, 2004 *(commencement) order 2004*
Number: SI 544/2004
Contents note: Appoints 20/9/2004 as the commencement date for the following sections of the act: sections 1, 5, 6, 8, 19, 21, 22, 25, 26, 29, 39, 41, 42, 43, 44, 54 and 55; appoints 31/3/2005 as the commencement date for sections 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 23, 24, 27, 28 and 40 of the act

District Court (children) Rules 2004
Number: SI 539/2004
Contents note: Amend orders 33, 37 and 84 of the *District Court Rules 1997* (SI 93/1997) to provide for applications under various sections of the *Children Act, 2001*
Commencement date: 14/10/2004

District Court (estreatment of recognisances) Rules 2004
Number: SI 535/2004
Contents note: Amend schedule B of the *District Court Rules 1997* (SI 93/1997) by the addition of form 27.6B (warrant of distress) and the substitution of new forms 27.7 (notice of application for warrant of execution) and 27.8 (warrant of execution), in order to facilitate the estreatment of recognisances
Revoke: SI 411/2003
Commencement date: 9/10/2004

District Court* (Personal Injuries Assessment Board Act, 2003) *Rules 2004
Number: SI 526/2004
Contents note: Amend the *District Court Rules 1997* (SI 93/1997) by the insertion of new rules in orders 7, 39 and 53 and the insertion of a new order 46C, in relation to applications under the *Personal Injuries Assessment Board Act, 2003*
Commencement date: 8/9/2004

District Court (railway infrastructure) Rules 2004
Number: SI 534/2004
Contents note: Insert a new order 90A 'railway infrastructure' in the *District Court Rules 1997* (SI 93/1997) to provide for applications under section 48 of the *Transport (Railway Infrastructure) Act, 2001*
Commencement date: 9/10/2004

Employment regulation order (Law Clerks Joint Labour Committee) 2004
Number: SI 522/2004
Contents note: Made by the Labour Court on the recommendation of the Law Clerks Joint Labour Committee; fixes statutory minimum rates of pay and regulates statutory conditions of employment for certain workers employed in solicitors' offices
Commencement date: 10/9/2004

European Communities (life assurance) framework (amendment) regulations 2004
Number: SI 543/2004
Contents note: Amend article 45 of the *European Communities (life assurance) framework regulations 1994* (SI 360/1994) in order to extend from 15 to 30 days the period (which commences on the date of issue of the policy) within which a policyholder may cancel a life assurance policy
Leg-implemented: Dir 2002/65
Commencement date: 9/10/2004

Residential Tenancies Act, 2004 *(establishment day) order 2004*
Number: SI 525/2004
Contents note: Appoints 1/9/2004 as the establishment day for the private residential tenancies board under part 8 of the *Residential Tenancies Act, 2004*

Rules of the Superior Courts* (Personal Injuries Assessment Board Act, 2003) *2004
Number: SI 517/2004
Contents note: Amend orders 4, 22, 41 and 52 of the *Rules of the Superior Courts* by the insertion of new rules to make provision for applications under the *Personal Injuries Assessment Board Act, 2003*
Commencement date: 10/8/2004

State Airports Act, 2004 *(Dublin appointed day) order 2004*
Number: SI 531/2004
Contents note: Appoints 1/10/2004 as the Dublin appointed day for the purposes of section 9(6) of the act. As provided for in section 9(6), this is the date with effect from which the principal objects of Aer Rianta, as set out in section 23 of the *Air Navigation and Transport (Amendment) Act, 1998,* shall include an additional object to do all things as are necessary to give effect to the restructuring of Aer Rianta and its memorandum of association shall be amended accordingly

Taxi Regulation Act, 2003 *(part 2) (establishment day) order 2004*
Number: SI 523/2004
Contents note: Appoints 1/9/2004 as the establishment day for the purposes of part 2 of the act (establishment of the commission for taxi regulation) 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 David R Burke, solicitor, practising under the style and title of David R Burke & Company at 24 Main Street, Dungarvan, Co Waterford, and in the matter of an application by the Law Society of Ireland to the Solicitors Disciplinary Tribunal and in the matter of the *Solicitors Acts, 1954 to 2002* [6151/DT410]
Law Society of Ireland (applicant)
David R Burke (respondent solicitor)

On 17 June 2004, the Solicitors Disciplinary Tribunal found that the respondent solicitor was guilty of misconduct in his practice as a solicitor in that he failed to file his accountant's report for the year ended 30 June 2002, in breach of regulation 21(1) of the *Solicitors' accounts regulations 2001* (SI no 421 of 2001), in a timely manner or at all.

The tribunal ordered that the respondent solicitor:
a) Do stand advised
b) Pay a sum of €500 to the compensation fund
c) Pay the whole of the costs of the Law Society of Ireland as taxed by a taxing master of the High Court in default of agreement.

In the matter of Patrick Mann, solicitor, practising as Patrick Mann & Company at 25, 26 and 27 Ashe Street, Tralee, Co Kerry, and in the matter of an application by the Law Society of Ireland to the Solicitors Disciplinary Tribunal and in the matter of the *Solicitors Acts, 1954 to 2002* [3806/DT432]
Law Society of Ireland (applicant)
Patrick Mann (respondent solicitor)

On 29 April 2004, the Solicitors Disciplinary Tribunal found that the respondent solicitor was guilty of misconduct in his practice as a solicitor in that he had:
a) Allowed a surplus to arise in the client account of €251,476 due to the existence of deposit interest of €126,306 and the solicitor's own funds of €146,623 in the client account reduced by debit balances totalling €21,453, as highlighted in the report of the Law Society's accountant dated 7 November 2002
b) Allowed client balances containing a large element of solicitor/client fees undrawn and unpaid third party outlay to arise, as highlighted in the report of the Law Society's accountant dated 7 November 2002
c) Had undischarged third party outlay totalling €300,315 as set out in the report of the Law Society's accountant dated 7 November 2002, and subsequently paid out a total of €408,910 to third parties.

The tribunal ordered that the respondent solicitor:
1) Do stand admonished
2) Pay a sum of €500 in respect of the findings of misconduct at (a) above; pay a sum of €500, in respect of the finding of misconduct at (b) above; pay a sum of €2,000 in respect of the finding of misconduct at (c) above
3) 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 Gerard Murphy, solicitor, carrying on practice under the style and title of Gerard Murphy at 1 Goldsmith Terrace, Quinsboro Road, Bray, Co Wicklow, and in the matter of the *Solicitors Acts, 1954 to 1994* [4354/DT349]
Law Society of Ireland (applicant)
Gerard Murphy (respondent solicitor)

On 26 May 2004, the Solicitors Disciplinary Tribunal found that the respondent solicitor was guilty of misconduct in his practice as a solicitor in that he had:
a) Failed to attend at the Compensation Fund Committee meeting of 5 July 2001 despite being requested to do so and failed to explain his non-attendance at the meeting
b) Failed to apply for a practising certificate for the year 2002 in a timely manner
c) Failed to file evidence of having professional indemnity insurance cover in place for the year 2002 in a timely manner or at all
d) Failed to file an accountant's report for the year ended 30 April 2001 in a timely manner or at all.

The tribunal ordered that the respondent solicitor:
a) Do stand admonished
b) Pay the sum of €500, to be paid to the compensation fund in relation to the findings of misconduct at (a), (b) and (d) above
c) Pay a sum of €1,000 to the compensation fund in relation to the finding of misconduct at (c) above, and
d) Pay the whole of the costs of the Law Society of Ireland as taxed by a taxing master of the High Court in default of agreement.

In the matter of James P O'Neill, solicitor, carrying on practice at Lindos, Mount Venus Road, Rathfarnham, Dublin 16, and in the matter of an application by the Law Society of Ireland to the Solicitors Disciplinary Tribunal and in the matter of the *Solicitors Acts, 1954 to 2002* [2586/DT408]
Law Society of Ireland (applicant)
James P O'Neill (respondent solicitor)

On 6 May 2004, the Solicitors Disciplinary Tribunal found that the respondent solicitor was guilty of misconduct in his practice as a solicitor in that he had:
a) Failed to respond to the society's correspondence and in particular letters of 27 March 2002, 2 May 2002, 17 May 2002, 17 June 2002, 31 July 2002, 19 August 2002, 27 November 2002, 5 December 2002, 6 January 2003, 30 January 2003, 20 February 2003 and 27 March 2003 in a timely manner or at all
b) Failed to comply with the notice served on him pursuant to section 10 of the *Solicitors (Amendment) Act, 1994*.

The tribunal ordered that the respondent solicitor:
a) Is hereby censured
b) Pay a sum of €2,500 in respect of each of the findings of misconduct, that is, €5,000
c) Pay the whole of the costs of the Law Society of Ireland as taxed by a taxing master of the High Court in default of agreement.

In the matter of Joseph Traynor, solicitor, and Seamus Mallon, solicitor, practising as Traynor Mallon Solicitors and in the matter of an application by the Law Society of Ireland to the Solicitors Disciplinary

NARY TRIBUNAL

Tribunal and in the matter of the *Solicitors Acts, 1954 to 2002* [5554-3936/DT417]
Law Society of Ireland (applicant)
Joseph Traynor (first-named respondent solicitor)
Seamus Mallon (second-named respondent solicitor)

On 10 June 2004, the Solicitors Disciplinary Tribunal found the first-named respondent solicitor and the second-named respondent solicitor guilty of misconduct in respect of the following complaints set out in paragraph 14 of the affidavit of Patrick Joseph Connolly, sworn 7 August 2003, in that they:

a) Allowed a deficit to arise in respect of client funds as of 30 November 2002 in the sum of €126,167, increasing as of 31 December 2002 to €250,693
b) Allowed this deficit to so arise in the practice of withdrawing costs from the client account in round sum amounts and failing to record these withdrawals in the ledger accounts of the clients concerned in breach of regulation 12(1) of the *Solicitors' accounts regulations 2001*
c) Failed to keep proper books of account in breach of regulation 12(1) of the *Solicitors' accounts regulations 2001*, thereby masking the deficit which was not readily apparent from the books of account that were presented to the investigating accountant
d) Allowed the client bank account to be overdrawn on a number of occasions, as set out in paragraph 2.14 of the investigating accountant's report dated 7 February 2003
e) Allowed debit balances on the client ledger to occur on the client ledger account, as set out in the investigating accountant's report dated 7 February 2003 and in particular paragraph 2.15 to 2.19 thereof. The existence of debit balances on the client ledger is in breach of regulation 7(1) and 7(2) of the *Solicitors' accounts regulations 2001*.

The tribunal ordered that:

a) The first-named respondent solicitor, Joseph Traynor, and the second-named respondent solicitor, Seamus Mallon, do stand censured
b) The first-named respondent solicitor, Joseph Traynor, pay to the compensation fund a sum of €3,000 in respect of each of the charges, that is, a total of €15,000
c) The second-named respondent solicitor, Seamus Mallon, pay to the compensation fund a sum of €1,000 in respect of each of the charges, that is, €5,000
d) The first-named respondent solicitor and the second-named respondent solicitor pay the whole of the costs of the Law Society of Ireland as taxed by a taxing master of the High Court in default of agreement. G

Personal injury judgment

Road traffic accident – negligence – liability – apportionment of damages – road signs at junction – duty of road authority to warn motorists of dangerous junction – whether liability on road authority in context of road signs and whether the road authority is liable to maintain adequate warning signs on roads

CASE

***Colm Carey v Warren Mould and County Council of the County of Donegal*, High Court, judgment of Mr Justice Michael Peart on 20 April 2004.**

THE FACTS

Colm Carey, a builder in his early 60s, was driving to his home near Buncrana, County Donegal. This was about 1pm on the date in question. Mr Carey knows the road intimately and had driven that way regularly over a great number of years.

Mr Carey was on a main road that veers to the right. There is another road, a minor road, which meets the main road. Warren Mould was travelling along the minor road towards the junction, travelling towards Colm Carey.

Donegal County Council had erected a 'stop' sign on the minor road close to the point at which the road meets the main road. This was to alert drivers on the minor road to stop in order to let traffic on the main road continue along the main road, as Mr Carey was doing on the date of the accident. However, it appears in some way that the 'stop' sign had been interfered with, as a result of which it was not facing in the intended direction on the date in question but had instead been turned 180 degrees in the wrong direction.

On the date of the accident, as stated, Mr Carey was travelling along the main road. Warren Mould was travelling towards Mr Carey on what he thought was a straight road.

As the 'stop' sign was facing the wrong way, Mr Mould continued straight ahead through the junction. However, there was evidence that 100 metres back on the road that Warren Mould was travelling, there was in place a yellow sign on the left with words in black informing a driver that there was a 'stop' sign 100 metres ahead. There was also a white stop line at the junction. These signs and markings had been placed at this point by Donegal County Council in order to alert drivers that they are required to stop in order to allow others pass along the main road in front of them.

Warren Mould and Donegal County Council agreed on an amount of damages in respect Mr Carey's injuries. So the only issue for the judge was whether Warren Mould or Donegal County Council was liable to Mr Carey or whether both of them were liable and to what degree there was liability between them.

JUDGMENT OF THE HIGH COURT

Peart J gave judgment on 20 April 2004. He summarised the facts and stated that Mr Mould had accepted that Mr Carey was entitled to proceed along the main road.

Mr Mould argued that the council was liable because the sign was not facing in the correct direction and there was no other sufficient warning to him that he was obliged to stop at the junction to allow Mr Carey to pass along the main road. Mr Mould did accept that the yellow sign placed 100 metres before the junction was in place on the date, but he accepted very fairly, according to the judge, that he did not see it.

Donegal County Council submitted that if Mr Mould had been keeping a proper lookout, he would have seen that sign and even if the 'stop' sign was facing the wrong way he would, and should have, realised that he had an obligation to yield to Mr Carey and stop at the junction. There was evidence that Mr Mould was travelling at 25 miles an hour and that there was no evidence that he slowed in any way as he came to the junction, so the council submitted he was liable for the accident.

On the other hand, Mr Mould stated that he lived in Northern Ireland and was on holidays in the area at the time and was not familiar with the junction. He stated he did nothing wrong since the sign was facing the wrong way and he argued that the yellow sign was not sufficient to alert him to the necessity of stopping at the junction.

Peart J also referred to evidence from Garda Wallace, who was called to the scene of the accident. She confirmed that the 'stop' sign was turned around the wrong way, but she also gave evidence that the white 'stop' line on Mr Mould's side of the junction was partially faded to the extent that, immediately after the accident, she contacted somebody by telephone at the council to tell them about it. Garda Wallace also stated that she personally typed a letter to the council informing them of the problem with this junction. The council denied ever receiving the letter. Garda Wallace had not produced a copy of the letter to the court, but she was sure she had sent the letter. Peart J observed that whether the letter was sent or not, he was satisfied that the garda was of the opinion that the road marking was somewhat faded because of age.

Donegal County Council submitted that, by placing the 'stop' sign at the junction, it had fulfilled its statutory obligation to alert the public to the necessity to stop. The council submitted that there was no statutory obligation to place white lines on the road and that, in addition, it placed a yellow warning sign at a position about 100 metres back from the junction. It maintained that even if some person by whatever means had turned that 'stop' sign around the other way, then the yellow sign ought to have been sufficient to alert Mr Mould to the necessity of stopping at the junction.

The council also submitted that Mr Mould in any event should have slowed as he approached the junction even if he did not appreciate that he needed to halt or stop at it.

Donal Kelleher, an engineer in the employ of the council, gave evidence that there was no history of accidents at the junction and that the priority of the roads at this junction had remained unchanged for many years. It had been suggested to the engineer that a better method of fixing the 'stop' sign would be to place bolts through the sign and the pole (supporting the sign) to ensure that it could not be turned around in another direction. The engineer was of the view that placing a bolt through the sign and the pole, as suggested, would in fact result over time in weather damage through corrosion and this would affect adversely the clarity and efficiency of the sign in the future.

Peart J stated that what was not in doubt was that Mr Carey was completely blameless for the accident. As far as Mr Mould was concerned, Peart J was satisfied that he was not travelling at an excessive speed as he proceeded towards the junction. However, he was satisfied that the yellow sign placed 100 metres back from the junction was placed there for a purpose, which was to give an early warning to a driver that he was approaching a junction at which he was required to stop. Mr Mould very fairly accepted that he did not remember seeing that sign. If he had seen it, the judge was satisfied that he would at least have been aware of the junction and the need to stop.

The judge stated that the fact that Mr Mould failed to observe the yellow sign did not absolve the county council from blame. The council had a statutory obligation, according to Peart J, to maintain a safe road system. While the council could not be expected to be automatically aware of every occasion on which a sign is turned around the wrong way, perhaps by mischief, the road authority retained an overall responsibility to ensure that the roads are safe and that all traffic users are aware of potential dangers, including people such as Mr Mould, a tourist, who would not be familiar with a potentially dangerous junction such as that involved in this accident. The judge was satisfied that this junction was (on the date in question), even ignoring the fact that the 'stop' sign was facing the wrong way, an inherently hazardous junction and one requiring that very clear warnings be apparent to any road user, particularly one such as Mr Mould, who was a visitor to the area.

Peart J noted that it was an unfortunate fact of everyday life that signs such as a 'stop' sign can become turned in the wrong direction for whatever reason. No doubt this was why the council felt it was desirable to give road users an early warning of the junction by placing the yellow sign 100 metres back from the junction. However, the judge stated that it was clear to him that the council could not have regarded that yellow sign alone as an adequate warning to a road user such as Mr Mould to stop at the junction. Hence, the fact that it placed the 'stop' sign and also the white 'stop' line at the junction itself. The white line marking was partly faded at the date of the accident according to the evidence of Garda Wallace, which the judge accepted.

The consulting engineer on behalf of Mr Mould had suggested a number of ways in which a junction such as this one could be improved and made safer. He was of the view that, without the 'stop' sign, this was a hazardous junction and that some sort of island design could be placed at the junction. He also suggested that at the 'stop' sign there could also be white lettering on the road itself saying 'stop'. He further suggested that the council should have placed a larger type of yellow warning sign, indicating the need to stop at the junction which would not be subject to the possible hazard of being turned the wrong way around by accident or otherwise.

Peart J was satisfied that the council had fulfilled the letter of its statutory obligation by erecting the 'stop' sign at the junction. However, that was not the full extent of the road authority's obligations to the public. First, this was an inherently dangerous junction requiring special steps to be taken in order to ensure as far as possible that an accident did not happen. In recognition of this, the road authority (council) went further than a statutory obligation by providing a white stop line at the junction and a yellow warning 100 metres back from the junction. However, the white line was partially faded and the yellow sign (as was evident from the photographs) was not a large and unmissable type of sign. Nevertheless, the judge believed that Mr Mould ought to have seen it, and if he had, he might have possibly realised that he was at a junction at which he was required to stop and give way to Mr Carey.

The judge was satisfied that, while Mr Mould was at fault, he was at fault to a much lesser extent than Donegal County Council, whose duty it was to secure the safety of the roads. The judge was particularly mindful of the fact that Mr Mould was a tourist and therefore completely unfamiliar with the junction. The council was in a position to ensure the safety of this junction to a much greater degree than was the case, such as the manner suggested by the consulting engineer for Mr Mould. Having said that, the judge expressed sympathy for the council, which cannot reasonably and fairly be expected to be aware of the fact that some person has turned the sign around so that it ceases to serve the purpose for which it was intended.

In all the circumstances, the judge found Mr Mould liable to the extent of 15%, as he ought to have at least seen the yellow sign. It was there and he ought to have at least noted it and have been on the lookout. Donegal County Council was liable to the extent of 85% for Mr Carey's damages because the junction created a greater hazard than ought to have been the case on the day in question. G

This judgment was summarised by solicitor Dr Eamonn Hall.

rochford brady group

...information as you need it

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

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

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

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

First Law Update

www.firstlaw.ie

News from Ireland's on-line legal awareness service
Compiled by Flore Bouhey for FirstLaw

COMPANY

Solicitors, trusts

Clients – duties of solicitor to client – right to documents – company law – partnerships – trustees – entitlement of client to see files in possession of solicitor – motion to adduce additional evidence – form of procedure – Rules of the Superior Courts 1986, *order 3*, *rule 19*, *order 38*

The defendant solicitors acted as solicitors in various transactions carried out by the plaintiff both as trustee and for other partnerships. The plaintiff purported to appoint Ivor Fitzpatrick & Co to be its solicitors. The plaintiff initiated proceedings by way of special summons, claiming an order that the defendant solicitors deliver up all documents pertaining to the plaintiff. Smyth J made the order. The defendants appealed. By notice of motion to the Supreme Court, the defendants also sought to adduce additional evidence relating to whether a partner in the defendant solicitors was a director of the plaintiff.

The Supreme Court (Denham, Murray and McCracken JJ) dismissed the appeal and refused the motion to adduce additional evidence, holding that the plaintiff was entitled to inspect the originals of all documents relating to transactions carried out on its behalf which were in the hands of the defendants and was entitled to copies of all such documents. A bare trustee was entitled to copies of all documents created by its own solicitor relating to transactions carried out in its name by that solicitor.

***Bayworld Investments v McMahon O'Brien and Downes, Solicitors*, Supreme Court, 13/7/2004** [FL9440]

CONSTITUTIONAL

Habeas corpus

Order for production – infant son removed from custody of mother by father – mother seeking order for production of son – whether order for production should be granted – Bunreacht na hÉireann 1937, *article 40.4*

The respondent removed his infant son from the custody of the applicant, who was the child's mother, following an argument between them. The parties were not married to each other. The applicant sought an order for the production of the child under article 40.4 of *Bunreacht na hÉireann*. The respondent resisted the application on the basis that the applicant, admittedly, drank alcohol heavily and would be unfit to properly care for the child.

Peart J directed that the child be returned to the applicant on her undertaking that she not abuse alcohol, holding that the applicant was the sole custodian of the child since the parties were not married to each other. Even though the court had an inherent jurisdiction to take any step appropriate to ensure that the child's welfare was not compromised, the concerns expressed about the applicant's ability to properly care for the child did not exist to any degree at the time of the application, which required that custody be taken from the applicant.

***G(Æ) v D(D)*, High Court, Mr Justice Peart, 9/7/2004** [FL9461]

CRIMINAL

Appeal, manslaughter

Appeal against sentence – error in principle – whether the trial judge erred in principle in imposing the appellant's sentence

The applicant was charged on 11 March 2000 with murder, assault, producing a weapon capable of inflicting serious injury in a manner likely to intimidate, assault with intent to rob, and producing an article capable of inflicting serious injury likely to intimidate. The applicant was subsequently acquitted of murder but was convicted of manslaughter and sentenced to ten years' imprisonment. The charges arose out of a number of incidents that occurred on 11 March 2000, when the applicant was returning from a party with some friends. The applicant was just under 16 years of age when he committed the crimes and he had consumed a substantial amount of alcohol on the night in question. The applicant was arrested on 11 March 2000 and he provided the gardaí with an account of the night that was apparently substantially truthful. When sentencing the applicant, the trial judge indicated that he considered that where an innocent life was taken the appropriate sentence was 20 years. However, the judge took into account the fact that the applicant was previously of good character, was of tender age, had certain learning difficulties, co-operated with the gardaí and was not the ring leader and/or prime mover on the particular night. The trial judge also considered a report that stated that the applicant was of borderline ability and a psychological report that outlined the fact that the applicant had frequently described the amount of alcohol he had consumed.

The Supreme Court (Hardiman, Laffoy, Quirke JJ) set aside the conviction and imposed the appropriate sentence, which was one of ten years' imprisonment, holding that:

1) The decision by this court in the case of *DPP v Stephen Kelly* applied to the present case. The approach to sentencing in this case displayed the same error in principle as that identified in the decision of the appeal of Stephen Kelly, accordingly the principles set out in the judgment of *DPP v Kelly* applied to this case
2) The correct approach was to consider the background of the applicant, the nature of the crime committed and the mitigating factors. The offence should be regarded as being in the most serious category of manslaughter because a weapon was used and the attack was brutal. However, the weapon had not been carried by the applicant, he did not play the leading role in the attack, and the appellant did not have an intention to kill or cause serious injury. The mitigating factors included the appellant's youth, the fact that he had no previous convictions and the fact that he had offered a plea to manslaughter
3) The mitigating factors were very weighty. But for those factors, the appropriate sentence would have been 14 years' imprisonment. However, in the circumstances, the appropriate sentence was one of ten years.

***DPP v Stephen Aherne*, Court of Criminal Appeal, 5/7/2004** [FL9444]

Judicial review, larceny

Prohibition – whether the applicant's right to a fair trial had been prejudiced by the failure of the gardaí to seek out and preserve video evidence

The applicant was charged with an offence contrary to section 2 of the *Larceny Act 1916*, as amended by section 9 of the *Larceny Act, 1990*. Brendan Duffy was also charged with the same offence. On 11 April 2002, Judge Malone directed that a security videotape for the night in question be made available to Mr Duffy. However, it emerged that the relevant tape was no longer available and, accordingly, an unopposed order for prohibition was made in favour of Mr Duffy by the High Court on 10 March 2003. The applicant was granted leave to seek judicial review by way of an order of prohibition preventing her trial on the said charge, on the grounds that her right to a fair trial had been violated by the failure of the gardaí to obtain and/or preserve the aforementioned video tape. The applicant further submitted that she was entitled to an order of prohibition on the basis of equality before the law as contained in article 40.1 of the constitution, as her co-accused had been granted prohibition on the same grounds.

Kearns J refused the application, holding that:

1) The applicant failed to show or demonstrate how the absence of the video material might conceivably prejudice her trial or create a real risk of an unfair trial
2) The omission of the gardaí to obtain and preserve the video was not of such significance as to warrant the making of a prohibition order given the existence of the identification evidence and the fact that the applicant had admitted committing the offence
3) The applicant had delayed in seeking the relief. In the context of video evidence, delay had a special meaning derived from the short life expectancy of video surveillance material.

***O'Callaghan v the Judges of the Dublin Metropolitan District Court and the DPP*, High Court, Mr Justice Kearns, 20/5/2004** [FL9479]

Murder, provocation, self-defence

Appeal against conviction – murder – provocation – self-defence – whether the trial judge erred in his charge to the jury

On 12 December 2002, the applicant was convicted of murder. Subsequent to the trial, grounds of appeal were submitted and the applicant gave notice of application for leave to appeal. Subsequently, the applicant's solicitor lodged two further grounds of appeal. The first additional ground was that the court erred in law by failing to leave the question of provocation before the jury. The second additional ground stated that the trial judge erred in law in failing to direct the jury adequately on the burden and standard of proof on the prosecution in respect of negativing the issue of self-defence raised by the applicant. However, it was accepted by counsel on behalf of the applicant that the ground relating to provocation was not arguable, having regard to the decision of *DPP v Mark Cronin* (CCA, unreported, 16 May 2003).

The applicant did not give evidence at his trial. However, the prosecution proved as part of its case certain statements made by him to the gardaí. From those statements, it appeared that the deceased man had produced the knife and that the two men wrestled around with the knife and the deceased got stabbed. There was evidence from the state pathologist at the relevant time which supported the applicant's version of events. The trial judge in his charge to the jury stated that, if they were to find self-defence, then they had to find the accused not guilty. On the following day, counsel for the DPP raised certain requisitions on the charge. He drew the attention of the trial judge to the case of *AG v Christopher Dwyer* ([1972] IR 416). Counsel for the defence did not comment specifically on that submission but simply stated that he was in the court's hands in that regard. However, the trial judge declined to recharge the jury on any of the points raised either for the prosecution or the defence. The applicant applied for leave to appeal against his conviction for murder.

The Court of Criminal Appeal (Hardiman, O'Donovan, Gilligan JJ) allowed the appeal, quashed the conviction and ordered a retrial, holding that:

1) Having regard to the evidence summarised before the court, the defence at the trial had discharged the evidential burden that lay upon them to raise self-defence. The evidential burden of raising the defence of self-defence was not a heavy one. It involved the accused being able to point to evidence of some sort suggesting the presence of the elements of self-defence
2) Prosecuting counsel was correct in the fundamental requisition that he made. The jury should have been told to consider, not only whether there was evidence that a situation of self-defence had arisen, but whether the defendant had or had not employed more force in self-defence than was reasonably necessary, and whether he had used more force than was reasonably necessary, but no more than he honestly believed to be necessary. In the latter event, they should have been told that the appropriate verdict was manslaughter. The jury were left with an erroneous view of the role of self-defence, one overly favourable to the accused. *AG v Christopher Dwyer* ([1972] IR 416) followed
3) The court was required to consider whether the applicant could be said to have adopted the charge actually given by failing to make relevant requisitions on it, on the basis that it misstated the law in a manner overly favourable to him, and thereby maximised his chances of total acquittal. There was ample authority for the proposition that there must at least be an explanation when an applicant seeking leave to appeal wishes to raise a point that was not raised by him or on his behalf in the court of trial
4) In circumstances such as occurred in this case, where the accused is professionally represented, consideration must be given to the duty of defence counsel in those circumstances. Neither the cases cited nor the code of conduct of the Bar of Ireland dealt with the situation where the trial judge misinterpreted the law in the defendant's favour. There was no authority for the proposition that defence counsel was obliged to make a requisition that would disimprove the client's position at trial
5) The conduct of defending counsel at the trial was not open to criticism. The trial judge had received all appropriate assistance from the prosecution and was under no misapprehension. Defence counsel very properly refrained from criticising or casting doubt on what the prosecution had said. Defence counsel was not under any duty, either to the court or to his client, to do more in the circumstances of this case.

***Richard O'Carroll v DPP*, Court of Criminal Appeal, 6/7/2004** [FL9450]

Sentencing

Rape – leniency of sentence – whether exceptional circumstances justifying departure from normal custodial sentence – Criminal Justice Act, 1993, *section 2*

The respondent pleaded guilty to a single charge of rape and was sentenced to three years' detention. At the time of sentencing, the respondent had already spent almost two months in detention and the judge suspended the entire balance of the sentence. The DPP applied pursuant to the provisions of section 2 of the *Criminal Justice Act, 1993* for a review of the sentence.

The Court of Criminal Appeal refused the application, holding that while a sentencing judge in a rape case must approach his deliberations on the basis that normally a custodial sentence will be imposed, he was not precluded from examining the particular circumstances of the case to consider whether such circumstances were so exceptional as to justify departure from the norm. The trial judge was correct in identifying the present case as one in which there were exceptional circumstances. It was an isolated event committed by a 15-year-old who was trying to come to terms with his homosexuality.

***DPP v D(G)*, Court of Criminal Appeal, 13/7/2004** [FL9380]

Sentence – appeal – minimum sentence for manslaughter where knife used – whether trial judge erred in principle – whether sentence excessive

The applicant was convicted of manslaughter. The trial judge in his sentencing stated that, where a knife was used and a life was taken, the minimum sentence upon trial and conviction was 20 years.

The Court of Criminal Appeal allowed the appeal and replaced the sentence with a sentence of eight years, holding that the trial judge erred seriously in principle. Positing a minimum sentence was totally wrong in principle, no matter what the offence or what the circumstances. The sentence imposed was excessive.

***DPP v Dillon*, Court of Criminal Appeal, 17/12/2003** [FL9127]

EMPLOYMENT

Appeal, contract law

Contract of service or contract for services – appeal from decision of appeals officer – procedural confusion – Social Welfare (Consolidation) Act, 1993, section 271

There was a difference between one Michael Walsh and the plaintiff, his employer, as to whether his contract was a contract of service or a contract for services. A deciding officer in the Department of Social and Family Affairs determined that Mr Walsh was employed under a contract for services.

Mr Walsh appealed that decision to an appeals officer and the decision was overturned. The plaintiff requested the chief appeals officer to review the decision, but he simply indicated that he could find nothing erroneous in the decision. The plaintiff appealed under section 217 of the *Social Welfare (Consolidation) Act, 1993*, requesting an order that Mr Walsh was an independent contractor.

The Supreme Court (Denham, Murray, McGuinness, Hardiman and Geoghegan JJ) dismissed the appeal and affirmed the High Court order with variations, holding that the order should expressly state that the decision of the appeals office be set aside and the decision of the deciding officer restored, that the case that Mr Walsh was an independent contractor was so overwhelming that it was not open to the appeals officer to arrive at the conclusion that she made.

***Castleisland Cattle Breeding Ltd v Minister for Social and Family Affairs*, Supreme Court, 15/7/2004** [FL9432] 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.*

Bank of Ireland Asset Management Limited, 40 Mespil Road, Dublin 4.
Tel 01 637 8000. Fax 01 637 8100.
www.biam.ie
Australia • Britain • Canada • Germany • Ireland • Japan • United States

Bank of Ireland
Asset Management

ASM 6763 09/04

Eurlegal

News from the EU and International Affairs Committee

Edited by TP Kennedy, director of education, Law Society of Ireland

The revised *Brussels II regulation* (part 2)

Part 1 of this article appeared in the *Eurlegal* section of last month's *Gazette* (page 49) and considered the scope of the revised *Brussels II*. It also examined the new rules governing jurisdiction and prorogation of jurisdiction.

Part 2 of this article on the revised *Brussels II* examines the new procedure that will apply to intra-EC member state child-abduction cases. It also considers, among other things, the limited availability of the principle of *forum non conveniens*, the removal of intermediate steps to the recognition of access judgments, and the voice of the child in the revised *Brussels II*.

The revised *Brussels II* will bring about a fundamental change in the procedure for dealing with intra-EC member state child-abduction cases, even though the 1980 *Hague convention* will continue to apply. At their council meeting of 29 November 2002, the EU justice ministers addressed the relationship between the revised *Brussels II* and the 1980 *Hague convention on the civil aspects of international child abduction* (1980 *Hague convention*). It was agreed that the courts in the state of the child's habitual residence are to have jurisdiction to make rulings on custody and access rights (see article 10 of council regulation 2201/2003). The exception to this is where the child has been living with the non-custodial parent for over a year and the custodial parent has made no request for his or her return. Recital paragraph 17 in the revised regulation provides that the 1980 *Hague convention* will continue to apply in child abduction cases, but will be complemented by article 11 of the revised regulation.[1]

Under the revised *Brussels II*, the courts of the requested member state can continue to refuse to return a child by invoking the defences provided by the 1980 *Hague convention*. Article 11(1) provides that paragraphs 2 to 8 of article 11 will apply when dealing with applications for the return of a child 'wrongfully removed or retained in a member state other than the member state where the child was habitually resident immediately before the wrongful removal or retention'.

Article 11(2) requires the court to which an application has been made to issue a judgment on custody without delay, and, in doing so, the child must be heard unless it is inappropriate because of his age and maturity. This mirrors obligations arising under article 6 of the 1950 *European convention for the protection of human rights and fundamental freedoms* (ECHR) and article 12 of the 1989 *UN convention on the rights of the child*. Article 11(3) of the revised regulation provides that the court shall, unless exceptional circumstances make this impossible, issue its order no later than six weeks after it is seised of the application (see articles 11 and 13 of the 1980 *Hague convention*).

Article 11(4) provides that a non-return order pursuant to article 13(b) of the 1980 *Hague convention* cannot be made if it is established that adequate arrangements have been made to protect the child after his return.[2] This will have little impact in common law jurisdictions where undertakings have been used effectively for some time to ensure measures are taken in order to protect the child after return. It will, however, bring about a fundamental change in the civil law member states, where a judge may only order what is provided by statute. In fact, undertakings are unknown in the civil law system.

Return of the child

Significantly, as regards the return of the child, a court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to be heard (see article 11(5) of the revised *Brussels II*). This may lead to an increase in oral evidence in child abduction cases. Under article 11(6), if a court issues an order for non-return under article 13 of the 1980 *Hague convention*, the court must send a copy of the court order on non-return and a transcript of the proceedings as well as any other relevant documents to the competent court in the member state where the child was habitually resident immediately before the wrongful removal or retention. The latter court must receive all the mentioned documents within one month from the date of the non-return order.

The court seised of the case in the member state where the child was habitually resident immediately before the wrongful removal or retention is expected to notify and invite the parties, including the local authority/health board, to make submissions within three months of the date of the notification so that the court can consider the question of custody (article 11(7)). Where a court is not already seised in the child's state of habitual residence, the court or central authority that receives the information must notify and invite the parties to make submissions. If neither parent files custody or access proceedings within three months of notification, the child will be left in the state to which he or she has been removed. The child will also remain in the state to which he or she has been removed if, following custody proceedings in the state of the child's habitual residence, custody is awarded to the abducting parent.

If there are custody proceedings, and should the order involve the return of the child, it will take precedence over a non-return order made under article 13 of the 1980 *Hague convention*.[3] An abducting parent would not be in a position to challenge the recognition of such an order, as the order comes within the automatic recognition procedure provided for in article 42. An order for the return of a child made under article 11(8) of the revised *Brussels II* is recognised and enforceable in another member state without any declaration of enforceability and without any opportunity for the recognition of such an order to be challenged. The only requirement necessary to avail of this expedited recognition is that the judgment be certified in the member state of origin to make sure that

it has satisfied the minimum grounds of procedural fairness (article 42(2)). The court in the member state where the child was habitually resident before the wrongful removal or retention must also take into account 'the reasons for and evidence underlying the (non-return) order issued pursuant to article 13 of the 1980 *Hague convention*'. Article 42 places a premium on the removal of all intermediate steps to the recognition of judgments.

The provisions on the rights of the child in this part of the revised regulation are very much to be welcomed, though stop short of requiring necessary procedural changes in the member states' domestic law.

In summary, the effect of this section of the revised regulation will, in my opinion, be to change the application of the 1980 *Hague convention* within the EU. It will allow courts in the member states to which the child has been abducted to make non-return orders, but leave the courts of the child's habitual residence to make final orders requiring the return of the child. In effect, this approach undermines mutual trust between the member states and will do little to promote co-operation between the courts of the member states.

While it is the case that the 1980 *Hague convention* is not being 'communitarised' by the revised *Brussels II*, it must be acknowledged that a different regime will apply to abduction within member states and outside such states. This is regrettable, in that it will change the dynamic and operation of the 1980 *Hague convention* within the European Union. While the revised *Brussels II* will, in reality, take precedence where the child is within the EU, the 1980 *Hague convention* applies where the child is outside the EU (article 60(e)). This should make for some interesting forum shopping by personal litigants.

Lis pendens

The revised *Brussels II* applies in civil proceedings relating to divorce, legal separation or marriage annulment. Each of these applications/actions is considered to be the same cause of action, although – unlike article 11 of the current regulation – the revised *Brussels II* does not use this term. It merely refers to divorce, legal separation or marriage annulment. Where a case might potentially be taken in either or any of two or more states, article 19 of the revised *Brussels II* must be considered. Article 19, unlike articles 11(1) and (2) of the current regulation, no longer contains discrete provisions addressing competing matrimonial proceedings between the same parties, which do and do not involve the same cause of action. It provides that when proceedings relating to divorce, legal separation or marriage annulment have already been commenced in the courts of one member state, a court in a different member state must 'stay its proceedings until such time as the jurisdiction of the court first seised is established'. Article 19(3) provides that the court second seised must decline jurisdiction in favour of the court first seised. It is to be noted that article 15 of the revised regulation, which to a limited degree allows a court having jurisdiction under the regulation to transfer jurisdiction to another member state, attempts to mitigate the worst excesses of the strict *lis pendens* rule outlined above.

Transfer to a court better placed to hear the case

When, in a matter with which the revised *Brussels II* is concerned, a court's jurisdiction has been invoked, it is generally not open to that court to deny a hearing on the grounds that another forum may be more appropriate. Provided that the court has lawful jurisdiction (under the above-mentioned rules) to hear the case, it must proceed with the hearing of the case, save in very limited circumstances.

One notable feature of the current regulation is the absence of discretion caused by the non-availability of the principle of *forum non conveniens*. This preclusion has the potential to cause difficulty and could result in the custody/access issue being considered in a jurisdiction other than that in which a child resides. Article 15 of the revised *Brussels II* is a welcome provision, facilitating a court with jurisdiction under the regulation to transfer the case to a court in another member state better placed to hear the case, and is similar to articles 8 and 9 of the 1996 *Hague convention*. This provision is significant in that it, for the first time in an EC instrument on jurisdiction, facilitates discretion. It allows for the transfer of a case, in whole or in part, from the court having jurisdiction to a court of another member state with which the child has a particular connection, where the court seised of the case is satisfied that the court of the other member state 'would be better placed to hear the case' and that this would be in the best interests of the child. Where the court seised is so satisfied, it may stay proceedings on a *forum conveniens* basis or it may invite the court of another member state to assume jurisdiction. The transfer can be requested by either a spouse or on the court's own initiative or 'upon application from a court of another member state with which the child has a particular connection'. Article 15(1) makes clear that any transfer will only arise 'by way of exception' and is more confined than the analogous provision in the 1996 *Hague convention*. The necessary connection for a case to be transferred is confined in article 15(3) to:

- A member state in which the child had a formal habitual residence or is a national, or
- A member state in which one of the spouses having parental responsibility is habitually resident, or
- A member state in which 'property of the child is located'.

Articles 15(4) and 15(5) set down strict time limits and require the second court to accept jurisdiction within six weeks 'of their seisure'.

Article 15 is a useful provision, allowing for the transfer of a case to a court of another member state on the ground of *forum conveniens*, though it is far too narrowly drawn. It is to be regretted that the drafters of the revised *Brussels II* have not, in large measure, addressed the concerns expressed by family law practitioners on the *lis pendens* rules, which have created a 'first come, first served' principle. This will continue to make speed of the essence in *Brussels II* applications. The danger then is that the parties to a transnational marital breakdown will be lured into a 'race' to see who can get to court first. Article 19(1) of the revised regulation provides that where the same action is taken in the courts of two or more countries, all but the first court to be seised of the case must stay proceedings pending the first court's decision. That first court thus has exclusive jurisdiction in the case. The revised regulation is quite inflexible in this regard insofar as matrimonial proceedings are concerned, with article 15 only allowing the transfer of jurisdiction to another member state, 'by way of exception', where it is in the best interests of the child. Instead of encouraging conciliation and mediation, the limited availability of 'one of the most civilised of legal principles'[4] will prompt parties to litigate earlier to secure jurisdiction in their home state. This militates against the recent statutory provisions in Ireland encouraging parties to engage in mediation and other forms of alternative dispute resolution.

Access

Section 4 of the revised regulation will bring about fundamental changes to access rights, the most significant of which is the removal of the need of '*exequatur*'.[5] The removal of all the intermediate steps to the recognition of access orders was an agreed objective at the European

Council meeting at Tampere in Finland in October 1999. Article 41 is, in part, the realisation of the objective to create a common judicial area and incorporates elements of the French proposal for adopting a council regulation on the mutual enforcement of judgments on rights of access to children. In particular, article 41(1) provides that an access judgment that has been certified in the member state of origin is to be treated for enforcement purposes as if it were handed down in the member state of enforcement.

Significantly, article 41(2) provides that the judge of origin should only issue a certificate where all the parties and the child (having regard to his or her age and maturity) have been given an opportunity to be heard. Where a judgment is given in default, certain special considerations apply. The person defaulting must have been served 'with the document (instituting proceedings) or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence'. A judge cannot refuse to issue a certificate, however, where the person defaulting has accepted the decision unequivocally.

With respect to rights of access, the revised regulation applies not merely to access orders made during matrimonial proceedings but generally. The access provisions of the revised regulation apply to not only parents but also grandparents and those *in loco parentis*. Article 48(1) of the revised regulation is a welcome provision and mirrors article 11(2) of the 1980 *European convention on the custody of children and on restoration of custody of children*.[6] It provides:

'The courts of the member state of enforcement may make practical arrangements for organising the exercise of rights of access, if the necessary arrangements have not or have not sufficiently been made in the judgment delivered by the courts of the member state having jurisdiction as to the substance of the matter and provided the essential elements of this judgment are respected'.

As with the current regulation,[7] the revised *Brussels II* takes precedence over the 1980 *European custody convention*. Application to enforce any custody order made in a member state will be made under the revised *Brussels II*. The opportunity for member states to enter reservations under articles 17 and 18 of the 1980 custody convention reduced its potential. Reservations will not be possible under the revised *Brussels II*.

It should be noted that, unlike seeking enforcement under the 1980 *Hague convention*, applicants seeking to enforce a custody order under the revised regulation will not automatically receive free legal aid. In short, the means test and merits test will apply (see article 50).

Recognition

One of the most common problems when dealing with foreign divorce, separation and parental responsibility judgments is how to enforce them. This is an area of law that has been very sensitive to Ireland due to its specific socio-cultural implications. As in the current regulation, the revised regulation provides that a judgment given in the courts of one member state is to be recognised in all other member states without any special procedure.[8] Article 2(4) of the revised regulation defines judgment as 'a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a member state, whatever the judgment may be called, including a decree, order or decision'.

Article 49 of the revised regulation provides for the recognition and enforcement of an order for costs and expenses. Similarly, recognition and enforcement will apply to 'documents which have been formally drawn up or registered as authentic instruments and are enforceable in one member state and also agreements between the parties that are enforceable in the member state in which they were concluded' (article 46 of the revised regulation).

Defences to recognition of a judgment in a matrimonial matter

Article 22 of the revised *Brussels II* details the grounds upon which a judgment relating to a divorce, legal separation or marriage annulment shall not be recognised. The ECJ has taken a very narrow and restrictive approach to these defences.[9] Indeed, as previously stated, the very existence of any of the grounds of non-recognition seems at odds with the EC objective of removing all obstacles to the recognition of judgments.

Recognition of parental responsibility judgments

In parental responsibility cases, article 23(e) of the revised *Brussels II* provides that in such cases a court can refuse recognition of a judgment if it is irreconcilable with a later judgment of the member state in which recognition is sought. Article 23(g) inserts an additional ground of non-recognition for parental responsibility judgments that mirrors article 23(2)(f) of the 1996 *Hague convention*. It provides that a judgment placing a child in care, either institutional care or foster care, in another member state (other than one seised of the application) will only be recognised if the authority facilitating such a placement has adhered to the procedure outlined in article 56. For example, the authority must first consult with the central authority or other competent authority in the member state where the placement is to take place.

Central authorities

Article 53 requires each member state to establish a central authority to which central authorities from other member states or holders of parental responsibility will be able to request co-operation or assistance with the application of the revised *Brussels II*. Such co-operation or assistance is broadly defined in article 55 and is to be provided free of charge (article 57(3)). It includes both facilitating communications between courts, administrative authorities and agreement between holders of parental responsibility. The foregoing will be complemented by the European Judicial Network in civil and commercial matters,[10] which will facilitate judicial co-operation between the member states in cross-border family issues.

The voice of the child in the revised regulation

Brussels II makes little reference to children and is confined to parental responsibility in respect of the natural and adopted children of both spouses (see articles 3(2)(b) and 15(2)). The status of the child in the revised regulation is, however, significantly enhanced. To this end, the hear-

ing of the child plays an important role in the application of the revised regulation. This is a welcome departure from the current mere affirmation of the 'best interests' principle. In particular, article 11(2) requires the child to be heard during child abduction proceedings 'unless this appears inappropriate having regard to his or her age or degree of maturity' (see also article 42(2)(a)). This is in line with article 13 of the 1980 *Hague convention*, which allows a court to refuse to return a child if the child objects to being returned, having regard to the age and maturity of the child. Article 41(2)(c) establishes the child's status in access proceedings: 'the judge of origin shall issue the certificate only if … the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity'.

The child is to be heard in accordance with the arrangements detailed in article 11 of EC council regulation 1206/2001 of 28 May 2001 on co-operation between the courts of the member states in the taking of evidence in civil or commercial matters. While, according to recital 19, it is left to member states' discretion to provide a framework for representing the interests and wishes of the child, this discretion must be exercised in a manner compatible with the provisions of the 1989 *United Nations convention on the rights of the child* (UNCRC). Research commissioned by the European Forum for Child Welfare in 2001, which took the form of a comparative analysis of the implementation of article 12, UNCRC in six EU countries – Austria, Greece, the Netherlands, Ireland, Italy and Britain – identified significant shortcomings and divergent age-based restrictions in giving effect to the right of the child to be heard in family law proceedings. The findings highlight the absence of an automatic right for the child to be heard in private law proceedings in Ireland, which is compounded by the fact that section 28 of the *Guardianship of Infants Act, 1964*, as introduced by section 11 of the *Children Act, 1997*, has not yet come into force. In public law cases, while section 26 of the *Child Care Act, 1991* allows for the appointment of a guardian *ad litem*, the practical reality is that the absence of a legal infrastructure for the operation of the guardian *ad litem* has led to a reluctance to engage children in decisions regarding their own future.

While the revised *Brussels II* establishes the general right of the child to be heard in family proceedings, child-consultation procedures remain an issue of national law. This is to be regretted and will result in the nature and extent of the child's right to be heard being dependent on the member state in which he or she is habitually resident. The vulnerable position of the migrant child arising out of the divergent child-consultation procedures between the member states should be addressed in advance of the seven-year review of the revised regulation required under article 65. This would ensure greater uniformity between member states and have a significant impact on honouring not only the terms but also the spirit of article 12 of the 1989 UNCRC.

Extended scope

Considering the controversy that accompanied the introduction of the current regulation, it is surprising that these new developments have attracted so little attention. The greatly extended scope of the expression 'parental responsibility' is to be welcomed, as is the limited availability of the principle of *forum non conveniens*. The revised *Brussels II* is likely to increase transfrontier judicial co-operation and represents a more equitable balance between placing a premium on ease of access to the courts of other member states at the expense of whether the court with first jurisdiction is the most appropriate venue for the parties' case.

One unfortunate matter is that a comprehensive family law regulation was not negotiated on this occasion to cover all aspects of child and matrimonial jurisdiction. As it now stands, issues of status and matrimonial jurisdiction will be dealt with by different regulations. The revised *Brussels II* is therefore unlikely to achieve the uniformity realised by the original *Brussels convention*. This is, in part, due to the fact that the conditions that heralded the success of the original *Brussels convention* are no longer present. Indeed, reaching agreement in the future will be more difficult, in that a number of features of the family law systems in the newer member states do not appear to be compatible with the family law systems of the original member states. It will now require consensus among 24, possibly 25, European member states.

Footnotes

1 '(17) In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the *Hague convention* of 25 October 1980 would continue to apply as complemented by the provisions of this regulation, in particular article 11. The courts of the member state to or in which the child has been wrongfully removed or retained should be able to oppose his or her return in specific, duly justified cases. However, such a decision could be replaced by a subsequent decision by the court of the member state of habitual residence of the child prior to the wrongful removal or retention. Should that judgment entail the return of the child, the return should take place without any special procedure being required for recognition and enforcement of that judgment in the member state to or in which the child has been removed or retained'.

2 See section 4 and annex IV of the revised *Brussels II*, which require a judge in the requested member state, in ordering the child's return, to include in any certificate issued details of any protective measures in favour of the child to be taken to ensure the protection of the child after its return to the member state of habitual residence. Also, article 36 of the 1980 *Hague convention*.

3 Article 11(8). The justification advanced for this approach has been that the main objective of the 1980 *Hague convention* is, after all, that the state of a child's habitual residence is the jurisdiction best equipped to adjudicate on any dispute relating to the child and not the state to which the child has been abducted.

4 Lord Goff describing the principle of *forum non conveniens* in *Airbus Industries GIE v Patel and Others* ([1998] 2 All ER 257 at 271).

5 '*Exequatur*' means an intermediate measure whereby a court decree is given enforceable quality.

6 '[T]he competent authority of the state addressed may fix the conditions for the implementation and exercise of the right of access taking into account, in particular, undertakings given by the parties on this matter'.

7 See article 37 of council regulation 1347/2000, OJ L160/19.

8 Article 21(1). Recognition is restricted to the dissolution of the marriage bond (that is, annulment, legal separation or divorce), article 2(4).

9 See, for example, case C-414/92, *Solo Kleinmotoren GmBH v Boch* ([1994] ECR 2237), decided in the context of the comparable provision in the *Brussels convention*.

10 Council decision of 28 May 2001 (2001/470/EC), applicable since 1 December 2002. G

Geoffrey Shannon is the Law Society's deputy director of education.

Recent developments in European law

EURO

Case C-19/03, *Verbraucher-Zentrale Hamburg eV v O2 (Germany) GmbH & Co OHG*, 14 September 2004. Regulation 1103/97 on the introduction of the euro provides that monetary amounts to be paid or accounted for, when converted, are to be rounded up or down to the nearest cent. O2 operates a mobile telephone network in Germany. In 2001, it converted its price-per-minute tariffs from German marks into euro and rounded them to the nearest cent. Verbraucher-Zentrale, a consumer association, took the view that this rounding practice resulted in an increase in O2's prices. It argued that the per-minute price should not be rounded in such a way under the 1997 regulation, as that price was only an intermediate amount, not an amount to be paid or accounted for. The ECJ, in deciding whether the concept of 'monetary amounts to be paid or accounted for' included per-minute prices used as the basis for calculating charges to consumers, looked at the objectives of the regulation. Its chief purpose was that the transition to the euro should take place without affecting obligations already entered into. It follows that the regulation only sets out minimum rules in relation to rounding. The rules were not intended to be exhaustive in relation to intermediate computations. Thus, the court concluded that a tariff such as the per-minute price does not constitute an amount to be paid for accounted for within the meaning of the regulation. There is no practical reason why this tariff must be rounded to two decimal places.

INSURANCE

Cases C-346/02 and C-347/02, *Commission of the European Communities v Grand Duchy of Luxembourg* and *Commission of the European Communities v French Republic*, 7 September 2004. In France and Luxembourg, national rules require insurance companies to include in motor insurance contracts a system under which policyholders are placed on a premium scale according to their accident record. The European Commission argued that this 'bonus/malus' system infringed the principle of freedom to set premium rates established by directive 92/49 (the third non-life-insurance directive). It brought infringement proceedings, arguing that the national rules are contrary to the directive as they result in the establishment of systems having automatic and compulsory effects on premium rates. France argued that there was still overall freedom to set the final price of premiums. It contended that the directive contained no provision establishing an absolute principle of freedom to set rates that would extend to the manner in which the cost of insurance is calculated. Nothing in the directive would therefore preclude the inclusion in the method of calculating insurance premiums of a mandatory coefficient that has no effect on the initial level of premiums and affects their alterations only in a very small way. Luxembourg made similar arguments. It argued that its regulations did not require the premium scales of insurance companies to be notified in advance to a supervisory or monitoring authority. The bonus/malus system is a means of subsequent personalisation of the premium, which concerns only variation of the insurance premium and leaves insurers absolutely free to determine all the components in the price calculations for the vehicle insurance. The ECJ did not accept the arguments of the commission. It looked to its previous case law, where it had held that the principle of freedom to set rates implies the prohibition of any system of prior or systematic notification or approval of the rates that an insurance undertaking intends to use in its dealings with policyholders. The court found that, while the bonus/malus systems had effects on the amount of premiums, they did not result in the direct setting of the premium rates by the state, as insurance companies remain free to set the amount of the basic premium. These systems cannot be equated with a system of approving premium rates that is contrary to the principle of freedom to set rates. The ECJ therefore held that it was not possible to uphold the arguments of the commission. G

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 8 October 2004)

Regd owner: John Carolan, Finternagh, Bailieborough, Co Cavan; folio: 25568; lands: Finternagh; area: 2.9440 and 13.7795; **Co Cavan**

Regd owner: the Urban District Council of Ennis; folio: 19752; lands: townland of Drumbiggil and barony of Islands; **Co Clare**

Regd owner: Gerard Murray and Catherine Murray; folio: 5468F; lands: townland of Tullyglass and barony of Bunratty Lower; **Co Clare**

Regd owner: Cyril Jones and Patricia Jones; folio: 6856F; lands: townland of Breaffy South and barony of Ibrickan; area: 0.1873 hectares; **Co Clare**

Regd owner: Martin Murrihy; folio: 23695; lands: townland of Seafield and barony of Ibrickan; **Co Clare**

Regd owner: William Henry Irwin; folio: 27071; lands: townland of Knockagroagh and barony of Burren; area: 2.7973 hectares; **Co Clare**

Regd owner: Margaret Healy; folio: 17311F; lands: situate to the north side of Curraheen Road in the parish of St Finbar's and county borough of Cork, being part of the townland of Ballinaspig More in the barony of Cork and county of Cork; **Co Cork**

Regd owner: Bridget Roche and Mary Cassidy; folio: 55211; lands: plots of ground situate to the east of Wilton Road in the parish of Saint Finbar's being part of the townland of Ballinsapig Beg in the barony of Cork and county of Cork; **Co Cork**

Regd owner: Timothy and Johanna Cronin; folio: 20862; lands: plots of ground being part of the townland of Garryhankard in the barony of Kinalea and county of Cork; **Co Cork**

Regd owner: Gary and Patricia Ann Kingston; folio: 80085F; lands: plot of ground known as 8 Mount Pleasant Road in the parish of St Nicholas and county borough of Cork; **Co Cork**

Regd owner: James Christopher Hegarty; folio: 30395; lands: plots of ground being part of the townland of Clashadoo in the barony of Carbery West (West Division) and county of Cork; **Co Cork**

Regd owner: Florence and Katherine McAuliffe; folio: 83766F; lands: plots of ground being part of the townland of Kishkeam Upper in the barony of Duhallow and county of Cork; **Co Cork**

Regd owner: David and Mary O'Regan; folio 25565F; lands: plots of ground known as 63 Halldene Drive, being part of the townland of Ballinaspig More in the barony of Cork and city of Cork; **Co Cork**

Regd owner: Nora Gertrude Reilly; folio: 1195; lands: plots of ground being part of the townland of Scartagh in the barony of Carbery East (East Division) and county of Cork; **Co Cork**

Regd owner: Rosaleen Tonson Rye; folio: 43053F; lands: plots of ground being part of the townland of Farnanes in the barony of Muskerry East and county of Cork; **Co Cork**

Regd owner: Anne Walsh and Thomas Walsh; folio: 36896; lands: plots of ground being part of the townland of Kilcullen South in the barony of Muskerry East and county of Cork; **Co Cork**

Regd owner: John Paul Kelly, Kiltown, Killygordon, Co Donegal; folio: 22133, 38226; area: 8.1515 hectares, 5.344 hectares, 3.035 hectares, 5.0990 hectares of the lands of Killygordon and 6.964 of the lands of Kiltown; **Co Donegal**

Regd owner: Ling Au Yeung; folio: DN71263L; lands: property being unit no 107 on the 1st level at Dun Laoghaire Shopping Centre, situate to the east of Marine Road in the parish of Monkstown and borough of Dun Laoghaire; **Co Dublin**

Regd owner: Damien Byrne; folio: DN2988; lands: property situate in the townland of Drishoge and barony of Balrothery West; **Co Dublin**

Regd owner: James Dore; folio: DN6617F; lands: property situate in the townland of Palmerstown Upper and barony of Uppercross; **Co Dublin**

Regd owner: Noel and Marie Ennis; folio: DN51496L; lands: property known as 29 Seagrange Road situate on the east side of Seagrange Road in the parish and district of Baldoyle; **Co Dublin**

Regd owner: Damien Harris; folio: DN40912L; lands: property situate to the west of Cooley Road in the parish and district of Crumlin; **Co Dublin**

Regd owner: Robert Nelson; folio: DN32201L; lands: property known as 7 Tibradden Drive, being part of the townland of Kilnamanagh and barony of Uppercross; **Co Dublin**

Regd owner: Ciaran Ryan; folio: DN78425F; lands: property situate to the north side of Coolock Lane in the parish of Santry and district of Coolock West; **Co Dublin**

Regd owner: Colum Ryan and Emer McGrath; folio: DN139817F; lands: a plot of ground known as site no 263 Woodstown Village, Ballycullen Road, situate in the townland of Ballycullen and barony of Uppercross, shown as plan A1WJR; **Co Dublin**

Regd owner: Carmel Donnelly; folio: DN99920F; lands: property situate in the townland of Knocklyon and barony of Uppercross; **Co Dublin**

Regd owner: Esther Mooney; folio: 37516F; lands: property situate to the south of the Grand Canal in the town of Clondalkin; **Co Dublin**

Regd owner: Kieran Murphy and Anne Murphy; folio: DN197L; lands: property known as no 19 Saint Ita's Road on the south side of the said road in the parish of St George and district of Glasnevin; **Co Dublin**

Regd owner: Mark Doyle and Sinead Timmins; folio: DN96328F; lands: property situate in the townland of Ballyowen and barony of Newcastle; **Co Dublin**

Regd owner: Michael Greene and Jacinta Fahy; folio: 51216F; lands: townland of Mountain West and barony of Dunkellin; **Co Galway**

Regd owner: John and Margaret Gilchreest; folio: 23019; lands: townland of (1) Aille, (2) Limehill and barony of (1) and (2) Leitrim; area: (1) 4.3377 hectares, (2) 0.3718 hectares; **Co Galway**

Regd owner: Michael Hackett; folio: 5589; lands: townland of Parkmore and barony of Galway; area: 2 acres, 3 perches; **Co Galway**

Regd owner: Stephen McDonagh and Rita Doyle; folio: 2769L; lands: townland of Townparks and barony of Galway; **Co Galway**

Regd owner: Mairead Murphy and Jarlath Collins; folio: 39895F; lands: townland of Rinmore and barony of Galway; **Co Galway**

Regd owner: Patrick John Tully, Derrymullan, Ballinasloe, Co Galway; folio: 9031; lands: townland of Derrymullan and barony of Clonmacnowen; area: 7.3335 hectares; **Co Galway**

Regd owner: John Hanley (deceased); folio: 46575; lands: townland of Ballinphuil and barony of Clare; area: (1) 5.2507 hectares, (2) 8.5565 hectares, (3) 4.7904 hectares, (4) 1.7806 hectares; **Co Galway**

Regd owner: Martin Halloran; folio: 6348F; lands: townland of Corranellistrum and barony of Moycullen; area: 0.4502 hectares; **Co Galway**

Regd owner: John Brosnahan; folio: 1111F; lands: townland of Coumduff and barony of Corkaguiny; **Co Kerry**

Regd owner: Michael Costello; folio: 15894; lands: townland of Garrane West and barony of Trughanacmy; **Co Kerry**

Regd owner: Derek and Adrienne Gilmer; folio: 19057F; lands: townland of Simmonstown and barony of South Salt; **Co Kildare**

Regd owner: Jeremiah O'Reilly; folio:

11813; lands: (1) Kilmurray, (2) Rathculliheen and barony of (1) Ida and (2) Kilculliheen; **Co Kilkenny**

Regd owner: Ellen Feely, Carrownoona, Largydonnell, Co Leitrim; folio: 19533; lands: Carrownoona, Kelloges, Largydonnell, and Largydonnell; area: 6.2802, 2.3522, 1.6819 and 136.8621; **Co Leitrim**

Regd owner: Katie B Fowley, Dunkelly, Leckaun, Co Leitrim; folio; 11687; lands: Ballynaboll; area: 19.3844; **Co Leitrim**

Regd owner: Robert Hayes, Farnham Street, Cavan; folio: 5223; lands: Tents; area: 7.790 hectares; **Co Leitrim**

Regd owner: Thomas and Breda Condon; folio: 5030L; lands: townland of Ballincoloo and barony of Smallcounty; **Co Limerick**

Regd owner: Joan McEnery; folio: 1224; lands: townland of Ballynahown and barony of Glenquin; **Co Limerick**

Regd owner: Thomas Moylan; folio: 20916; lands: townland of Bunkey and barony of Clanwilliam; **Co Limerick**

Regd owner: Kevin O'Callaghan, 1 Elm Grove, Bay Estate, Dundalk, Co Louth; folio: 3361L; lands: Marshes Lower; **Co Louth**

Regd owner: John Eaton (deceased) and Josephine Eaton (deceased); folio: 8870; lands: townland of Hazelhill and barony of Costello; area: 0.0519 hectares; **Co Mayo**

Regd owner: Dermot Gallagher and Sonia Gallagher, Lurga, Charlestown, Co Mayo; folio: 37118F; lands: townland of Lurga Upper and barony of Costello; area: 0.2620 hectares; **Co Mayo**

Regd owner: Michael O'Malley; folio: 46898; lands: townland of Keel East and barony of Burrisoole; area: 0.1037 hectares; **Co Mayo**

Regd owner: Michael Walshe (deceased); folio: 9253; lands: townland of (1) Ballycastle and (2) and (3) Glenulra and barony of Tirawley; area: (1) 3 acres, 2 roods, 8 perches; (2) 7 acres, 2 roods, 29 perches; (3) 880 acres, 20 perches (one undivided fourth part); **Co Mayo**

Regd owner: Thomas Quinn; folio: 19513F; lands: townland of (1) Castlecarra, (2) Burriscarra, (3) Glengary Island and barony of (1), (2) and (3) Carra; area: (1) 58.397 hectares, (2) 0.751 hectares, (3) 0.654 hectares; **Co Mayo**

Regd owner: Mary Albina Roche; folio: 183R; lands: townland of Moat and barony of Costello; area: 9.4974 hectares; **Co Mayo**

Regd owner: Catherine, Clare and Ann Moore, 74 Carlingford Road, Drumcondra, Dublin; folio: 9965; lands: Ballybin; area: 0.661 hectares; **Co Meath**

Regd owner: Anthony M O'Shea; folio: 9296; lands: Tullamore and barony of Ballycowan; **Co Offaly**

Regd owner: Thomas Smyth; folio: 3852; lands: Townparks (with the building thereon situate on the west side of Main Street in the town of Philipstown and barony of Philipstown; **Co Offaly**

Regd owner: John Cox; folio: 15975; lands: townland of Ballyglass and barony of Ballintober South; area: 3 acres, 2 roods, 10 perches; **Co Roscommon**

Regd owner: John Hurley; folio: 31918; lands: townland of Derrylahan and barony of Moycarn; area: 8.3516 hectares; **Co Roscommon**

Regd owner: Andrew Carnegie and Miriam Harte; folio: (1) 4210F and (2) 14297; lands: townland of Clooneen and barony of Tireragh; area: (1) 0.3540 hectares and (2) 0.3850 hectares; **Co Sligo**

Regd owner: Henrietta Patricia Spence; folio: 23105; lands: townland of Carrowdough and barony of Carbury; area: 0.1163 hectares; **Co Sligo**

Regd owner: Patrick Cody; folio: 40044; lands: townland of Coole and barony of Owney and Arra; **Co Tipperary**

Regd owner: Ciaran Godkin and Therese Godkin; folio: 12214F; lands: plots of ground situate at Cleaboy in the parish of Trinity without division, Cleaboy and county borough of Waterford; **Co Waterford**

Regd owner: Anthony and Aine O'Meara, 29 Petiswood Manor, Mullingar, Co Westmeath; folio: 18589F; lands: Petiswood; **Co Westmeath**

Regd owner: Desmond Tallon; folio: 5155F; lands: Killisk and barony of Ballaghkeen South; **Co Wexford**

Regd owner: Icekin Mouldings Limited; folio: 6485F; lands: townland of Burgagr More and barony of Talbotstown Lower; **Co Wicklow**

Regd owner: Joseph Keenan; folio: 4737; lands: townland of Togher More and barony of Ballinacor North; **Co Wicklow**

WILLS

Ahern, Brenda (deceased), late of Main Street, Ennistymon, Co Clare. Would any person having knowledge of a will executed by the above named deceased, who died on 16 May 2004, please contact Chambers & Company, Solicitors, Parliament Street, Ennistymon, Co Clare

Condon, Patrick Oliver (deceased), late of 21 Gardenrath Close, Kells, Co Meath. Would any person having any knowledge of a will made by the above named deceased, who died on 26 April 2004, please contact Thornton, Solicitors, 52 O'Connell Street, Limerick; tel: 061 315 543; fax: 061 315 503

Crotty, Thomas (deceased), late of 1 Coolagh Road, Crotty's Cross, Dungarvan, Co Waterford. Would any person having knowledge of a will made by the above named deceased, who died on 9 May 2004, please contact Ronan Daly Jermyn, Solicitors, 12 South Mall, Cork

Kelly, William John (deceased), county council employee, died 23 May 1980; **Kelly, Jane (deceased),** housewife, died 26 November 1998; and **Kelly, Thomas William (deceased),** bus conductor, died 26 June 2004. All late of 153 Hill View, Pottery Road, Kill o' the Grange, Dun Laoghaire, Co Dublin. Would any person having knowledge of the whereabouts of wills made by the above named deceased please contact Hooper & Company, Solicitors, 97 Upper Georges Street, Dun Laoghaire, Co Dublin (ref: 0039390001.JH); tel: 01 280 6971; fax: 01 280 1558; e-mail: jhooper@hooperco.ie

McDonagh, Louis (otherwise Luke) (deceased), late of Dawros, Tourlestrane, Ballymote, Co Sligo. Would any person having knowledge of a will made by the above named deceased, who died on 17 August 2004, please contact Rochford, Gallagher & Co, Solicitors, Tubbercurry, Co Sligo; tel: 071 918 5011; fax: 071 918 5650

O'Donnell, Mary (deceased), late of 19 North Summer Street, Dublin 1. Would any person having knowledge of a will made by the above named deceased, who died on 2 March 2003, please contact Coleman and Company, Solicitors, Main Street, Ballinrobe, Co Mayo; tel: 09495 42202; fax: 09495 42219

Ryan, Michael (deceased), late of 12 Rathdown Avenue, Terenure, Dublin 6W. Would any person having any knowledge of a will made by the above named, who died on 26 June 2004 at Our Lady's Hospice, Harold's Cross, Dublin 6 West, please contact Donal T McAuliffe, Solicitors, 57 Merrion Square, Dublin 2; tel; 01 676 1283; fax: 6619459

Scanlon, Joseph (deceased), late of 36 Moeran Road, Walkinstown, Dublin 12. Would any person having knowledge of a will made by the above named deceased, who died on 20 March 2002, please contact Mary Cowhey & Co, Solicitors, Main Street, Maynooth, Co Kildare; tel: 01 628 5711; fax: 01 628 5613; e-mail: marycowheyandco@securemail.ie

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

Office to let. New, state-of-the-art offices in Capel Building beside Four Courts, approximately 2,000 sq feet with cat 6 cabling, raised access floors, suspended ceiling, air conditioned, dramatic entrance foyer, car parking options. €35 psf. Available January 2005; tel: 087 243 0027 for further information

Solicitor's practice for sale
North Dublin city area. Well-established sole practitioner. Contact Owen McGinley & Co, Accountants; tel: 01 601 2751 or e-mail: omginley@eircom.net

Solicitor's practice required. Dublin city or north county Dublin. Might suit retiring solicitor. Immediate purchase or phased arrangement. Contact Jim Harnett, Accountant; tel: 01 660 3855

Practice for sale – Co Tipperary. Enormous potential. Fee income doubled in last two years. Mainly conveyancing and family law. No reasonable offer refused. Principal retiring. Reply in confidence to **box no 81/04**

To let – 4/5 Usher's Court, Usher's Quay, D6. Superb ground-floor office accommodation close to the Four

Courts; c 172 sq m with parking. Benefits from a modern office fit-out. Available on flexible lease terms. Lambert Smith Hampton; tel: 01 676 0331

TITLE DEEDS

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

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 city of Dublin 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 from 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 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 premises is unknown or unascertained.

All that and those the hereditaments and premises known as Clarendon, 46 Terenure Road East, Rathgar, Dublin 6.

Date: 8 October 2004

Signed: John Glynn & Co, Solicitors, Law Chambers, The Village Square, Tallaght, Dublin 24

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 D O'Sullivan Graphic Supplies Limited (the applicant)

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 city of Dublin 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 any such application 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 are unknown or unascertained.

Schedule: 19, 21, 23 and 25 Grantham Place; 23, 24 and 25 Grantham Street; 49 Synge Street.

Date: 8 October 2004

Signed: Daly, Lynch Crowe & Morris (solicitors for the applicant), The Corn Exchange, Burgh Quay, Dublin 2

RECRUITMENT

Apprenticeship required: all areas considered. A dynamic, personable, hard-working, individual with excellent references available for immediate start. Strong academic background including honours law degree. All eight FE1s and first Irish exam passed. Extensive work experience with IT skills. Tel: 087 904 2256

Sligo – enthusiastic assistant solicitor required for busy but friendly legal practice in Sligo town. Mainly conveyancing with some other work. Excellent salary and working conditions for suitable applicant. Immediate start. Please reply with CV to **box no 76/04**

Assistant solicitor required for busy north Dublin office. Apply with CV to Patrick W McGonagle & Co at patmcgon@indigo.ie or fax: 01 840 1616

Experienced family and conveyancing solicitor with ten years' PQE seeks a move to a part-time position in the Cork city/county area (commuting distance from Cork city). Please reply to **box no 80/04**

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, 15a Margaret Street, Newry, Co Down, BT34 1DE; e-mail: callison@eircom.net; tel: 00353 42 9320854

Full time solicitor required. Must have conveyancing experience. Preferably minimum two years' PQE. Replies to Sean A Mahon & Co, Solicitors, Market Street, Roscommon

Hard-working legal executive/legal graduate (first class honours) with three-and-a-half years' conveyancing, probate and family law experience with eight FE1s and first Irish examination passed. Able to work on own initiative. Available to start immediately. All areas considered; tel: 087 945 4734

Locum solicitor required: Mullingar, general practice, four/six months, start January 2005, 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

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

Experienced solicitor required for conveyancing and probate. Excellent salary for this senior position. Apply in writing to Thomas Noonan of 2 Bedford Place, Navan, Co Meath or e-mail: ThomasNoonan@noonanson.com

Mature energetic law clerk wishes to return to employment in Dublin. Extensive experience in civil litigation, criminal proceedings, road traffic offences and court attendances; tel: 01 837 3194 any time

Solicitor with interest in specialising in taxation required for capital tax department. You will primarily be engaged in CAT, CG stamp duty work for both personal and corporate tax clients. Position commensurate with experience. CVs to Sancha Mulcahy, Deloitte, Earlsfort Terrace, Dublin 2; e-mail: smulcahy@deloitte.ie

Solicitor with commercial and/or financial services experience required to be involved in general structuring of tax-based projects and provision of stamp duty advice. Would suit newly-qualified or solicitor with one/two years' PQE. CVs to Sancha Mulcahy, Deloitte, Earlsfort Terrace, Dublin 2; e-mail: smulcahy@deloitte.ie

Solicitor required for senior position. Three to five years' post-qualification experience preferable. Conveyancing, litigation, family law, probate and general practice. Reply in strict confidence to Hughes Kehoe & Co, Bridge Street, Tullamore, Co Offaly; e-mail: hughkehoe@eircom.net

Benson & Associates

The Irish Legal Recruitment Specialists

Benson & Associates is a niche consultancy, specialising in the recruitment of lawyers for private practice, commerce & industry, from newly qualified to partner level.

PRIVATE PRACTICE, DUBLIN

Banking 4-6 yrs pqe
A topflight practice is seeking a high calibre senior solicitor. This is an excellent opportunity for an ambitious lawyer seeking a fresh challenge whilst dealing with cutting edge work.

Capital Markets 3-5 yrs pqe
Top five firm requires qualified lawyers to advise on the full range of capital markets transactions including all forms of bond and note issues, swaps, tax-driven products and other OTC derivatives.

Commercial Property 1-3 yrs pqe
Rapidly developing mid-tier practice requires ambitious solicitors to join an expanding department with a strong client base dealing with purchase, sale, leasing and development work.

Commercial Litigation 3-5 yrs pqe
Superb opportunity to join a first-rate practice with an interesting workload involving substantial investigation work. Candidates will demonstrate an interest in public administrative law. In addition, there will be a broad spread of general commercial litigation.

Construction (Non-contentious) 1-3 yrs pqe
Front-running practice is seeking junior to mid-level assistants to join a burgeoning department. Whilst prior experience in construction law is not an essential pre-requisite, commercial property exposure will be a distinct advantage.

Corporate Finance 1-3 yrs pqe
This prominent Dublin firm has a strong private equity and corporate finance practice with a first-class client base. Applicants will need to be highly motivated, driven and dynamic with a high level of academic achievement.

EU/Competition 3-5 yrs pqe
An excellent lawyer with strong academics who has specialised in this practice area since qualification is being sought by a leading firm to complement its successful and expanding department. Providing advice on competition issues across all major industrial and commercial sectors, you will have advised on mergers, strategic alliances, private acquisitions and the implications of EU directives.

Funds Lawyer 1-5 yrs pqe
Junior and mid-level assistant solicitors are currently being sought by our client, a first tier practice with a strong asset management and investments funds department.

Corporate/Commercial 1-3 yrs pqe
Pre-eminent Dublin practice requires commercially astute lawyers to work in a demanding and challenging environment. Acting for blue chip clients as well as SMEs, you will be dealing with general commercial transactions as well as M&A, business structuring, venture capital and private equity transactions.

Pensions 1-3 yrs pqe
A top five firm is searching for a high calibre assistant solicitor to work in this rapidly developing practice field. Prior exposure to pensions work whilst an advantage is not an essential pre-requisite. Candidates who are currently working in the financial services arena whether in private practice or in-house are invited to apply for this challenging role.

Pensions 3-5 yrs pqe
Leading practice requires an ambitious senior solicitor. Prior experience in the pensions field is an essential pre-requisite and candidates who are currently working in-house as well as in private practice will be seriously considered. High calibre work coupled with excellent partnership prospects await the successful applicant.

Professional Support 2-5 yrs pqe
Pre-eminent Dublin legal practice requires professional support lawyers with experience or an interest in knowledge management and legal research. A professional legal qualification or law degree is essential.

Regardless of your level of seniority, if you are a qualified solicitor in an Irish law firm or working in-house and seeking a fresh challenge, we would be very interested in hearing from you.

Please contact Michael Benson before for a discussion in the strictest confidence.

Michael Benson,
Benson & Associates,
Carmichael House,
60 Lower Baggot Street,
Dublin 2.
T +353 (0) 1 670 3997
F +353 (0) 1 644 9749
E mbenson@benasso.com

www.benasso.com

LAWYER – COMPLIANCE

+ Excellent + Bonus + Benefits

Pioneer Investments is a leading global fund management company, based in Dublin. We are now recruiting a talented and dynamic Lawyer for its Dublin based compliance team.

Reporting to the Head of Compliance. The selected candidate will be responsible for Codes of Conduct and Ethics in all applicable Jurisdictions, Data Protection, Companies Act developments, Anti Money Laundering Legislation, EU directives and the provision of Compliance Training. Finally, the position will allow the successful candidate to develop their own area of expertise and responsibility by focusing on important areas of financial services in general and asset management in particular. The successful candidate will have the following attributes:

- qualified lawyer with good academics, with 0-2 years PQE
- a strong interest in pursuing a career within financial services
- an ability to combine developments in global compliance with certain structured, periodic tasks
- capable of taking the role forward to establish it as a key function within the legal and compliance team and the wider business

Pioneer Investments will offer an excellent package and support your training and development needs as appropriate to your career.

Applicants should send their Curriculum Vitae to
Mary O'Reilly, 1 George's Quay Plaza, George's Quay, Dublin 2, Ireland.
Tel: (01) 4902883 Fax: (01) 4495883

Email: mary.oreilly@pioneerinvest.ie

Pioneer Investments is a trading name of Pioneer Global Asset Management Group of companies.

PIONEER Investments

IS YOUR FIRM LOOKING FOR THE BEST LEGAL STAFF?

Look no further!

Advertise your vacancies in the *Law Society Gazette*, the only magazine that has 100% penetration of the Irish legal market.

Talk to Sean O hOisin about your advertising needs on 01 837 5018, 086 811 7116 or e-mail: seanos@iol.ie.

Exceptional Opportunities

PRACTICE

Senior Commercial Property
Leading practice seek candidates with 3-5 years PQE in all areas of Commercial Property.
Salary: €65-90K + Bonus

Investment Fund Lawyers
Highly reputable Funds team. Candidates with 2-6 years PQE and domestic experience in Investment Funds.
Salary: €60-100K + Bonus

Senior Banking Lawyers
Outstanding opportunity. Experience in advising Irish/International banks. 3-6 years PQE.
Salary: €60-90K + Bonus

Corporate Lawyers
Large & Medium firms. 3-5 years PQE M&A, IPO's, Joint Ventures, General Commercial.
Salary: €60-80K + Bonus

Residential Development Lawyers
Small & Medium firms seek Solicitors with 3 years PQE in dealing with Developers/Builders.
Salary: €60K + Bonus

Medical Negligence Lawyer
Candidates with experience of Defence Medical Negligence. 2-4 years PQE.
Salary: €55-75K + Bonus

Commercial Property & Probate
Medium firm seeks candidates with experience in Commercial Property & Probate. 3 years PQE.
Salary: €55-70K + Bonus

Commercial Property Solicitor
South Dublin firm. Role involves Commercial Property and some general Commercial work. 2 years PQE.
Salary: €55-65K + Bonus

IN-HOUSE

Senior Legal Counsel (x 2)
International Finance company. Leasing/Financing experience. French/German required. 3-6 years PQE.
Salary: €100K + Benefits

Senior Regulatory Lawyer
Leading Telecoms company. Experience in Commercial/Regulatory issues. 3- 5 years PQE.
Salary: €90K + Benefits

Senior Legal Counsel
Senior Management position. Candidates with 5-7 years experience in Life & Pensions.
Salary: €90K + Benefits + Bonus

Legal Advisor
Regulatory body. Advise on legal aspects across communications and competition. 3-4 years PQE.
Salary: €75K + Benefits

Legal & Compliance Manager
Financial Services. Lawyer/Barrister with 4-6 years experience, particularly in Asset Management.
Salary: €75K + Benefits

In House Pensions Lawyer
Leading Consulting firm. 2-6 years PQE Experience of Pensions, Share Schemes & Employment Law.
Salary: €45-70K + Benefits

Commercial Conveyancing
Leading Telecoms company. 1-2 years PQE in Commercial Property to work in their multidisciplinary team.
Salary: €55K + Benefits

Legal Advisor Compliance
Global Financial Services. 1-2 years PQE Legal & Compliance role within Investment Funds.
Salary: €45K + Benefits

HRM RECRUITMENT GROUP

Contact Eamonn O'Reilly (01 632 1870) or Justin Loughnane (01 632 1885)
47 Fitzwilliam Square, Dublin 2. e: legal@hrm.ie www.hrm.ie

"Before beginning, plan carefully"

Marcus Tullius Cicero

Meghen Group is regarded as the leading legal agency in the Irish market. We offer a tailored service, which meets the specific, and often subtle, demands of the legal industry. Our consultants profit from a wealth of experience and have filled a number of high profile positions in recent months. Our client relationships have developed and matured over the years and we are entrusted with a number of positions on a sole agency basis. Meghen Group's commitment to your job search ensures you have access to decision makers in law firms, confidentiality, effective introductions and control of negotiations.

PRIVATE PRACTICE

Commercial
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: CR1290

Banking and Finance
Top tier firm requires an experienced solicitor with knowledge of syndicated lending and project finance transactions. Ref: CR1299

Funds
Top tier firm requires fund expertise with multi jurisdictional experience and wide product knowledge. Advising fund promoters and knowledge of Irish Investment fund law essential. 4 years' + PQE. Ref: CR1292

Commercial Property/Banking
Top tier practice is looking for a strong commercial property solicitor with established bank relationships. You will be used to working on high value property deals and be looking to progress your career. 3 years' + PQE. Ref: CR1296

Residential Conveyancing
A chance to progress your career in this mid size practice, some development experience required. 3 years' PQE. Ref: CR1291

Technology
This prestigious client requires solicitor with experience in software licensing, IP, Data Protection and E-Commerce. 3 years' + PQE. Ref: CR1297

Cork – Commercial
Reputable practice is looking for an experienced commercial solicitor. You will need excellent experience in commercial transactions, drafting and agreements. 2-3 years' PQE. Ref: CR1281

IN-HOUSE

Commercial Property
Global communications company is looking for a commercial property lawyer with 0-2years PQE. With strong drafting and negotiating skills this role offers a great lifestyle change and excellent benefits. 0-2 years' PQE. Ref: CR1298

Funds/Hedge Funds
A leading investment company is looking for a strong and successful funds lawyer with significant Hedge Fund knowledge. 3-5 years' PQE. Ref: CR1293

Company Secretary
Global leader is looking for a manager to lead its client relationship team. 5 years experience at a senior level is required + full ICSA accreditation. Ref: CR1294

Compliance
Global financial company requires a high academic achiever to join its compliance division. You will be looking to work in the finance industry and have some knowledge of financial regulations. 6 mnth – 2 years' PQE. Ref: CR1285

PARTNERS

With recent success in partner placements we are able to give an informative and discreet consultation for partners considering their future.

LONDON

Our strong reciprocal relationship with a leading London Legal Recruiter ensures we can assist you in your London search. Our Dublin consultant has extensive experience from within the London market and can offer you an informed consultation regarding relocation.

View our website for further roles available **www.meghengroup.com**

Your details will not be forwarded to any third party without your prior consent

Contact Clare Reed on T: (01) 433 9022 F: (01) 433 9090
E: clare@meghengroup.com

97 Lower Baggot Street Dublin 2 T: (01) 433 9000
www.meghengroup.com

MEGHENGROUP