Law Society Gazette

## Regulars



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## Cover story



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# Meeting the members

As I approach the halfway mark in my term as president – rather shocking proof for me that time really does fly when you are enjoying yourself – I want to reflect briefly on what has happened in the presidential year to date. I want to say a few words also on something which I have found during that time to be very valuable, namely, the meetings which the director general and I have with bar associations all over the country.

A number of the major set-piece events of the presidential year are now behind me. I refer in particular to the annual conference which was held this year in Kracow and to the society's annual dinner, both of which were highly successful as a result of the tremendous organisational work put in to make them so by very many people.

The year 2005 has also brought significant developments in a number of the major policy issues facing the society and the profession. In this regard, I would refer most particularly to the very favourable judgment in the High Court judicial review proceedings, which struck down the policy of the Personal Injuries Assessment Board that they would refuse to communicate directly and exclusively with solicitors on behalf of claimants regardless of the wishes of those claimants.

Other major developments have been in the work being undertaken by the minister for justice's review on the costs of civil litigation (representatives of the society met with the minister's task force last month), and in the publication of the long-awaited Competition Authority consultation paper in its study of competition in the legal profession. The society is studying the contents of this radical paper in detail and, following consultation with its members, including a special meeting of the presidents and secretaries of bar associations which will be held in the near future, the society will respond constructively to the Competition Authority by the end of June, as the authority has invited us to do.

Mention of the bar associations prompts me to reflect on one of the most worthwhile and pleasant activities that presidents have, namely, the range of visits made by the president, accompanied by the director general, every year to meet the members of bar associations the length and breadth of the country.

These meetings provide an invaluable opportunity for us to brief the members face to face on a wide range of issues facing the profession and, even more importantly, to listen to the views and insights of members on these issues. In addition, when the agenda reaches 'any other business', we invariably pick up on a range of problems and concerns that members have. On some of these, the society can do very little, but on others there is a great deal that we can do, and we proceed to do, to improve things.

For the president and the director general, these meetings are an invaluable means of keeping our finger on the pulse of the profession.

I wish to thank the members of the Midland, Mayo, Galway, Wicklow, Dublin (at a meeting in Swords, with a meeting in Tallaght due shortly), Roscommon and Leitrim bar associations for their hospitality and engagement with Ken Murphy and me over the past few months. West Cork and Tipperary are next on the list.

Watch out – if we haven't already been, then we shortly will be coming to a venue near you!

**Owen Binchy,**
**President**

***'The society will respond constructively to the Competition Authority by the end of June, as the authority has invited us to do'***

# rochford brady group

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# NATIONWIDE
# News from around the country

## GALWAY

### Lawyers v the islanders

It is important that solicitors and our colleagues at the bar help those less fortunate than ourselves, according to Louis Bourke, president of the Galway Bar Association.

The association recently hosted a fund-raising soccer match between Galway solicitors and barristers and a selection of islanders from Innisbofin, off the Galway coast. The match result in favour of the islanders will not be released – ever. But Louis Bourke did admit that 'it was decisive'.

The result to Our Lady's Hospital for Sick Children in Crumlin, Dublin, will also be decisive when the sponsorship cards are all collected. 'Here in Galway, we very much believe in the importance of life outside the office, and we try in something like this to help what is a most worthy cause', said Bourke.

### Here comes the new judge

Meanwhile, the new Circuit Court judge for the area, Judge Raymond Groarke, has taken up office for counties Galway and Mayo. 'We are delighted to have a man of his experience and we look forward to working with him over the coming years', said Bourke. Judge Groarke, who replaces the popular Judge Harvey Kenny, comes from the Circuit Court area of Kildare, Louth, Meath and Wicklow.

## LEITRIM

### Not a lot of people know that

There is an active spirit of co-operation among solicitors in Leitrim and the recent Leitrim Bar Association general meeting was very well attended, according to committee member Michael Keane Jnr.

The meeting debated various matters affecting solicitors, ranging from the Personal Injuries Assessment Board to the rural tax designation scheme, which expires next year and which has brought considerable work to some solicitors.

### Costs again

However, this co-operation does not seem to extend in all cases to solicitors' fees, where some solicitors are reputed to be doing conveyancing at 'ridiculous' prices. In one case, the auctioneer for the vendor earned a fee a full 14 times higher than the solicitor's fee, despite the complexities and responsibilities of the solicitor's work.

'I agree with competition and the benefits of proper and informed competition, but cut-price conveyancing cannot be in the consumer's interest in the long run', said Keane, who is a son of Michael Keane, a former president of the bar association.

DSBA president Orla Coyne *(centre)* with judges Con Murphy, Yvonne Murphy, Pat McCartan and Esmond Smyth

## DUBLIN

### Food, glorious food

The council of the Dublin Solicitors' Bar Association (DSBA) recently hosted a dinner in honour of the members of the Circuit Court bench in Dublin. Seventeen of the 20 Dublin-based judges attended the event. They were joined by senior litigation practitioners. DSBA president Orla Coyne noted that some judges emphasised that it was important that they be able to meet with practitioners outside the court environment.

Later this month, the dinner campaign continues with dinner for Judge Peter Smithwick and his Dublin-based District Court colleagues. The guest list will be supplemented by seasoned District Court practitioners from throughout the county.

'Other bar associations throughout the country also organise events like these on a smaller scale. Meeting judges socially does help mutual understanding of the different roles and pressures', according to DSBA secretary Kevin O'Higgins.

### What committee are you on?

The members of the many and active committees of the DSBA will be recognised by the association later this month at a 'thank-you dinner' at Fitzwilliam Tennis Club near Ranelagh, Dublin 6.

'We know and hugely appreciate the tremendous time and energy which many of our colleagues throughout Dublin give to the various committees which help all practising solicitors', noted Orla Coyne. Things did not just happen, she added. It took work and this required people to give freely and voluntarily of their time. The dinner would be a small recognition of their work.

### Fifty, not out

And, finally, it is the turn of many senior practising solicitors, some with more than 50 years each in practice. They too will be fêted at a dinner hosted by DSBA president Orla Coyne. It is expected to be well attended and to be a memorable night of anecdotes and reminiscences.

This was an idea of former DSBA president John O'Connor and has now become an annual event. It is greatly looked forward to by senior and very experienced colleagues, many of whom have been in practice since the 1950s.

### And so to work

A further series of seminars will be held over the coming weeks, according to John O'Malley, the DSBA's programmes director. The topics will include *Wills* on 11 May, the new *Civil Liability Act* on 12 May, and a seminar on *Employment law* on 2 June. Details will be circulated. As the year-end time limit approaches, the continuing professional development (CPD) hours will become increasingly useful.

### Not quite town and gown

By kind invitation of the Lord Mayor of Dublin, Michael Conaghan, and in accordance with tradition, the May council meeting of the DSBA will take place in the Mansion House. 'Our annual meeting in the Mansion House highlights what we see as the close relationship between solicitors and the city and people of Dublin whom we try to serve', said DSBA secretary Kevin O'Higgins. G

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

**RETIREMENT TRUST SCHEME**
**Unit prices: 1 April 2005**
**Managed fund: €4.7597**
**All-equity fund: €1.09827**
**Cash-fund: €2.5926**
**Long-bond fund; €1.2798**

**DISABILITY DISCRIMINATION SUMMER SCHOOL**
**A two-week summer school focusing on anti-discrimination legal issues is to be held from 4-15 July in NUI Galway. This is believed to be the first summer school of its type. The two-week school aims to 'raise general legal awareness about the practical potential of the EU's framework directive on employment in the disability context'. For further information, visit *www.eusummerschool.info* or e-mail: disability@eusummerschool.info.**

**GOREY DISTRICT COURT OFFICE CLOSED**
**Gorey District Court Office has closed permanently since the start of last month. However, Gorey District Court will continue to sit in Gorey Courthouse. Management of the Gorey District Court area has been taken over by the Wexford District Court Office at Rowe St, Wexford (tel: 053 22097). Management of the Arklow District Court area has been transferred to Bray District Court Office, Boghall Road, Bray, Co Wicklow (tel: 01 2862474).**

# Cowen says government has 'high regard for Law Society'

Finance minister Brian Cowen, the guest speaker at the society's annual dinner, spoke in praise of the Law Society and said that the government would listen carefully to the society's views before reaching any conclusions in relation to Competition Authority recommendations.

Cowen told the 200 guests at the dinner that the government had 'an open mind' on the Competition Authority recommendations. In addition, he said several times that the government had 'a high regard for what the Law Society does in the interest of the profession and in the public interest'. The government 'would listen carefully to the society's views before reaching conclusions on where the public interest lies', he added.


Cowen: will 'listen carefully'

Although Cowen is not the first solicitor to have been minister for finance, he is the first to have held this very senior government position for many years. Cowen was appointed to finance last September, following a very successful term as minister for foreign affairs.

In introducing him as guest speaker at the dinner, director general Ken Murphy referred to the pleasure that Irish solicitors had taken at seeing a colleague, particularly during his time as minister for foreign affairs, dealing with world political leaders at the very highest level. This had been particularly striking during such periods as Ireland's chairmanship of the UN Security Council and its highly successful presidency of the European Union last year.

Murphy added that 'the whole country took pride in the success of the EU presidency in which minister Brian Cowen and the taoiseach played the central political roles'.

## REVENUE CAT SECTION RELOCATES

The Revenue's capital acquisitions tax section covering the Sligo, Longford and Leitrim areas has moved from the Sligo Revenue office to Longford. Seamus Gill will deal with all queries about disponers from these areas. He can be contacted at the Revenue Commissioners, Richmond St, Longford, tel: 043 50701, e-mail: segill@revenue.ie.

## CONSTITUTIONAL RECOMMENDATIONS

The Irish constitution should be amended to grant express rights to children, the Law Society has said in a written submission to the All-Party Oireachtas Committee on the Constitution. The committee is currently reviewing the existing articles in the constitution that deal with the family (see p14). Representatives of the Law Society made oral submissions to the All-Party Oireachtas Committee on the Constitution on Tuesday 19 April.

# ONE TO WATCH: NEW LEGISLATION

**The register of reserved judgments**

Section 46 of the *Courts and Courts Officers Act, 2002*, as amended by section 55 of the *Civil Liability and Courts Act, 2004*, was commenced by SI 712/04 to come into effect on 31 March. It provides for the establishment by the Courts Service of a register of reserved judgments. If a judgment is not delivered within two months after being reserved, the president of the relevant court (the District, Circuit, High Court or chief justice) is required to list the case before the judge concerned and notify the parties to the case (promptly or on return after vacation). On expiration of any subsequent two-month period, if the judgment is not delivered meanwhile, the same obligation arises. Where proceedings are listed before a judge under this section, the judge must specify the date on which he or she intends to deliver judgment. The date named by the judge must be entered in the register. The only exemption is for death or illness of the judge, or as provided by regulation (see below). If the court consists of more than one judge, it is the senior judge (as defined) against whose name the reserved judgment is registered.

The register is required to be open to the public, and any person may apply for a certified copy of any entry in the register. A judgment does not count as reserved until at least 14 days after the conclusion of a hearing.

SI 171/05 sets out regulations for the register of reserved judgments, which also came into effect on 31 March. The Courts Service is delegated to decide in what form the register is to be set up, but the regulations provide that it is to be kept in electronic or other non-legible form which is capable of being converted into legible form. The regulations provide that time does not run against a judge if he or she is a member of the Supreme Court when it is considering a referral

# RTÉ apologises over unfair interview

RTÉ's *Morning Ireland* presenter Cathal MacCoille has apologised to Law Society director general Ken Murphy for repeatedly, but wrongly, asserting in an interview that a study had shown that 60% of solicitors believed there was no competition between them. The Indecon study in fact recorded that a mere 3.8% held such a belief. Murphy had subsequently written to MacCoille to complain about the use of this false and misleading figure (see last issue, page 6).

MacCoille has now written to Murphy saying, 'I wish to apologise for putting a question to you in your interview on February 24 that was not soundly based'. He added: 'my editor, Shane McElhatton, is writing to you to explain in more detail how the error arose, and the unfortunate delay in replying to your well-justified complaint on this matter'.

McElhatton, in a separate letter, confirmed that the statistic repeatedly used in the interview by MacCoille was 'incorrect' and continued: 'in using this figure during the interview with you, he could not fail to throw you off, because the figure did not exist. I have to apologise to you for the embarrassment and discomfort caused'.

Murphy: matter is now at an end

The series editor of *Morning Ireland*, Hilary McGouran, also telephoned Murphy to apologise and explain the position. She referred to the good relationship that *Morning Ireland* and Murphy have had over many years, and made it clear that she hoped to see that relationship continue.

Murphy wrote in reply to thank the journalists for graciously apologising for their mistake. He recognised that by no means everyone in the media would have acknowledged and apologised for such an error and he confirmed that as far as he was concerned the matter was now at an end.

## FLOOR AREA COMPLIANCE CERTIFICATES: A FOLLOW-UP

The Law Society's Conveyancing Committee has been advised by the Department of Finance that it is not proposed to make any changes to the primary legislation and an amended SD10A has been issued by Revenue which reflects the statutory position (see also practice note on page 36 of this issue). In relation to new houses under 125 square feet, first-time buyer's relief no longer applies and stamp duty relief is now available only if there is a floor area compliance certificate in existence at the date of the transfer/conveyance.

Purchasers' solicitors should insert special conditions in contracts for sale/building agreements relating to new houses under 125 square feet, to provide that the floor area compliance certificate must be available on closing. An undertaking is not acceptable, the Conveyancing Committee says. Practitioners must advise clients that purchasers buying these houses under stage payment contracts will not be able to claim exemption from stamp duty.

# Cork courts and culture

Partly because this year it is the European Capital of Culture, but primarily because Law Society president Owen Binchy is a native of the county, the Law Society Council will hold a meeting in Cork on 27 May, *writes Ken Murphy*.

The venue for the meeting, by kind permission of the Courts Service, will be the courthouse in Washington Street where very extensive refurbishment has been completed recently at a cost in excess of €20 million.

Although no fewer than ten of the Council's 43 members are from Cork, Binchy hopes that the Council generally will have an opportunity to meet with colleagues from 'the rebel county' through events being organised with the assistance of the Southern Law Association and its president Jerome O'Sullivan.

This will be the third year in a row that the Council has successfully held one of its meetings outside Dublin in a newly-refurbished courthouse. In 2003, a meeting was held in Sligo courthouse and last year the venue was Dundalk.

under article 26 of the constitution.

They provide that different parts of the register are to be kept in the offices of the registrars of the different levels of court. In the case of the Circuit and District Court offices, they are to be kept in the local area where the case was heard, and the times for inspection are the opening hours of the registrars' offices.

Certified copies are charged at €5. Schedule 1 of the regulations sets out the information to be recorded in the register.

Section 46 as amended institutes an important system for review of cases that are awaiting judgment. In some extreme cases, judgments have been outstanding for very long periods, amounting to a year or more. Much of the case law of the European Court of Human Rights deals with delays in hearing cases and handing down judgments (Italy is a leading culprit). One Irish case was taken to Strasbourg on this point: *Doran v Ireland* (2003), which concerned a case that was instituted in 1991, substantially heard in 1993, finished hearing in 1994 and did not result in a completed hearing and judgment until October 1995 (the trial judge, Hamilton J, was caught up in the Beef Tribunal). There were further delays on appeal, so that the applicants finally got an award in their favour only at the end of 1998, with the question of the amount of costs owing to them still outstanding. The state was held to have breached the applicants' rights under article 6(1) (right to a fair trial) and article 13 (right to an effective remedy).

This new system of regularly reviewing outstanding judgments should make judges more accountable and help to prevent this sort of occurrence in the future. G

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

# 443 solicitors added to roll last year

In 2004, 443 new solicitors were admitted to the roll of solicitors, *writes TP Kennedy*. This was a busy year for admissions, but not as significant as 2001, when 474 solicitors were added to the roll.

The bulk of the new admissions were Irish trainees, but 93 were lawyers transferring to Ireland from other jurisdictions. Over 20% of all those admitted in 2004 were from other jurisdictions. This is the largest number of transferring lawyers ever admitted, up from 68 in 2003 and from the former record of 80 in 2002. The majority of these lawyers are English and Northern Irish solicitors who can apply for admission in Ireland without the requirement of sitting a test. Fourteen lawyers were admitted from jurisdictions where reciprocal arrangements are in place. These lawyers sat the qualified lawyers' transfer test. Eleven of them were New York attornies.

### Gender balance

The one major variation in the 2004 admission figures was a small resurgence in male admissions. For the last number of years, over 60% of all new solicitors have been female. They are still in the majority, but in 2004 this percentage fell to 54%. This is due in part to the large number of transferring lawyers. Most lawyers transferring to Ireland from other jurisdictions are male.

**GENDER BALANCE**

| | 2003 | 2004 |
|---|---|---|
| **Female** | 251 (60%) | 232 (54%) |
| **Male** | 171 (40%) | 211 (46%) |

**AGE PROFILE**

| | 2001 PPC1 | 2002 PPC1 | 2003 PPC1 | 2004 PPC1 |
|---|---|---|---|---|
| **21-25 years** | 76 (22%) | 162 (46%) | 282 (65%) | 318 (59%) |
| **26-30 years** | 207 (61%) | 143 (41%) | 106 (24%) | 161 (30%) |
| **31-35 years** | 27 (8%) | 26 (7%) | 25 (6%) | 40 (7%) |
| **36-46 years** | 17 (5%) | 16 (5%) | 13 (3%) | 18 (3%) |
| **47+** | 10 (4%) | 5 (1%) | 7 (2%) | 4 (1%) |

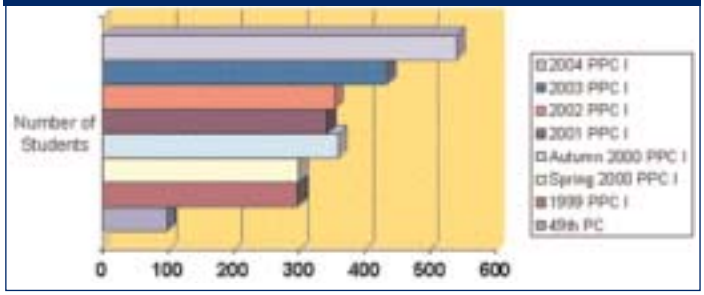
**TRAINEE NUMBERS**

| 2001 PPC1 | 2002 PPC1 | 2003 PPC1 | 2004 PPC1 |
|---|---|---|---|
| 343 | 355 | 434 | 546 |

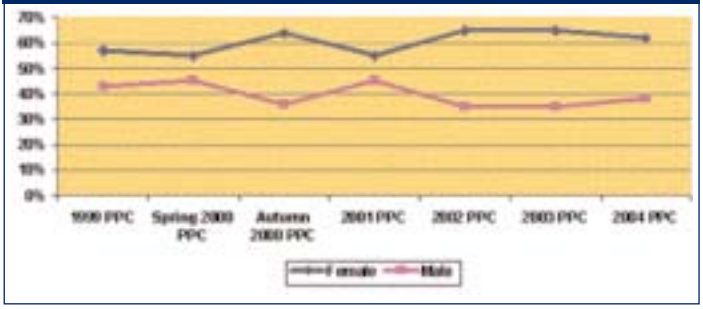
### Trainee numbers

The number of trainees has dramatically increased and continues to increase. The professional courses in the 1990s were limited to 98 students. The 2004 PPC1, which has just finished, broke all records. With a student intake of 546, it was the largest training course to pass through the Law Society's doors.

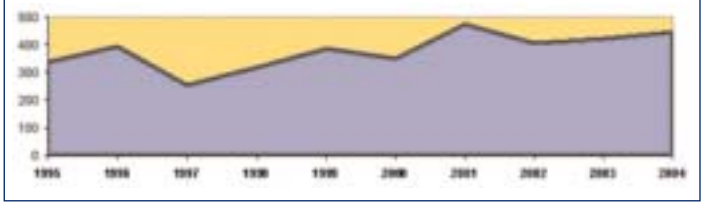
**TRAINEE NUMBERS**




**GENDER BALANCE**




**NUMBERS ADMITTED FROM 1995 – 2004**



### Age profile

The age breakdown of the 2004 PPC1 was broadly similar to that in 2003. Almost 90% of all students on both courses were 30 or younger. This is up from 87% in 2002 and 84% in 2001. The number of students aged 21-25 years has dropped back to 59% from 65% on the 2003 PPC1. This percentage is still very high compared with 46% in 2002 and a mere 22% in 2001.

The gender breakdown of the 2004 PPC1 showed a similar trend to that observed with admissions. The female majority has dropped from 65% to 62%.

### Location of training firm

The 2004 PPC1 had the greatest geographical spread of any course since the Education Centre opened its doors in 2000. The percentage of trainees working with a firm in Dublin has fallen to 61%. This is down from 65% in 2003 and from 75% in 2001. Cork, Galway and Limerick all have broadly similar percentages to 2003 – the increase has been in trainees working in other parts of Ireland. The number of trainees working in the 22 other counties had grown to 21.5% from 16% in 2003. G

**NUMBERS ADMITTED FROM 1995 – 2004**

| | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 |
|---|---|---|---|---|---|---|---|---|---|---|
| Qualifying Irish trainees and transferring barristers | 306 | 360 | 198 | 263 | 323 | 284 | 409 | 321 | 354 | 350 |
| English/Northern Irish solicitors | 30 | 31 | 54 | 54 | 60 | 60 | 59 | 73 | 49 | 70 |
| Non-EU lawyers | | | | | 1 | 5 | 6 | 5 | 14 | 14 |
| EU lawyers | 0 | 3 | 0 | 1 | 1 | 1 | 1 | 2 | 5 | 9 |
| **Total** | **337** | **394** | **252** | **318** | **385** | **350** | **474** | **405** | **422** | **443** |

HUMAN RIGHTS WATCH

# Small fries and Big Macs: defamation, damages and legal aid

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

The applicants in *Steel & Morris v UK* (European Court of Human Rights, 15 February 2005) are two impecunious activists who were sued for libel because they distributed leaflets that made serious allegations against the McDonald's Corporation. They were refused legal aid. They received some help from lawyers and supporters, but largely carried the brunt of a 313 court-day trial, and 23 days on appeal, themselves. The court largely found against them and awarded damages that were reduced on appeal to £36,000 and £40,000. Their case under the *European convention on human rights* argued that the proceedings were unfair under article 6(1), principally because they were denied legal aid, and that the proceedings and their outcome constituted a disproportionate interference to their right of freedom of expression under article 10.

### Article 6 and legal aid

The court held that the necessity for legal aid must be determined on the basis of three criteria in the light of the particular facts and circumstances of each case:

- The importance of what was at stake for the applicant for legal aid
- The complexity of the relevant law and procedure, and
- The applicant's capacity to represent him or herself effectively.

The court held that in this case the financial consequences had been potentially severe and the complexity was enormous, involving a trial of record length, 40,000 pages of documentary evidence and 130 witnesses. Assessing the defendants' ability to defend themselves, the court held that they had been deprived of an opportunity to defend their case effectively and there was an unacceptable inequality of arms with McDonald's. Accordingly, there had been a violation of article 6(1).

### Article 10

The court held that there was a strong public interest in enabling groups and individuals to contribute to public debate in relation to matters of general public interest, including health and the environment. The applicants argued that the existing law placed an intolerable burden on people like themselves, who (they asserted, despite a domestic court finding to the contrary) only distributed leaflets, to verify the truth of everything contained in them. They also argued that large multinational companies should not be entitled to sue without proof of actual financial damage.

Under UK and Irish libel law, once a defamatory statement is challenged, the person who made the statement (the defendant) must prove it is true to the balance of probabilities: this is known as the presumption of falsity. The court accepted that the presumption of falsity was not, in principle, incompatible with article 10, but stated that in circumstances where there is an enormous imbalance between the parties, it could infringe article 10.

The court held that states have a margin of appreciation in how they protect the interests of companies against damaging allegations. However, if the UK did so by putting the burden of

proof on the defendants, in accordance with UK libel law, 'it is essential, in order to safeguard the countervailing interests in free expression and open debate, that a measure of procedural fairness and equality of arms was provided for'. Further, there was an interest in promoting the free circulation of information and ideas about multinationals, and the potential 'chilling' effect in silencing others must also be taken into account. The court found that the lack of equality and procedural fairness amounted to a breach of article 10.

### Damages

The court held that the damages awarded were disproportionate to the harm done to McDonald's reputation, which had not shown any financial damage. Although McDonald's had not tried to collect the damages awarded, the damages were enforceable. It found that the damages awarded were disproportionate to the legitimate aim served. This also amounted to a breach of article 10.

The case featured in last month's *Gazette*, *Carmody v The Minister for Justice, Equality and Law Reform and the AG*, is currently on appeal to the Supreme Court.

### Defamation law reform

The *Programme for government* includes a commitment to reform the law of defamation, and the current legislation programme lists the bill for publication in early 2006. What does this mean for revisions to the bill?

- The court did not say that legal aid must be granted for defamation cases, but stressed the complexity of the case and the extreme inequality of the parties. This has potentially wide-reaching effects in relation to all kinds of cases, for both plaintiffs and defendants. The legal aid scheme does not cover defamation cases and will therefore be in breach of the convention once a case with similar elements arises. One solution might be to make provision for a discretionary award of legal aid, in accordance with the criteria mentioned above
- The presumption of falsity should be re-examined, as otherwise the freedom of expression in article 10 can be infringed
- The scale of damages issue is currently before the ECtHR in connection with *de Rossa v Independent Newspapers*, and, whatever the outcome of that case, it is clear that damages for libel will have to be much more closely related to the harm suffered and the effect on the person paying. G

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

# Drama, death, indignity and

**Lawyers must always bear in mind the distinction between law and justice, writes Robert Pierse**

Law Society conferences, in my experience, are never producers of high drama. However, in Kracow this year, we were provided with high drama and stark contrasts.

On 28 March, we went to Auschwitz/Birkenau. We returned from its horror and the indignity of mass death to the beginning of the dignified death drama of the passing of Poland's icon, Karol Wojtyla, Pope John Paul II. His dignified departure from life engulfed the conference for three days.

Road to hell: the railtracks leading into Auschwitz

## Forged in the fires

John Paul II was an unbending champion of the laws and teachings of his Church. His central theme was the dignity and value of each human being, based on human rights. His statement of these laws was as clear as those of a good judge, delivered with logic, with knowledge, with the clarity of justice, and with understanding of the weakness of human natures. He spoke with the dignity of huge visible courage from a base of deep study and knowledge. He was never afraid of public opinion or to take a strong decision unpopular to the media and the materialist society. He was visibly impartial, steely strong, wise and generous in his life and he never wavered from his principles.

He was the son of an army captain and a teacher, both of whom were conservative and disciplined Catholics. Talking to people in Kracow on the long day of his death, one learnt that his character was forged by these parents and the troubles of his country. He lost his mother at the age of nine and his brother shortly after. To avoid deportation in World War II, he worked in a quarry. He became aware of the internment and extermination of his Jewish friends. Kracow had 65,000 Jews before the war; at its end, 120.

His grasp of the principle of equality is shown by a story told by a Jewish school friend at the age of 11. His friend went into a church where Karol was serving mass. He wanted to tell him they had passed an exam. A woman in the church said to the young Jew, 'What are you doing here in a Catholic church?'. When his friend told Karol of this, his reply was: 'Do they not know we are all children of the one God?'.

He grew up and was forged in an era of oppression, inequality and injustice, where the law of the conqueror was absolute, no matter how awful. Both the Russians and the Germans murdered and oppressed the Poles. His first mass had to be celebrated in an underground crypt in virtual darkness and anonymity.

## Law in contrast

In this former royal city, we sat listening to speakers on the theme *East meets West*. It was a dash of legal cold water amid the unfolding death of a great Pole. It was focused on the technical law of competition, partnerships, joint stock companies, property law, international legal services, and so on. It certainly was more about economic regulation than law as the Pope wrote about it.

As to what law is, I am still puzzled after 50 years of attempting to learn and practise it. This main working session of the conference came after the previous day's visit to Auschwitz/Birkenau and two days before the death of the Pope. The previous day in Auschwitz was a day of tears of horror, the following days were days of tears of admiration by a whole nation for Pope John Paul.

I saw such a contrast between the conference law and the Pope's view of law. I bought his recently-published book *Personal reflections* in Kracow that evening. The Pope's views on law went to the heart of what is its source and objective:

*'The law established by man, by parliaments and by every other human legislator, must not contradict the natural law, that is to say, the eternal law of God. Saint Thomas gave us this famous definition of law:* Lex est quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet promulgata – *the law is a rational ordering promulgated for the sake of the common good by him who has the care of the community. As a "rational ordering", law rests on the truth of being; the truth of God, the truth of man, the truth of all*

# the lessons from Auschwitz

*created reality. That truth is the basis of natural law. To this, the legislator adds the act of promulgation. For God's law, this happened on Sinai, and for modern legislation it happens in parliaments.*

*'Let us now consider a question of great importance for the history of Europe in the 20th century. It was a regularly elected parliament that consented to Hitler's rise to power in Germany in the 1930s. And the same Reichstag, by delegating full powers to Hitler, paved the way for his policy of invading Europe, for the establishment of concentration camps, and for the implementation of the so-called "final solution" to the Jewish question; that is to say, the elimination of millions of the sons and daughters of Israel. Suffice it to recall these events, so close to us in time, in order to see clearly that law established by man has definite limits, which it must not overstep. They are the limits determined by the law of nature, through which God himself safeguards man's fundamental good. Hitler's crimes had their Nuremberg, where those responsible were judged and punished by human justice. In many cases, however, this element is lacking even if there always remains the supreme judgment of the divine legislator. A profound mystery surrounds the manner in which justice and mercy meet in God when he judges men and their history.*

*'From this perspective, as we enter a new century and a new millennium, we must question certain legislative choices made by the parliaments of today's democratic regimes. The most immediate example concerns abortion laws. When a parliament authorises the termination of pregnancy, agreeing to the elimination of the unborn child, it commits a grave abuse against an innocent human being, utterly unable to defend itself. Parliaments which approve and promulgate such laws must be aware that they are exceeding their proper competence and place themselves in open conflict with God's law and the law of nature'.*

The extraordinary contrast between the 'laws' we spoke of at the conferences and reading this was pretty stark.

I regret to note that the new EU constitution proposes to change all their applicable regulations to the new name of European laws. These have been inflexible bureaucratic positive rules on the whole – it diminishes the word *law*, certainly in the view of St Thomas and indeed Plato and Aristotle, to rename them 'laws'. To these, law was about administering justice.

Pope John Paul II: a dignified departure from life

## Why was this lawful?

As I have a daughter in Germany, I went to Dachau, to the Nazi concentration camp. I carried with me memories of my shock as an eight-year-old on seeing some post-World War II pictures, which my mother had hurriedly confiscated. What I found was 100 times worse than what I vaguely recollected. I, of course, now looked at the camp through the eyes of a lawyer. I found many of the Nazi 'laws' and camp 'regulations' printed in English with accompanying photographs of the torture and punishment for infractions, for example, being hanged by your thumbs until they broke off. This was all lawful – we must never forget that.

In Auschwitz/Birkenau on 31 March, I found a much larger arena of mass extermination, terror and human degradation.

In Block 11, there were two portable gallows to supplement the permanent gallows. These permanent gallows were built like soccer goals, so as to dispatch 12 prisoners at a time. We visitors prayed as a group at the wall of death in Block 11, where naked men and women stripped of any dignity were shot in relays, as other prisoners in scant, striped prison garb took the bleeding bodies away in relays.

I passed on, upset and mystified, to the gas chambers and ovens, all then lawful, but now thankfully unused for 60 years.

How was all this lawful?

## Searching for the answer

Can we, as lawyers, provide any worthwhile answer to this question? More importantly, is our answer going to be of lasting preventative value?

To be of value, our legal answer must be to go back to the age-old question of the purpose, nature and source of 'law' and its use as an instrument of power and control within the limits of justice. The central importance of each individual's dignity must be clearly recognised, with the remedy available to all for its breach. I believe that much of what is emerging in political thinking and action in Europe is reflecting only some of these considerations, mainly by academics rather than practising lawyers. Practising lawyers have been concerned more with what I term 'regulating' than with laws. That is a pity. It is necessary for practising lawyers to be in a position to spot and stop human rights violations and deprivations that come across our doorsteps.

The first legal answer to the atrocities of the vanquished in World War II was the Nuremberg trials, where a thin veneer of legality overcame in most cases the defence of 'I was acting on lawful orders. This was my lawful duty'.

Look at the photo of Michael Mulcahy's painting of

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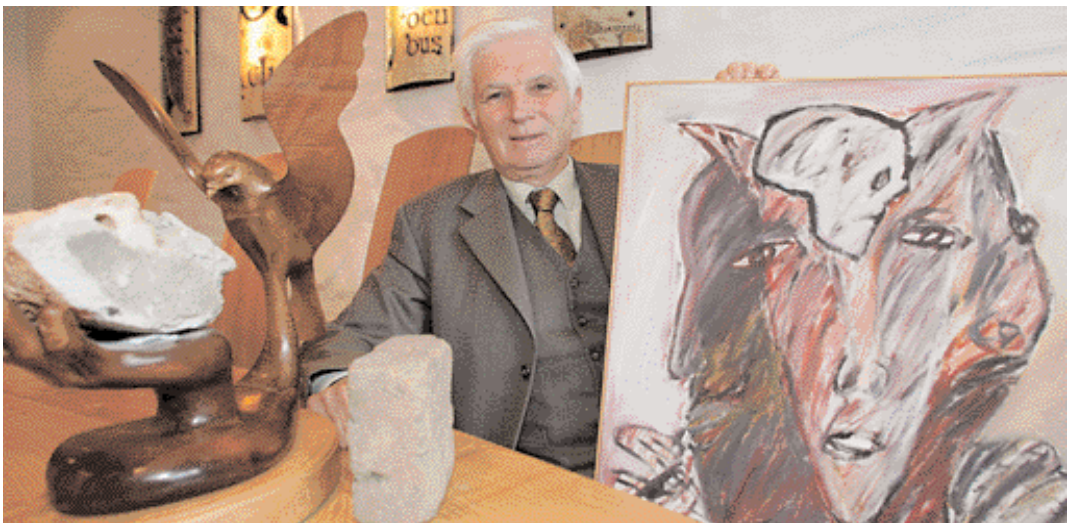


Robert Pierse with Michael Mulcahy's painting of the three faces of lawyers

the three faces of lawyers *(above)*. I understand from him that he painted this in Paris while visiting Jewish friends during the Nuremberg trials. His friends thought the lawyers in the process were hypocritical in acting as judges, prosecutors and defenders, all proclaiming the rule of their law. Not a pretty picture, not a pretty view of us, not a pretty situation.

In that photo there are also two pieces of brick, which I think exemplify progress in the 44 years between 1945 and 1989. The small piece of brick I picked off the ground as it fell off a guardhouse near the electrified barbed wire at the Birkenau extermination camp. These watchtowers were at close intervals, where the mainly Christian guards shot any inmate – Jew, Gypsy, gay, Pole – seeking escape. To me, the brick is a symbol of the end of the Nazi regime. On the dove/hand carving, there is a piece of the Berlin Wall brought home to me by one of my sons in 1989. It, too, is a symbol of the end of another totalitarian regime. Two totalitarian regimes ended within 44 years is progress.

We lawyers must never forget the nature of their claimed lawfulness and must continue to search for a true meaning and value of fair and just law.

Pope John Paul loved the young. He challenged them to implement his principles and values. He did not specifically address those values to young lawyers, but the passages quoted above show what ultimate legal values he held. I just hope that the young lawyers of the first half of this century consider them, implement them and prevent the mass injustices of the first half of the last century and continuing in Darfur and other places today. G

*Robert Pierse is a partner in the Kerry law firm of Pierse & Fitzgibbon.*

# FAMILY B

**New legislation and court decisions have led to several important developments in Irish family and child law. Geoffrey Shannon discusses some of the recent and impending changes**

MAIN POINTS

- ***Brussels II bis***
- **Recent family law judgments**
- **Law Society's recommend-ations for reform**

A new council regulation repealing *Brussels II* came into force on 1 August 2004, though it did not apply in its entirety until 1 March 2005. It has become known as *Brussels II bis* and makes few changes to the provisions on divorce. The principal changes are in relation to children, where the expression 'parental responsibility' is greatly extended. *Brussels II bis* applies to all civil matters relating to the 'attribution, exercise, delegation, restriction or termination of parental responsibility'. Essentially, jurisdiction is based on the child's habitual residence at the time the court is seised. This is a significant departure from the repealed regulation, where parental responsibility was linked to the divorce. There are, however, a number of limited exceptions.

*Brussels II bis* 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. It will allow courts in the member state 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. While the *Hague convention* is not being 'communitarised' by *Brussels II bis*, it will change the dynamic and operation of the convention within the European Union.

Section 4 of *Brussels II bis* brings about fundamental changes to access rights, the most significant of which is the removal of the need of 'exequatur'. With respect to rights of access, *Brussels II bis* applies not merely to access orders made during matrimonial proceedings but generally.

The status of the child in *Brussels II bis* is significantly enhanced. This is a welcome departure from the relative invisibility of children in the repealed regulation. 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'. Article 41(2)(c) establishes the child's status in access proceedings. While, according to recital paragraph 19, it is left to the 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*.

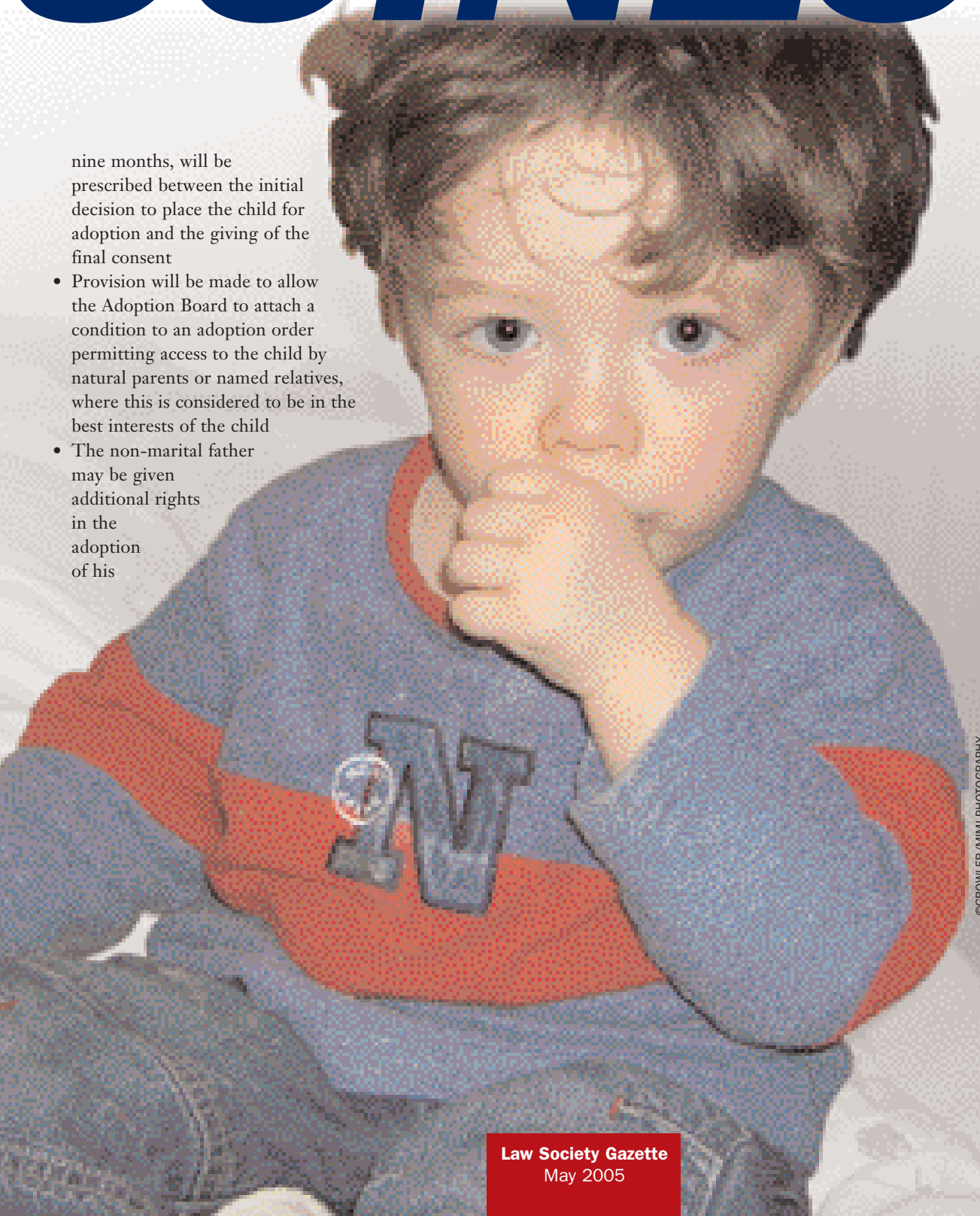
## Guardianship and adoption

In December 2004, the government approved a range of legislative proposals on adoption and guardianship. The 1993 *Hague convention* will be incorporated into Irish law under the proposed legislation. An adoption authority will be established to carry out key functions and will replace the Irish Adoption Board.

A number of specific issues are included in the legislative proposals. The key points are:

- A period of at least six weeks, but no more than

# USINESS



nine months, will be prescribed between the initial decision to place the child for adoption and the giving of the final consent

- Provision will be made to allow the Adoption Board to attach a condition to an adoption order permitting access to the child by natural parents or named relatives, where this is considered to be in the best interests of the child
- The non-marital father may be given additional rights in the adoption of his

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## MARRIED WITH CHILDREN

The *Civil Registration Act, 2004*, which was enacted on 27 February 2004, will bring about some significant changes to the conduct of the marriage ceremony. To date, the law on the registration of major life events is contained in a number of statutes. The 2004 act provides for the reorganisation of the law on registration into one statute. The life events to be registered include not only births, stillbirths, deaths and marriages, but also extend to adoptions, foreign adoptions, divorces and decrees of nullity of marriage. Various schedules to the act outline the information to be registered.

The act also introduces major changes to the legal provisions applicable to the solemnisation of marriages. When section 46 of the act is commenced, it will change the law on the notification of proposed marriages. Significantly, s51(7), which is not yet in force, defines the legal moment of marriage for the first time as follows: 'The parties to a marriage solemnised in accordance with this act shall be taken to be married to each other when both of them have made a declaration in the presence of each other, the registered solemniser and the two witnesses that they accept each other as husband and wife'.

child by a third party by means of a provision allowing conditions regarding access to be attached to the adoption order, and

- Provision will be made allowing a step-parent or long-term foster carers (that is, where the child has been with the foster parent for at least five continuous years) to apply to the court for a special guardianship order. Such an order will be enjoyed without prejudice to the guardianship rights of other parties, in particular those of existing guardians and of the natural parents of the child. For the duration of the 'special guardianship', the court may suspend the guardianship rights of persons other than the foster parents. This may only occur where:
  1) the other guardians of the child give a full, free and informed consent to the suspension or have otherwise abandoned their rights and responsibilities in respect of the child, and
  2) the court is satisfied that the child's best interests would be seriously compromised unless the suspension was granted.

The court may attach conditions to the order relating to access by the parents or other members of the child's family. The special guardianship order may be revoked or varied on application to the court and will cease to have effect when the child reaches 18.

### Voice of the child

Children have a right to be heard in legal proceedings affecting them. That said, hearing the voice of the child in legal proceedings is not easy. After all, our family law system is adult-oriented rather than child-centred. Moreover, the child's views and the welfare of the child are not synonymous.

A relevant and instructive case is the recent decision of Finlay-Geoghegan J in *FN and EB v CO, HO and EK* (unreported, High Court, 26 March 2004), where the applicant maternal grandparents were appointed guardians over two children, aged 13 and 14. The judge held that, while the Oireachtas did not detail the factors to be taken into account when making a decision under section 8(2) of the *Guardianship of Infants Act, 1964*, the provisions of ss3 and 25 of the 1964 act were applicable. Section 25 of the act (as inserted by s11 of the *Children Act, 1997*) requires that 'in any proceedings to which s3 applies, the court shall, as it thinks appropriate and practicable having regard to the age and understanding of the child, take into account the child's wishes in the matter'. (Section 3 of the 1964 act makes it abundantly clear that in considering an application relating to the guardianship, custody or upbringing of a child, the court must have regard to the welfare of the child. This, the section states, is 'the first and paramount consideration'.)

In this regard, Finlay-Geoghegan J held that the children in the case were of an age and maturity to have their wishes taken into account. This is an interesting and innovative judgment that draws a useful link between the personal right of a child under article 40.3 of the constitution to have a decision made in accordance with natural and constitutional justice and the provisions of the *Guardianship of Infants Act, 1964*: '[section] 25 should be construed as enacted for the purpose of, *inter alia*, giving effect to the procedural right guaranteed by article 40.3 to children of a certain age and understanding to have their wishes taken into account by a court in making a decision under the act of 1964, relating to the guardianship, custody or upbringing of a child'.

### Ombudsman for children

The *Ombudsman for Children Act, 2002* provides for the appointment of an ombudsman who has a dual role: to promote the rights and welfare of children in all aspects of public policy, practices, procedures and law and to conduct investigations of complaints. The act came into force on 1 May 2004, though the president appointed Emily Logan as ombudsman in December 2003. One of the ombudsman's most important functions is her power to deal with complaints made by or on behalf of children arising as a result of the actions of public bodies, schools and voluntary hospitals.

### *Children Act, 2001*

Part 2 of the *Children Act, 2001*, which came into force on 24 September 2004, establishes for the first time on a statutory basis provisions for early intervention at an inter-agency level for children at risk by the holding of a family welfare conference. The basic purpose of the conference is to produce a plan for the future care, protection and development of the child. This will involve

the family taking responsibility for the child and coming up with proposals for the plan with the assistance of the professionals attending the conference.

Family welfare conferences provide a useful framework within which a child, its family and the appropriate agencies can find solutions to the problems that have led to the child being vulnerable. It empowers families to come to their own solutions in co-operation with the relevant professionals. The emphasis is on consensus and partnership. One of the most significant and progressive elements of the family welfare conference is that children will be present. Two core principles underlying the conference are that the child's interests are paramount and that, as far as possible, the child is best looked after within its own family.

### Law reform and the family

The Law Reform Commission's *Consultation paper on the rights and duties of cohabitees* considered the legal position of non-marital couples in Ireland. It recommends a scheme of certain limited rights and duties to 'qualified cohabitees', which it defines as intimate non-marital couples who have lived together for at least three years in a 'marriage-like' relationship. The three-year period can be reduced to two years if the couple has resident children.

The All-Party Oireachtas Committee on the Constitution is currently considering over 6,000 written submissions from individuals and groups on the definition of 'the family' in the constitution. The Law Society made various recommendations in its submission:

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- An amendment to the constitution to grant express rights to children
- The rights of cohabitees should be reflected in legislation rather than in the constitution. Legislation should be introduced facilitating registered partnership agreements, but the society does not see the need to change our fundamental law. In summary, the Law Society endorses the recommendations of the Law Reform Commission in its consultation paper
- Greater emphasis on family support in the family law system. Steps have been taken towards improving the family law system. For example, the need for some form of national machinery to advance the development of support services has, in part, been met by the Family Support Agency. A more tangible link between the court system and support services should also be created, as in New Zealand
- The special position of marriage recognised by the constitution should be maintained
- Article 41.2(1) should be removed from the constitution or altered. One way of dealing with this matter would be simply to amend this article to read as follows: 'In particular, the state recognises that by his or her life within the home, a parent gives to the state a support without which the common good cannot be achieved'. Alternatively, and the society's preferred approach, is that article 41.2(1) should be removed. The society does not see any reason why 'life within the home' should have a greater value than life outside the home
- The society would see the benefit of introducing amending legislation to allow for clean-break divorce in appropriate circumstances to be potentially available to all divorcing couples. There is no constitutional impediment to introducing such a legislative amendment
- The society would like to draw attention to the non-implementation of key statutory provisions in the family law area, in particular, the non-implementation of section 28 of the *Guardianship of Infants Act, 1964*. This section was introduced in the *Children Act, 1997* but has not yet commenced. This is in clear breach of obligations under international instruments to which the state is a party and has led to a chaotic system for the representation of children in divorce and separation cases.

In conclusion, the review undertaken by the All-Party Oireachtas Committee on the Constitution presents an ideal opportunity for strategic reform for the benefit of the family, individual members of the family and the community in general. G

*Geoffrey Shannon is the Law Society's deputy director of education and author of the recently-published* Child law *(Thomson Round Hall).*

## RECENT SUPREME COURT DECISIONS

Until recently, arguments of estoppel appeared attractive in cases involving the recognition of foreign divorces. The Supreme Court in *CK (applicant) v JK (respondent); FMcG (notice party)* (unreported, 31 March 2004) has now rejected the application of the doctrine of estoppel in cases involving issues of marital status, holding that to allow a principle of estoppel in such circumstances would give rise to considerable uncertainty insofar as the marital status of many couples is concerned.

The court's decision in *BD v JD* (unreported, 8 December 2004) addressed both the tax implications of ancillary relief orders on the granting of a judicial separation or divorce and the legal costs involved in such an action. The case came before the Supreme Court by way of an appeal from a decision of the High Court. The Supreme Court held that large realisation costs should be taken into account when ancillary orders are made on the granting of a judicial separation or divorce. Hardiman J stated the position in the following terms: 'it appears that both statute and case law positively require realisation costs (in this case, tax liability) to be taken into account in a specific way'.

The court also held that when a trial judge orders ancillary relief in an ample resources case, no order for costs should be made. Hardiman J concluded that those charging instruction fees or brief fees in family law actions 'must bear in mind that [fees] are to be related to the work done and not directly to the asset value in a case'.

# A voyage round JOHN M


**Barrister, author and raconteur Sir John Mortimer is coming to Dublin with his new show. Conal O'Boyle talks to the creator of *Rumpole of the Bailey* about his life, the law and the Sex Pistols**

Bad news for Tony Blair. Sir John Mortimer won't be voting Labour in the forthcoming British general election. The author and playwright, creator of *Rumpole of the Bailey* and sometime barrister, believes that the Labour Party has forsaken its traditional ethos and is now eroding fundamental civil liberties.

'I'm horrified by the Labour Party's interference with the jury system', says Mortimer. 'For instance, they're holding people in prison without trial and they're introducing a *Prevention of Terrorism Act* in which they can shut people up in their homes without a trial.

'It's very difficult. I've voted Labour all my life, but I don't think I shall this time'.

Mortimer, who was knighted in 1998, is bringing his show to Dublin's National Concert Hall next month. *Mortimer's miscellany: life, love and the law* is an intimate audience with the man who, among his many accomplishments, created the enduring figure of Rumpole, adapted *Brideshead revisited* for television and is credited with finding a new definition of the word 'bollocks'.

'Basically, I tell stories, some jokes and we read bits from plays and poems and play a little music', he explains.

MAIN POINTS

- ***Mortimer's miscellany* at the NCH**
- **The wizard for *Oz***
- ***Never mind the bollocks***

## The X-files

He certainly has a lot of material to draw on. Born in 1923 and educated at Harrow and Oxford, Mortimer is the only child of a famous divorce lawyer. When he entered the law himself, he practised largely in the probate and divorce areas until he took silk. Then he sprang to public prominence as the defending barrister in some of the high-profile obscenity cases that Britain seemed to relish in the late 1960s and early 1970s.

'The first one I did', recalls Mortimer, 'was a book called *Last exit to Brooklyn* by Hubert Selby Jr. That was about drug taking and male prostitution in New York. As a defence, I invented the "aversive theory", which was that if a description of sex is so disgusting that it puts people off sex at least until next Sunday, then it must be highly moral and beneficial. The Court of Appeal thought that was wonderful, so we won the case. After that, I sort of had a reputation for doing those sorts of cases'.

That was 1968. In 1971, Mortimer found himself defending the editors of the satirical underground magazine *Oz*, who had given over editorial control to a bunch of English public schoolkids. The result was what has been described as 'some of the most hilariously and/or disturbingly obscene material to be found on the shelves of a UK newsagent'. Among the images that disturbed the Establishment so much was one of Rupert the Bear doing what cartoon bears are not supposed to do.

The editors of *Oz* were charged with 'conspiring to produce a magazine containing diverse lewd, indecent and sexually perverted articles, cartoons and drawings with intent thereby to debauch and corrupt the morals of children and young persons within the realm'. Mortimer says that he got the case because others were reluctant to take it on, believing it to be a lost cause.

While the *Oz* trial now seems like a ridiculous footnote at the fag-end of the summer of love, it was taken very seriously at the time. Certainly, the maximum possible sentence of life imprisonment should have been enough to concentrate the mind of the defendants. The defence wasn't helped by the trial judge, Mr Justice Michael Argyle, who, suggests Mortimer, was not playing with a full deck.

'The judge was slightly mad', he laughs. 'On one occasion he said, "For those of us without a classical

# ORTIMER

John Mortimer, and *(below)* Leo McKern as Rumpole

education, what is this *cuny linctus*?" I think he thought it was a sort of cough mixture'.

The trial was the longest obscenity trial in British history, and a huge number of witnesses were called, including DJ John Peel, comedian Marty Feldman and jazz musician George Melly. The jury convicted the three defendants, who received sentences of up to 15 months' hard labour, but they were freed on appeal because Argyle grossly misdirected the jury.

'The *Obscene Publications Act* says that the definition of obscenity was that it should tend to deprave or corrupt the likely reader', explains Mortimer. 'And the judge told the jury the test was whether it was disgusting or embarrassing or put you off, when the fairer test was whether it would deprave or corrupt people. So he misdirected the jury, and we got off'.

The *Oz* case catapulted Mortimer into the public gaze, but he wasn't so successful in the *Gay News* trial (*Whitehouse v Lemon* [1976]). This was a private

Rotten luck: Britain went mad for the fab four with their quirky mop-top hairdos

prosecution taken by decency campaigner Mary Whitehouse and centred on the alleged blasphemous libel contained in a poem written by a professor about a centurion falling in love with the body of Christ on the cross. This was the first time this common-law offence had been used in Britain since 1922. Mortimer lost, and the editor of the magazine received a hefty fine and a suspended sentence.

## Rigging the jury

The following year Mortimer was back, representing the Sex Pistols in what might well be one of his finest moments. The spiky-haired rascals had just released their first and only album, *Never mind the bollocks, here's the Sex Pistols*, to critical acclaim and public outrage. In its wisdom, the Crown decided to prosecute the Virgin record store in Manchester for displaying the 'obscene' record cover in its window. Virgin owner Richard Branson drafted in Mortimer, who had defended him and his student magazine years earlier.

The first thing Mortimer did was to banish the Pistols from the environs of the court. 'They looked disgusting', he says, 'so I sent them off to the other end of the town and said, "Don't come near the place". One of them had very green teeth and they looked awful'.

Luckily, his legal skills were better than his appreciation of punk style and he soon came up with a novel defence. 'We called in a lexicographer, who was also a vicar, from the local university and he testified that one of the meanings of the word "bollocks" was the rigging of an 18th century man-of-war. And the magistrate said, "Oh yes, of course, an 18th century man-of-war! Case dismissed"'.

Mortimer's distinguished legal career came to an end 15 years ago almost by accident. 'I was defending an Opposition MP in Singapore – they don't like Opposition MPs in Singapore – and I was defending him because they'd charged him with fiddling his party's funds to try to get rid of him', he recalls. 'I was having lunch with a man from *The Times* and I said, "I don't really need all this law. I've got enough money from writing, so perhaps I'll give it up". And in the morning I saw it was in *The Times* that I was giving up. So I thought to myself, if it's in *The Times*, then I have to do it – so I did.

'But we won the case and got him off. And then I left, and they immediately started the prosecution all over again. They sent him to prison and demoted the judge to office boy'.

An unusual end to an equally unusual career. Over his 82 years, Sir John Mortimer has written 12 *Rumpole* novels, 11 other novels, a number of plays, and three volumes of his autobiography, not to mention his screenplays for cinema and television.

His show in the National Concert Hall includes actresses Sinead Cusack and Joanna Davis, with music from ex-Deep Purple keyboard player Jon Lord. Given the rich vein that there is to mine, audiences can expect anything except a rousing rendition of *Smoke on the water*. G

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*Tickets for* Mortimer's miscellany: life, love and the law *are available from the National Concert Hall, Earlsfort Terrace, Dublin 2, prices from €30. For further information, contact Florence Irwin at Flo Management on 01 671 1123.*

# MIBI? M

**The relationship between the Motor Insurers Bureau of Ireland and PIAB is not so simple. Stuart Gilhooly looks at the arguments**

MAIN POINTS

- Issuing proceedings
- Motor Insurers Bureau of Ireland
- Personal Injuries Assessment Board

The *Personal Injuries Assessment Board Act, 2003*, which was drafted in somewhat of a hurry, has thrown up a serious anomaly that is expected to be litigated in the near future. The essential issue is this: do cases involving the Motor Insurers Bureau of Ireland (MIBI) have to be first referred to the Personal Injuries Assessment Board (PIAB) or is it in order to issue proceedings without so doing? A debate has recently begun and here I intend merely to set out the two views and let you make up your own mind, though I will be advising caution.

Section 12 of the *PIAB Act* states, among other things, that no proceedings in respect of a relevant claim may be initiated without first making an application to PIAB. Section 9 defines 'a relevant claim' as a civil action to which the act applies. Section 3 states, among other things, that the act applies to all civil actions, except those involving medical negligence. The big question, therefore, is what constitutes a 'civil action'. This is defined in section 4 as follows:

*'An action intended to be pursued for the purpose of recovering damages, in respect of a wrong, for:*

*a) Personal injuries, or*

*b) Both such injuries and damage to property (but only if both have been caused by the same wrong)'.*

There are, however, a number of exceptions to this rule and it is the first of these, paragraph (i), that has engendered the debate:

'[A civil action] *does not include:*

*i) An action intended to be pursued in which, in addition to damages for the foregoing matters, it is* bona fide *intended, and not for the purpose of circumventing the operation of section 3, to claim damages or other relief in respect of any other cause of action'.*

Before examining the two arguments, it is important to remember that there are, in general, two occasions in which damages and/or compensation can be claimed from the MIBI: first, when a motorist is uninsured and, second, when a motorist is unidentified, commonly known as a hit-and run accident.

### Issuing proceedings without reference to PIAB

The argument for issuing proceedings without reference to PIAB centres around the proposition that a MIBI claim is not a civil action, as it falls within the exception outlined above. In any

# MIBI not

proceedings against the MIBI, it is usual (and indeed necessary) to seek a declaration to enforce the provisions of the agreement. It is argued that this represents an 'other cause of action' and therefore is not a civil action. The proponents of this view are especially strong in their view in respect of an action involving an identified but uninsured motorist, as it would be necessary to sue the identified motorist in negligence and/or breach of duty and the MIBI for specific performance of their agreement, thus constituting two separate causes of action and seeking two separate reliefs. The argument is bolstered by the fact that the act is silent in relation to the MIBI and does not make any provision for such claims and, more importantly, that the new 2004 MIBI agreement, which was signed a full three months after the act came into force, makes no reference whatsoever to PIAB and refers only to the issue of proceedings throughout.

### The argument against

It is important to distinguish between a claim involving an untraced motorist and one involving an identified but uninsured motorist. In the former instance, it seems unlikely that it could not constitute a civil action. It is clear that the MIBI qualifies as a 'respondent', which is defined in section 13(1) of the act as 'the person or each of the persons who the claimant alleges in the application is or are liable to him or her in respect of the relevant claim'.

A claim in an untraced motorist case can only be against the MIBI and therefore the only cause of action can be enforcement of the agreement. While two separate reliefs can be sought (damages and a declaration seeking specific performance), they both arise out of the same cause of action and therefore cannot fall within the exception.

It becomes a bit more complicated in the case of an identified but uninsured motorist. While there would indeed be two causes of action pleaded and two separate reliefs sought in such proceedings, the question arises as to whether they fall within the exception. The difficulty is that the declaration sought does not stand alone. It cannot be granted without an order for damages and, therefore, if the claim for damages fails, so necessarily must that part of the action seeking a declaration. It is not a new cause of action but rather one that seeks a consequential relief arising from the original cause of action, which necessarily flows from the award of damages and only exists for the purpose of enforcing the award against the MIBI.

Furthermore, it is quite clear that the exception was not intended to include such cases and one assumes the purpose was to exclude a case where a claim for personal injury and, say, defamation were made in the same proceedings, which would clearly not be within PIAB's remit. Furthermore, it could be argued that if the legislature had intended to exclude MIBI claims, it would have expressly said so. The act did, after all, clearly exclude garda compensation claims, among others.

### The result?

Who knows? We should find out quite soon, though. In late March, a plenary summons was issued by the central office against an uninsured motorist and the MIBI claiming damages and a declaration in the manner outlined above. An application has not yet been made to PIAB in respect of this claim. It will be interesting to see what now emerges.

PIAB has made it clear that it considers itself to have jurisdiction over all MIBI cases. The MIBI has been more circumspect, though its website seems to indicate that a PIAB application must be made first. One assumes, therefore, that it will seek to stay the proceedings issued and that the argument will have to be decided as a preliminary issue. Of course, it is always possible it will simply decide that it doesn't really want to use PIAB and that it is happier using the courts. One would imagine, though, that the powers behind PIAB would not tolerate this, as it would mean losing between 5% and 10% of their claims.

It is worth remembering that, even if the courts agree that proceedings can be issued without recourse to PIAB, it is, of course, open to the legislature to amend the act to expressly include MIBI claims.

### What to do?

In my opinion, play it safe until this matter is decided by the courts or clarified by the MIBI. If you issue proceedings now without a PIAB application, there is a danger that the proceedings could be fully defended on the basis of section 12 and, if you lose, you may find yourself statute barred.

Even going to PIAB is better than that. G

*Stuart Gilhooly is a partner in the Dublin law firm HJ Ward & Co.*

# Mighty KR

**Kracow in Poland was the venue for this year's annual conference. Conal O'Boyle reports on the business session at what was generally regarded as one of the most successful conferences in recent history**

MAIN POINTS

- ***East meets West***
- **Buying property in Poland**
- **Continuing professional development**

This year's annual conference in Kracow was held in the shadow of the failing health and ultimate death of that city's adopted son, Pope John Paul the Second. As news of his passing filtered through on the Saturday evening, most of the 200-plus Law Society delegates found their way to the Archbishop's Palace, where thousands of Poles had gathered to mourn and pray. The palpable sense of grief felt by the pope's countrymen moved even the most cynical of Irish lawyers, and nobody who made the journey to the Kracow conference was in any doubt that they had witnessed history as it happened.

The Irish connection with Poland was one of the themes elaborated at the conference's business session, which, without a trace of irony, took place the day after a visit to Auschwitz and the day before a visit to Poland's celebrated salt mines at Wieliczka.

Poles gathering at Kracow's Archbishop's Palace to grieve and pray

According to Maria Slazak of the Polish Law Society, who spoke on the subject of *Doing business in Poland*, Irish people are the biggest single group of investors in Polish real estate, with apartments being the property of choice. Ms Slazak detailed the history of the Polish legal professions (there are two, 'legal advisors' and 'advocates'), both under communist rule and afterwards, and noted the close links that had been forged between the Irish Law Society and its Polish counterparts (see also *Gazette*, November 2003, page 20).

## Money's too tight to mention

Ms Slazak took delegates over the hurdles that exist for foreigners wishing to buy Polish property and highlighted the differences between Polish and Irish conveyancing. Notably, under Polish law, the lawyer cannot take possession of the deposit or indeed touch clients' money. Deposits have to be paid directly to the vendor. Members of the Solicitors Disciplinary Tribunal in the audience were heard to mutter 'eureka' at this point.

Noting that Irish investors and their advisors tended to feel confused by the differences in the two systems, Ms Slazak went on to point out that Polish developers expected to get paid in advance so that

Owen Binchy with the conference speakers

# ACOW


President Owen Binchy opens the business session

they could afford to finish building the properties they had just sold. She added that there was no insurance available for this and no escrow account arrangements. With a certain degree of understatement, she concluded that Irish solicitors needed to be careful with their clients' monies when buying such property in Poland.

## Holding back the years

Next up was the Law Society's senior vice-president Michael Irvine, who took the conference theme of *East meets West* literally. Irvine had been involved in a wide range of legal consultancies in eastern Europe and the developing world, and in an entertaining speech he brought delegates through the highs and lows of doing such work. For the record, his favourite city is Vilnius, his favourite country Armenia, and his greatest professional achievement is his firm's contribution to the establishment of a financial services centre in Botswana. He also likes pina coladas and taking walks in the rain.

Donald Binchy of the Law Society's Education Committee took the opportunity to explain the continuing professional development (CPD) regime to a captive audience. The fact that they might get a CPD credit for their attendance at the business session made the delegates a little more attentive. So far, around 110 CPD seminars had been held, with 64 in Dublin and the rest outside the Pale. 'As far as


Maria Slazak


Donald Binchy


Douglas Mill


Michael Irvine


A palpable sense of grief in Kracow

CPD is concerned', said Binchy, 'east definitely meets west'.

He concluded by warning that failure to complete the quota of CPD hours was technically misconduct and hinted that the Law Society might consider mandatory CPD hours if voluntary compliance with the current requirements proved unreliable.

The final speaker of the business session was Douglas Mill, the chief executive of the Law Society of Scotland, who spent a good deal of time talking about what he was going to talk about and doing it with great wit and charm. For him, 'east meets west' was Glasgow versus Edinburgh. In Scotland, he said, the major by-product of the introduction of CPD was the reinvigoration of local bar associations, who had embraced the new training role.

Mills had a reassuring message for his colleagues in Ireland. Scotland, too, had been the subject of innumerable studies and reports from accountants, economists and government – so much so that the profession was suffering from what he called regulation fatigue.

'Don't worry', Mill told delegates. 'It's not just you'. G

# JUNK food for

**A recent European ruling may send shockwaves through the law on collective redundancies and could have a dramatic impact on Irish employers. Ciaran O'Mara explains**

MAIN POINTS

- ***Protection of Employment Act, 1977***
- ***Junk v Wolfgang Kühnel***
- **Collective redundancies**

The ruling of the European Court of Justice in *Junk v Wolfgang Kühnel* (case C-188/03, January 2005) has jolted employment lawyers into reconsidering the significance of one of the Cinderellas of the labour law statute book, namely, the *Protection of Employment Act, 1977*.

Since a 1975 EC council directive, implemented by the 1977 act, there has been a special legislative regime for collective redundancies, their notification to the public authority, and provision for the information and consultation of the employees' representatives when such redundancies are being proposed. A number of enhancements to the 1977 act were made in recent years as a result of an amending directive and also the pressure of threatened European court action by the European Commission. These can be found in the *Protection of employment order 1996* (SI no 370 of 1996) and the *European Communities (protection of employment) regulations 2000* (SI no 488 of 2000). They mostly relate to providing an enforcement mechanism by way of application to the rights commissioner, and they change the definition of employees' representatives.

Despite its somewhat grandiose title, this legislation has not really 'protected' employment, at least in the sense of making it difficult for employers to reduce their workforce. The best that could be said for it was that employers were a little delayed in carrying out a decision to dismiss. Critics, on the other hand, complained that it was simply another piece of bureaucratic regulation. Certainly, the almost complete absence of case law in Ireland confirmed the experience of practitioners that the *Protection of Employment Act* needed only cursory attention.

This assessment has been radically revised in the last few months as the impact of the *Junk* judgment has been studied. There is no doubt that it has significant implications for employers making collective redundancies. Irish law currently provides that employers must consult appropriate employee representatives when proposing to make collective redundancies as defined in the 1977 act. Consultation must begin 'in good time' and must in any event begin at least 30 days before the first of the dismissals takes effect.

Representatives must be consulted about ways of avoiding dismissals, reducing the number of employees to be dismissed and mitigating the consequences of dismissal. It is also generally accepted that consultation must start before notices of dismissal are served on employees, otherwise employees could say that the consultation process is a sham.

However, until *Junk*, it appeared to be the case that employers could serve notices of dismissal, such as the familiar RP1 forms, on employees who they were proposing to dismiss before the end of the consultation period, provided the consultation had reached a meaningful state and the notice did not expire before the end of the consultation period.

### Extended timetable

The ruling in *Junk* means that employers will have to count back the 30-day consultation period from the date on which the employees were given notice of dismissal, rather than the date on which such a notice would expire. This means that the redundancy process

## FACTS OF THE *JUNK* CASE

Irmtraud Junk was employed as a care assistant by AWO, a not-for-profit care provider. Wolfgang Kühnel was the liquidator appointed to wind up AWO when it got into financial difficulties. On 23 May 2002, he reached agreement with the AWO works council that AWO would cease trading and agreed a social plan, as required by German law. On 19 June, he informed them that he intended to terminate all 176 remaining contracts of employment, including that of Mrs Junk. Ten days later, she received written notice from the liquidator that her employment would end on 30 September. On 27 August, after consultations with the works council, the liquidator notified the redundancies to the labour office.

Junk claimed that her dismissal notice was ineffective, as the liquidator did not inform the labour office or properly consult the works council before giving her notice.

The Berlin Labour Court decided that the answer to Junk's case was in council directive 98/59/EC, which lays down the rules on collective redundancies. The Berlin court asked the European Court of Justice (ECJ) whether the word 'redundancy' in the directive refers to the giving of notice or the actual termination of employment.

The ECJ held that 'redundancy' in the *Collective redundancies directive* means giving notice to dismiss for redundancy, and not the contract's termination on expiry of the notice.


Protest march over what the workers saw as unacceptable redundancy payments after the closure of the Irish Glass Bottle Company in 2002

is extended by the notice period and employers will now have to factor extra time into the exercise. Otherwise, they risk breaching their consultation obligations and being held liable in disputes before rights commissioners.

The extended timetable will doubtless alarm many employers who are engaged in collective redundancies and want to address their business problems as quickly as possible. It may be that one way employers can expedite the redundancy process is to explore the option of making a payment to employees in lieu of notice. This would involve completing the consultation process and then giving employees a payment in lieu instead of requiring them to work out their notice period. It remains to be seen how employers will approach this issue, but they should proceed cautiously on legal advice.

### Duty to negotiate

The other important point raised by the *Junk* case is the ECJ's statement that the consultation procedure in article 2 of the directive 'imposes an obligation to negotiate', thereby driving home the point that consultation 'with a view to reaching an agreement' envisages compromise and change. Employers who have a rigid agenda that they want to impose on the workforce without engaging in meaningful consultation will be in breach of their obligations. As the court stated, 'the effectiveness of such an obligation would be compromised if an employer was entitled to terminate contracts of employment during the course of the procedure or even at the beginning thereof. It would be significantly more difficult for workers' representatives to achieve the withdrawal of a decision that has been taken than to secure the abandonment of a decision that is being contemplated'.

As far as we are aware, this is the first ruling of the ECJ on what it regards as 'meaningful consultation' in the context of a number of similar provisions in health and safety directives and, most importantly of course, the directive on information and consultation that is overdue for transposition in Ireland. If the ECJ is insisting that the process of information and consultation really is one of negotiation between the two sides, the consequences for Irish employers will be quite dramatic. G

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# REFORM M

**Since 1975, the Law Reform Commission has produced over 100 reports, and more than 60% of its recommendations have passed into law. Mr Justice Declan Budd discusses how the LRC goes about its work and what it aims to achieve**

MAIN POINTS

- Work of the commission
- Summary of major projects
- Invitation for submissions

The Law Reform Commission was established almost 30 years ago as an independent statutory body under the *Law Reform Commission Act, 1975*. Its main role is to keep the law under review and conduct research with a view to reforming the law and formulating proposals for reform. This involves the development of the law as well as the revision and codification of statute law.

The commission is made up of a president, who so far has been a serving or retired Supreme Court or High Court judge, a full-time commissioner and four part-time commissioners, all of whom are practising or academic lawyers of distinction and experience. It is currently engaged in its *Second programme of law reform*, which followed wide consultation with the public, practitioners, experts and governmental organisations. Work started in 2000 on a range of 31 topics from judicial review to criminal law.

The recent publication of the *Consultation paper on the rights and duties of cohabitees* attracted widespread media attention and comment. This and other aspects of the *Second programme* reflect the rapid pace of social and political change at home in Ireland and abroad.

### Sources of work

There are two sources of work for the commission. First, topics come from the general programme of work that was prepared in consultation with the attorney general for submission by the taoiseach for government approval. The second source is requests or references sent by the attorney general on behalf of the government. For example, in March 2004, a *Consultation paper on the establishment of a DNA database* was published on foot of a request to examine the implications of the advent of DNA as a forensic tool. In making its provisional recommendations, the commission took account of the broad and complex constitutional and human rights issues that may arise and also the more specific question of what classes of DNA profiles might constitute such a database.

In reply to a further request from the attorney general, the *Consultation paper on prosecution appeals from unduly lenient sentences in the District Court* was published in June 2004. The paper provisionally recommended the conferring of an appeal power on the director of public prosecutions. This would involve a rehearing of the case in the Circuit Court, with the test to be applied in such appeals being whether the sentence imposed in the District Court

# OVEMENT

involved a significant departure from the appropriate sentence amounting to an error of principle. This is the test currently applied in cases where the prosecution appeals from an allegedly unduly lenient sentence in cases on indictment.

A third example of a paper produced in response to a reference is the *Consultation paper on a fiscal prosecutor and a Revenue Court*, published in July 2003, which examined the merits of a fiscal prosecutor separate from the director of public prosecutions and a distinct Revenue Court segregated from the ordinary courts. While preferring that Revenue prosecutions should remain within the normal criminal process and court system, with prosecutions under the overall supervision of the DPP, the commission nevertheless reviewed the Revenue's procedures in respect of litigation and set out some observations on the Revenue's recent restructuring reforms and their efficacy.

### How the work is carried out

Responsibility for conducting research and producing texts, issue papers and reports rests with

the commission, which employs researchers who usually have post-graduate degrees and research experience. They work on specific projects, under the direction of the director of research. The studies conducted are generally historical, contemporary and comparative in scope, reviewing the developments in other common-law jurisdictions, particularly Australia, Canada, England and Wales and New Zealand. Increasingly, the law in civil law jurisdictions such as France, Germany and Italy is also examined. The commission is involved throughout the process as a collegiate body discussing issues, modifying and adopting papers, and producing reports.

Usually the commission produces a consultation paper and seeks submissions in response to it from interested members of the public and experts, including practitioners and academics as well as government departments and interest groups. Often a seminar is convened to further the debate on the topic, to stimulate discussion of contentious issues and to elicit suggestions. After considering responses and following further research, the commission prepares a report and frequently appends appropriate statutory draft provisions for consideration by government.

The commission may convene advisory committees of leading experts and practitioners in a particular field. For instance, the commission had considerable guidance from an expert judicial review group made up of practitioners and academics who attended a number of meetings and assisted the commission greatly with their suggestions based on wide experience. The resulting *Report on judicial review procedure* examined the long-established conventional judicial review procedure as well as several special statutory regimes in such fields as planning and refugees.

As regards conventional judicial review, the overseeing of decision-making procedures, the report recommended retention of the leave stage and the 'arguable case test' as appropriate as the threshold criterion. In the context of the statutory schemes for judicial review, the report recommended the retention of the leave stage and of the higher standard of 'substantial grounds test', which it considered a justifiable threshold.

# REPORT ROUND-UP

**LITIGATION**

■ In July 2003, the commission published a *Consultation paper on multi-party litigation.* In Australia, New Zealand and Canada, types of class action procedure have been used to good effect to secure the fair and expeditious determination of a cause of action where there are numerous plaintiffs or defendants, and such group litigation warrants an examination in the Irish context, particularly with a view to reducing the cost of litigation. While steps have recently been taken to improve the manner in which the state meets multiple claims against it, there would appear to be scope for learning practical lessons from comparable jurisdictions. A scrutiny of the cost/benefit arguments in multi-party litigation would appear to be justified, particularly after the experience of the Irish army deafness cases and with the prospect of claims being brought by prisoners in respect of conditions in prisons.

**CRIMINAL LAW**

■ Papers have been produced on the mental element in homicide and on the defence of provocation. Consultation papers should shortly be produced in respect of other defences to murder, namely, legitimate defence and the pleas of duress, necessity and coercion.

**LANDLORD AND TENANT LAW**

■ With the invaluable assistance of an expert working group on this project, a *Consultation paper on business tenancies* was launched in March 2003 and a further paper on the general law of landlord and tenant was published in December 2003. The commission is currently examining agricultural tenancies and reversionary interests. It intends to proceed with the preparation of a report on landlord and tenant law with a draft bill attached, encompassing the deliberations covered in these consultation papers.

**COMMONHOLD**

■ The commission is considering, with the help of another expert group of practitioners, property managers and representatives from the department of the environment, the issues in respect of such developments as condominiums or multi-unit developments. The consultation paper will examine whether there should be a form of statutory regulation for such developments or whether the legislation should simply provide for an application to court that would give sufficient 'rescue measures' where problems have arisen. The paper will also examine such issues as management structures, dispute resolution, conveyancing, service charges and consumer protection.

**VULNERABLE PEOPLE AND THE LAW**

■ Having received detailed submissions on the *Consultation paper on law and the elderly*, published in 2003, the commission decided to examine in detail the issues in respect of the assessment of capacity, giving consideration to the merits and drawbacks of the functional approach, where capacity is assessed on an 'issue specific' basis, as against the status approach under which a substitute decision-maker is simply appointed. The definition of capacity in relation to vulnerable adults has been discussed generally in the context of the rights and autonomy of such individuals

A number of recommendations concerned time limits in judicial review procedure and greater use of case management and the awarding of costs. The report did not recommend the introduction of an administrative court.

The commission has greatly benefited from the wisdom and experience of *ad hoc* expert groups in respect of multi-party litigation and the rights and duties of cohabitees. It is deeply grateful to practitioners of the legal, medical and other professions, who often give willingly of their time and expertise helping for the public benefit.

### Hitting the century

Since 1975, the commission has produced over 100 consultation papers and reports on topics as diverse as plain language and statutory interpretation, defamation, family courts and sentencing. The *Second programme*'s content reflects the profound changes taking place in Irish society. For instance, in March 2003, the commission produced a *Consultation paper on public inquiries including tribunals of inquiry*, which examined the numerous inquiries into various matters of public concern, ranging from major disasters involving loss of life to allegations of wrongdoing in the land development and planning process.

Mr Justice Declan Budd

Several of these inquiries had been conducted under the *Tribunals of Inquiry (Evidence) Act 1921*, as amended, which is perceived to produce inquiries that are costly. The paper suggested that this was 'the Rolls-Royce of inquiries' and made suggestions for the enactment of legislation providing for a more low-key inquiry with various hearings in private, which would focus on the wrong or malfunction that has occurred in the system and on making recommendations to prevent a recurrence, rather than on individual wrongdoing. An inquiry that concentrates on finding out what has gone wrong in the system may avoid the panoply of entitlements that protect an individual's good name. Thus, the inquiry may be able to reach conclusions and make recommendations in an expeditious and cost-effective manner. Furthermore, if one of the actors in the drama being investigated is suspected of being guilty of a criminal offence, then there is merit in the state proceeding to prosecute this person without prejudicial matter being adduced and the fairness of a trial being put in jeopardy.

Recommendations were made for procedural changes concerning the selection of an appropriate form of inquiry for each type of investigation, for the drafting of proper and well-considered terms of reference, and for the protection of the rights of individuals and organisations by these being heard and represented, and also for the awarding or withholding of legal costs.

***'Over 60% of the commission's recommend-ations have eventually passed into law after grinding through the legislative process'***

### Done and dusted

In the past, there was a belief that the reports of the commission were welcomed and then placed on departmental shelves to gather dust. A trawl of all the publications has revealed that, while there has been delay in implementing some recommendations that are manifestly overdue, nevertheless well over 60% of the commission's recommendations have eventually passed into law after grinding through the legislative process.

Over recent years, the commission has made an effort to inform the public of its work and draw attention to its reports and consultation papers by organising press briefings and interviews to explain its recommendations. This helps to keep the public aware of efforts to keep the law under scrutiny and to draw attention to proposals for reform.

The commission welcomes submissions on matters in its programme and its work on references undertaken, and also invites suggestions that alert the commission to aspects of the law important to the public and in need of reform. The commission can be contacted by e-mail at info@lawreform.ie and its website is *www.lawreform.ie*. G

*Mr Justice Declan Budd is the immediate past-president of the Law Reform Commission.*

as well as particular scrutiny being given to the issue of consent to medical treatment.

**E-CONVEYANCING**

■ This major project has a number of different components. In the first phase, the commission is being supported in a joint effort by the Department of Justice, Equality and Law Reform in consultation with the Statute Law Revision Unit in the review of existing statutes (which includes over 150 pre-1922 statutes, from the 13th century up to the *Conveyancing Act 1911*), with a view to preparing a codifying bill that will repeal, retain and reform (as appropriate) the law relating to land and conveyancing. In this context, the commission has agreed a programme that included the production of a consultation paper and a conference with leading experts from Canada, England and Wales in November 2004. This work is to pave the way towards an on-line paperless transaction model.

**THE LAW OF TRUSTS**

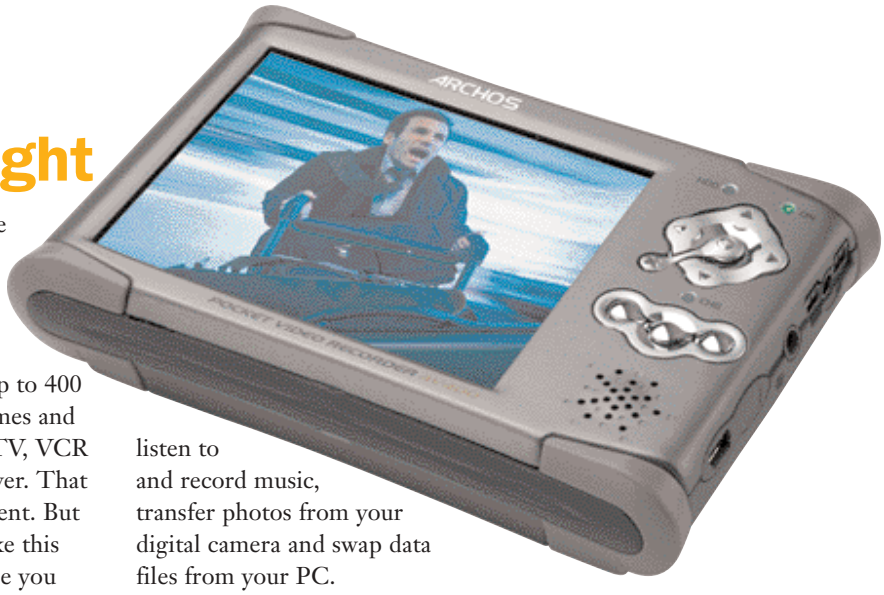
■ The commission is at an advanced state of work relating to trust law, which has an urgency because of the projects on e-conveyancing and forthcoming proposals relating to charities. The Department of Community, Rural and Gaeltacht Affairs has issued a consultation paper on the law of charities. The department proposes to produce a draft *Charity Bill* and has requested the commission to examine and make recommendations, including the drafting of legislative proposals in relation to trustee powers and obligations. The commission will be participating in this project as part of its remit in respect of the law of charities referred to in its *Second programme*.

# Tech trends

## Now that's living alright

So you know that you ought to have higher aspirations, such as world peace or a three-in-a-bed romp, but how can you possibly ignore the chance of getting your hands on a pocket digital video recorder. The Archos AV4100 allows you to record up to 400 hours of TV programmes and video content from a TV, VCR or cable/satellite receiver. That in itself is time well spent. But afterwards, you can take this pocket rocket anywhere you like and watch videos or view photos on the large colour LCD screen. You can also listen to and record music, transfer photos from your digital camera and swap data files from your PC.

If you feel you really must treat yourself, this is the way to do it.




*The Archos AV4100 costs around €900 and is available on-line at* www.bcoolgadgets.com.

## Thinner than Teri Hatcher

Motorola's new Razr V3 phone is an extraordinary piece of work. At 53mm across, it is no wider than a credit card, and it is almost as thin (13.9mm). Yet somehow it manages to incorporate all the functionality of those fat phones that we all own. It has a digital camera (with zoom facility and video play-back), Bluetooth connectivity, and quadband technology that allows you to use it anywhere in the world. Add to that a colour screen and a precision-cut metal keypad, and you couldn't look any cooler unless you were dating a Desperate Housewife. It's good for 290 hours' standby and 430 minutes' talk time. The Motorola Razr V3 retails from around €300.

*For more information, visit* www.motorola.com.

## Cork courthouse gets wired to the moon

Until now, solicitors and other regular users of the Circuit Court in Cork had no easy way to access the internet, e-mail or important files back in their offices. But all of that has changed.

Using properly-equipped laptops or personal digital assistants (PDAs), anyone working in the newly-renovated Washington Street courthouse can access wireless broadband services using wi-fi (802.11b) technology that has been put in place by Eircom and the Courts Service.

Access points for the new wireless broadband service can be found in three locations within the courthouse: the barristers' room, the solicitors' room and the media room.

Users will need only a laptop computer or PDA with an internet browser and an 801.11b wireless networking card or chipset – a feature that comes standard on many new devices. Payment options are flexible and include unlimited-use monthly subscriptions that can be set up over the web. Users can also buy pre-paid cards on-site, allowing them to log on to the internet for one hour or 24 hours, depending on their requirements.

The renovated Cork courthouse: loaded for bear. Those poor bears

# Wake up, sleepyhead, there's a midget in your room

Does your job hang by a thread because you can never wake up on time? And when you do finally surface, do you wake up feeling like the Grinch? If so, then the SleepSmart alarm clock might be the answer to your prayers. This alarm clock measures your sleep cycle, using a headband (specially designed by boffins who should get out more) to record your distinct brain pattern. The average person goes through a sequence of sleep states (light sleep, deep sleep and REM sleep) every 90 minutes, so the SleepSmart can be set to go off during a light phase in or around the time you want to wake up. And they call this scientific progress. A

midget with a bucket of water might work just as well, but you wouldn't trust them with the keys of your house, would you? Axon Sleep Research Laboratories estimates that the first units will be available in December and will sell for somewhere between $299-$399. *For more information, visit* www.axonlabs.com.

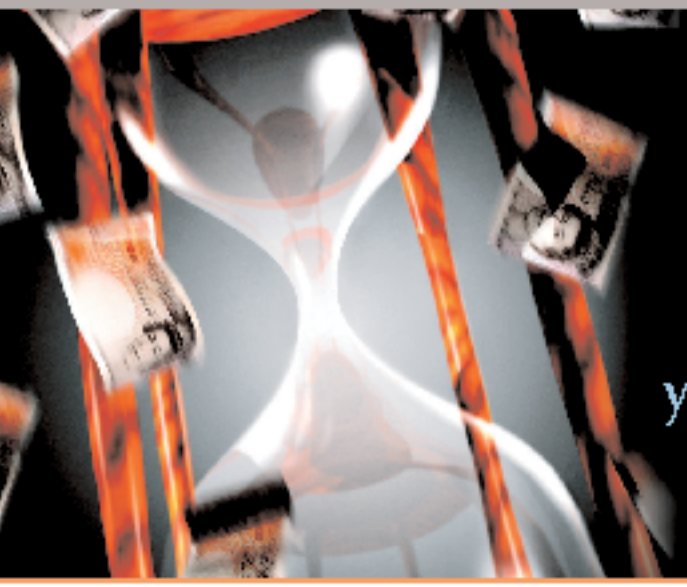
# Sites to see


**Open to negotiation** (*www.lawsociety.ie/inc/*). The 2005 International Negotiation Competition, co-hosted by the Law Society, is taking place in the society's Blackhall Place headquarters in July. All the information for wannabe competitors, including the rules, schedule, frequently-asked questions and much, much more is available right here.


**Singing monkey variety act** (*www.chestyodell.com*). This is one of the earliest websites, dating back to the 1940s. It features black and white footage of variety artist Chesty O'Dell and her troupe of singing apes. Chesty's career came to a premature end when she was prosecuted for beating her monkey in a public toilet. Beat me up before you go go. Indeed.


**Jobs for the boys** (*www.recruitlegal.ie*). This new site says that it's designed to give both employers and job-seekers instant access to legal positions nationwide. Those on the prowl for a cushier number can apply directly through the site. Just don't tell your mates.


**For the man who has everything** (*www.iwantoneofthose.com*). Forget Aer Arann. If you want to make your commute from Mayo really interesting, you'll surely want your very own Russian jet fighter. Well, there's one available on this site (they say they're not kidding), and it's a snip at a mere stg£200k.



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# Report of Law Society Council meeting held on 25 February 2005

**Motion: PII regulations**

*'That this Council approves the Solicitors Acts, 1954-2002* (professional indemnity insurance) (amendment) regulations 2005 *and that the regulations of the Council be amended to delegate the implementation of the regulations to the Professional Indemnity Insurance Committee without reference to the Council'.*

**Proposed**: Michael Irvine
**Seconded:** Jerome O'Sullivan

Michael Irvine outlined the contents of the draft regulations, which (a) provided for an extended definition of 'solicitor', (b) would increase the minimum level of cover from €1.3 million to €2.5 million from 1 January 2006, and (c) would adjust the method of calculating and dividing the cover in the assigned risks pool to reflect the actual system in operation.

John P Shaw expressed reservations regarding the proposed increase in the minimum level of cover from €1.3 million to €2.5 million. He said that the Clare Bar Association was of the view that there was insufficient information on which to base this increase and he believed that a number of small practices would be quite happy to maintain their level of cover at €1.3 million. He was also concerned about the cost of the increased level of cover.

James Cahill said that the Mayo Bar Association had no difficulty with the proposed increase and he noted that he had increased his own level of cover to €2 million for the current year, at an additional cost of only €125. Jerome O'Sullivan said that the proposal had been discussed at a meeting of the Southern Law Association, which was satisfied that the proposed increase was absolutely necessary. Orla Coyne said that the Dublin Solicitors' Bar Association also supported the proposed increase, but concerns had been expressed about the potential for significant increases in premiums. Simon Murphy noted that his firm had recently increased its cover from €2 million to €6 million over a two-year period and the premium had actually reduced.

The Council approved the Solicitors Acts, 1954-2002 *(professional indemnity insurance) (amendment) regulations 2005*, as circulated.

**Competition Authority study**

The president briefed the Council on the press conference held by the Competition Authority on the previous day to launch its consultation paper entitled *Study of competition in legal services*. The director general outlined the contents of the authority's proposals to the Council. It was agreed that a special Council meeting should be held to consider the contents of the consultation paper.

**Judicial review proceedings against PIAB**

The president noted that a positive judgment had been handed down in the judicial review proceedings brought by Declan O'Brien against PIAB. The society had participated in the proceedings as *amicus curiae*. He congratulated all those involved in the proceedings on behalf of the society. He noted that PIAB had indicated its intention to appeal, pending which it would deal directly with solicitors acting for claimants.

**Judicial review proceedings against the Competition Authority**

The president noted that the society's judicial review proceedings against the Competition Authority concerning decision no N/04/001 and the choice of legal representation had been heard by the High Court on 1 and 2 February and a decision was awaited.

**Review of legal costs**

The president reported that the ministerial working group established to review legal costs had confirmed that it would conduct oral hearings and that the society would be afforded an opportunity to make a presentation. Presentations by the society and by other bodies would not take place until after 4 March 2005. The president noted that a copy of the society's submission to the working group had been circulated to every member of the profession.

**Oireachtas committee on the constitution**

Moya Quinlan briefed the Council on the contents of a submission from the society to the All-Party Oireachtas Committee on the Constitution, in relation to those articles of the constitution dealing with the family.

**Section 133, *Finance Bill, 2005***

The Council noted the contents of a letter to the minister for finance, signed by the CCAB-I, the Law Society and the Irish Taxation Institute. The letter had issued to the minister following a meeting with him to discuss section 133 of the *Finance Bill, 2005*, which was of concern to each of the organisations represented at that meeting. There were concerns that section 133 of the bill would have an unfortunate dual effect. It would create a climate of fear in which it would be impossible for accountants, solicitors and tax advisors to advise on tax compliance, while it also introduced potentially confusing language and concepts that created constitutionally-suspect legislation. There were also concerns that the proposal to criminalise neglect by officers and management of corporates would deter people from taking on these roles. G

# Practice notes

## SPECIAL CONDITIONS IN CONTRACTS FOR SALE

The Conveyancing Committee is concerned about the growing tendency of including in contracts for sale special conditions that are unnecessary, badly drafted, unfair or unacceptable for some other reason. Some solicitors are using what might be termed 'standard special conditions' in all contracts, including contracts for the sale of second-hand houses.

**Amendments to general conditions**

The *General conditions of sale* of the Law Society, as amended from time to time, have been accepted by the profession for a considerable time as, on balance, reasonable to both parties. Where special conditions are inserted for the purpose of amending the general conditions, there should be a particular reason as to why the general conditions cannot be adopted. The necessity for special conditions that conflict with the general conditions should be capable of being explained to the solicitor for the purchaser (unless this is obvious). Otherwise, considerable time can be wasted in negotiating conditions that are not necessary.

For example, special conditions requiring the purchaser to accept the boundaries of the property, and so on, may be unnecessary if this is already adequately covered by general condition 14 under the heading 'Identity'.

Similarly, clauses providing that the purchaser buys with full knowledge of the state of repair of a second-hand house are unnecessary, as this is covered by the *caveat emptor* rule and only leads to queries as to why the special condition has been inserted.

**Special conditions re: title**

Special conditions are typically used to preclude a purchaser from insisting on something relating to the title to which he would be otherwise entitled. The special condition should be specific as to what is missing or excluded from the title and should not mislead. If there is a defect on the title, a purchaser cannot be precluded from an investigation unless the condition contains a warning about the defect. It should not be stated that something is not known to the vendor if, in fact, it is.

**Planning**

Similarly, if there is any unauthorised development or other planning defect, this should be disclosed by special condition and an indication given as to what extent and why the warranty in general condition 36 is to be limited.

**Drafting**

Inserting special conditions may not always have the intended effect and regard should be had to a number of aspects:

1) Bad drafting may turn out to be a problem for the vendor, as any ambiguity will be construed in favour of the party whose rights are to be restricted. Usually this means that it will be construed against the party drafting the special condition
2) The Law Society conditions provide that the special conditions shall prevail in case of any conflict with the general conditions
3) In the case of new houses, a term that is found to be unfair within the meaning of the *European Communities (unfair terms in consumer contracts) regulations 1995* will be unenforceable. Certain terms found by the High Court in December 2001 to be unfair within the meaning of the regulations may not be included in a building agreement
4) Some conditions are, in any event, prohibited by statute, such as:
   a) a condition precluding a purchaser from objecting to title on the grounds of absence or insufficiency of stamps on any instrument executed after 16 May 1888 – section 131, *Stamp Duties Consolidation Act, 1999*
   b) a term designed to prevent the raising of requisitions in relation to burdens generally or to any particular burden that, by virtue of section 72 of the *Registration of Title Act, 1964*, may affect registered land – section 115 of the act
   c) a condition excluding a purchaser from raising requisitions in relation to letting, sub-letting or sub-division of an agricultural holding – *Land Act, 1965*, section 12
   d) a condition requiring one party to pay any of the legal fees incurred by the other party on the granting of a lease – section 32, *Landlord and Tenant (Ground Rents) Act, 1967*
   e) a condition requiring a purchaser, lessee or tenant to pay the fees of an auctioneer or house agent employed by the vendor, lessor or landlord – section 2, *Auctioneer's and House Agents Act, 1973*.

Practitioners are requested to give some thought to special conditions and not to include them merely because they have been seen in contracts prepared by other solicitors or because they find they can impose them on purchasers regardless of their suitability or necessity.

The reputation of the profession depends on individual solicitors acting in a professional manner at all times.

*Conveyancing Committee*

## ADVERTISING REGULATIONS

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

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

**X & Company, Solicitors**

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

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

*Registrar's Committee*

# STAMP DUTY RELIEFS: *FINANCE ACT, 2005*

The Conveyancing Committee has been asked by the Revenue Commissioners to bring to your notice certain aspects of the *Finance Act, 2005* relating to stamp duty that entail a change in the certificates required to be inserted in instruments. The provisions relate to the new farm consolidation relief and the stamp duty relief for first-time buyers.

**Farm consolidation relief (section 121, *Finance Act, 2005*)**

Section 121 inserts a new section 81B into the *Stamp Duties Consolidation Act, 1999*, which provides for a stamp duty relief for an exchange of farm land between two farmers for the purposes of consolidating each farmer's holding.

The new relief will mean that no stamp duty will be charged on an exchange of such lands where the lands are of equal value. In a case where the lands exchanged are not of equal value, stamp duty will be charged on the amount of the difference in the value of the lands concerned. Where consideration is paid in respect of the difference (or part of the difference) in those values, it must be payable in cash.

This new relief applies to instruments executed on or after 1 July 2005 and on or before 30 June 2007 and the instrument must contain a certificate to the effect that the provisions of section 81B of the *Stamp Duties Consolidation Act, 1999* apply where the relief is claimed.

Further information regarding the relief and the wording of the new certificate (which is also available on the Revenue website, *www.revenue.ie*) is attached at appendix 1.

**First-time buyer relief (section 126, *Finance Act, 2005*)**

Section 126 of the *Finance Act, 2005* first confirms the changes to section 92B of the *Stamp Duties Consolidation Act, 1999* announced in the budget, reducing the stamp duty rates for first-time buyers who are owner occupiers of second-hand houses. The revised stamp duty rates apply to instruments executed on or after 2 December 2004.

Second, this section also ensures that all new houses with a floor area under 125 square metres will have to have a floor area compliance certificate within the meaning of section 91A of the *Stamp Duties Consolidation Act, 1999* to avail of an exemption from stamp duty by providing that first-time buyer relief is no longer available to such houses. To facilitate this change, certificate no 5 in table 4 of leaflet SD10A has been amended to restrict application of first-time buyer relief to second-hand houses. This change applies to instruments executed on or after 1 March 2005.

Further information in relation to the changes to the first-time buyer relief (which is also available on the Revenue website, *www.revenue.ie*) is attached at appendix 2.

A revised version of leaflet SD 10A, which includes the wording of all Revenue certificates required in instruments for stamp duty purposes, is also available on the Revenue website.

## APPENDIX 1
## FARM CONSOLIDATION RELIEF

***Purpose of the farm consolidation relief***

Section 81B of the *Stamp Duties Consolidation Act, 1999* provides for a new stamp duty relief which applies in respect of an exchange of land between two farmers for the purposes of consolidating each farmer's holding.

***What is farm consolidation relief?***

The new relief provides that where there is a valid consolidation certificate in existence at the time of an exchange of lands, no stamp duty will be charged on an exchange of such lands where the lands are of equal value. In a case where the lands exchanged are not of equal value, stamp duty will only be charged on the amount of the difference in the value of the lands concerned. This stamp duty is payable by the person or persons to whom the land which is of greater value is transferred. Where consideration is paid in respect of the difference (or part of the difference) in those values, it must be payable in cash.

The new relief applies to instruments executed on or after 1 July 2005 and on or before 30 June 2007.

***What is a consolidation certificate?***

A consolidation certificate is a certificate issued by Teagasc for the purposes of the relief to each farmer concerned in an exchange of lands. This certificate identifies the lands involved, the owners of such lands, and certifies that Teagasc is satisfied that the exchange of lands complies with or will comply with the conditions of consolidation.

The conditions of consolidation, together with instructions on how to apply for a consolidation certificate and the supporting documentation required to be submitted when an application is made for a consolidation certificate, will be set down in guidelines to be made by the minister for agriculture and food with the consent of the minister for finance.

***Who is eligible for the relief?***

The farmers involved in an exchange of lands are eligible for the relief. A farmer is a person who spends not less than 50% of his or her normal working time farming. The relief can also apply to an exchange of lands where not all of the joint owners, on either side of the exchange, are farmers. However, the relief does not apply where any of the parties to the exchange is a company.

***What type of land does the relief apply to?***

The relief applies to exchanges of agricultural land, including land suitable for occupation as woodlands on a commercial basis in the state and farm buildings on that land. Dwelling houses or the lands occupied with such dwelling houses are not included unless they are derelict and unfit for human habitation.

***What conditions must be met before relief will be granted?***

- The deed of transfer must contain a certificate to the effect that the provisions of section 81B of the *Stamp Duties Consolidation Act, 1999* apply to the transfer. The wording of this certificate is:
  **'It is hereby certified that section 81B (farm consolidation relief) of the *Stamp Duties Consolidation Act, 1999*, applies to this instrument'**
- The following documentation/information must be submitted to the Revenue Commissioners with the deed of transfer when it is presented for adjudication:
  - a consolidation certificate that is valid on the date of execution of the deed effecting the exchange – **a consolidation certificate is valid for one year from the date it is issued**
  - a declaration* to the effect that each **farmer** who is a party to the deed of transfer will, for a period of five years from the date of execution of the deed of transfer, remain a farmer and will farm the land exchanged
  - a declaration* to the effect that each **person** who is a party to the deed of transfer will, for a period of five years from the date of execution of the deed of transfer, retain ownership of his or her interest in the exchanged land and that

# FIRST-TIME BUYERS: FREQUENTLY-ASKED QUESTIONS

**Who is a first-time buyer?**
A first-time buyer is a person (or, where there is more than one buyer, each of such persons):

- Who has not on any previous occasion, either individually or jointly, purchased or built on his/her own behalf a house (in Ireland or abroad), and
- Where the property purchased is occupied by the purchaser, or a person on his behalf, as his/her only or principal place of residence, and
- Where no rent, other than rent under the rent-a-room-scheme, is derived from the property for five years after the date of the current purchase.

**What is the rent-a-room scheme?**
Under this scheme, there is no clawback of the first-time buyer relief where rent is received by the person in occupation of the house on or after 6 April 2001 for the letting of furnished accommodation in *part* of the house.

**When does a clawback arise?**
A clawback arises if rent is obtained from the letting of the house, other than under the rent-a-room scheme. The clawback amounts to the difference between the higher stamp duty rates and the duty paid and it becomes payable on the date that rent is first received from the property.

**What is the position where a first-time buyer purchases a new house where the floor area is under 125 square metres?**
The purchase of a new house by a first-time buyer, where the floor area is under 125 square metres, is exempt from stamp duty only where a floor area compliance certificate has been issued in respect of the house by the minister for the environment, heritage and local government. If there is no floor area compliance certificate, the full rates of stamp duty apply, as first-time buyer relief is not available for such a purchase.

**What is the position where the purchase monies are not provided entirely by the first-time buyer?**
To qualify for the relief, the entirety of the purchase monies, including any borrowings, must be provided by the first-time buyer. Any person who provides part of the purchase monies or who is a party to any borrowings relating to such purchase is also regarded as a buyer of the house and the relief will not be available unless that other person is also a first-time buyer.

The basis for this treatment is that, in such circumstances, the house is held for the person providing the monies used in the purchase of the house by way of a resulting trust presumed in favour of that person. This treatment applies whether or not all the parties providing the purchase monies, or all the parties to any borrowings, are actually named in the deed of transfer.

**What is the position in the case of a gift of part of the purchase monies?**
Where a first-time buyer receives an unconditional gift of monies which are used to purchase a house, he/she will not be precluded from claiming first-time buyer relief.

**What is the position where a person, being a first-time buyer, purchases a house using the proceeds of the sale of a house owned by their spouse or partner who is not a first-time buyer?**
Where a person who is a first-time buyer uses the proceeds of the sale of the house they previously occupied which was owned solely by their spouse or partner to buy a house solely in their own name, first-time buyer relief would not be available as the spouse or partner (not being a first-time buyer) would be providing the purchase monies for the house.

**Can I qualify as a first-time buyer if I have previously purchased a house abroad but not in Ireland?**
No. A person who has previously purchased a house, either in Ireland or abroad, is not entitled to claim first-time buyer relief.

**What is the position where there is more than one purchaser and all of the purchasers are not first-time buyers?**
The first-time buyer relief is not available and stamp duty is chargeable at the full rate on the entire purchase price. In order to obtain the relief, all of the purchasers must qualify as first-time buyers.

**Can I avail of first-time buyer relief if I previously received a gift of a house?**
The relief can be claimed where the gift of the house was received prior to 22 June 2000 (or prior to 27 June 2000 in the case of **part** of a house). A gift received after the above date(s) is regarded as a prior purchase and would preclude a person from claiming the relief.

**Can I avail of first-time buyer relief if I have previously inherited a house?**
Yes. An inheritance is not regarded as a previous purchase and the first-time buyer relief can be claimed provided all other conditions of the relief are satisfied.

**Can the first-time buyer relief apply to a gift of a house?**
Yes. A gift of a house is treated in the same manner as a purchase and the first-time buyer relief can be claimed provided all other conditions of the relief are satisfied.

**What is the position where a person, who had obtained first-time buyer relief on the joint purchase of a house with another first-time buyer, subsequently acquires the other joint owner's interest in the house?**
A person who obtained first-time buyer relief on the purchase of an interest in a house would not be precluded from obtaining first-time buyer relief on a subsequent purchase of another interest in the **same** house, provided that person has not purchased another house or part of another house in the intervening period.

**Are there any special situations where a person who is not a first-time buyer can avail of first-time buyer relief?**
Yes. There are two particular situations where a person is deemed to be a first-time buyer:

a) The **trustees** of a trust (to which section 189A of the *Taxes Consolidation Act, 1997* applies), whose trust funds are raised by **public** subscriptions for the benefit of permanently incapacitated persons, in respect of the first house(s) bought after the establishment of the trust, for occupation by the beneficiary or if more than one, each of the beneficiaries
b) A **spouse** to a marriage the subject of a decree of **judicial separation**, a **deed of separation**, a decree of **divorce** or a decree of **nullity** in the case of the first acquisition of a house by the spouse following the separation or divorce provided that the spouse had, in relation to the former marital home,
   - left that home
   - not retained an interest in that home

   whose separated/former spouse continues to occupy that home, which home was occupied by both spouses prior to the separation or dissolution of the marriage.

the land will be used for farming
- the PPS number* of each person who is a party to the deed of transfer.

- Where there is more than one deed of transfer required to effect an exchange of lands, all the deeds must contain the appropriate certificate that section 81B applies to the deed and must be presented for adjudication at the same time. Where the lands exchanged are not of equal value and there is more than one deed of transfer required to effect an exchange of lands, only the principal deed is chargeable to stamp duty and the other deeds of transfer will be adjudicated as not chargeable with any duty.

*** A leaflet containing an application form relating to the relief will be published shortly.**

***Can the relief be clawed back?***

The amount of relief actually granted will be clawed back by way of a penalty if the land or part of the land is disposed of within five years from the date of execution of the deed of transfer giving effect to the exchange of lands.

The amount of the penalty is the difference between the duty that would have been charged on the value of **all** the lands transferred to the farmer in the first instance (that is, under section 37 of the *Stamp Duties Consolidation Act, 1999*) had the relief not applied and the duty (if any) that was charged under section 81B. Interest is also charged on the penalty at the rate of 0.0273 per cent per day from the date of the disposal to the date the penalty is paid.

***Are there any situations where the relief will not be clawed back?***

A clawback of the relief will not occur where the land is compulsorily acquired or is the subject of another exchange of lands which qualifies for farm consolidation relief.

In addition, a clawback of the relief will not occur where a farmer or other joint owner disposes of part of the land to a spouse for the purpose of creating a joint tenancy or where one joint owner disposes of part of the land to another joint owner, who is a farmer.

***What other penalties can apply?***

Any person who furnishes a false declaration will be liable to a penalty of an amount equal to the difference between 125% of the duty that would have been charged on **all** the lands transferred to that person had the relief not applied and the duty (if any) that was charged under section 81B, together with interest on the penalty at the rate of 0.0273 per cent per day from the date of execution of the deed of transfer to the date the penalty is paid.

A similar penalty, together with appropriate interest (as above), applies where an invalid consolidation certificate is used to obtain the relief.

**APPENDIX 2**
**FIRST-TIME BUYER RELIEF**

Section 126 of the *Finance Act, 2005* amends section 92B of the *Stamp Duties Consolidation Act, 1999,* which provides for relief from stamp duty for first-time buyers of residential property. The effect of the changes is set out below, together with some general information in relation to 'frequently-asked questions' regarding the application of the relief.

**Revised rates**

The stamp duty rates payable by first-time buyers who are owner-occupiers of second-hand residential property up to €635,000 have been reduced. The revised stamp duty rates, which apply to **instruments executed on or after 2 December 2004,** are set out in the panel below.

**New houses**

The relief under section 92B is no longer applicable to instruments executed on or after 1 March 2005 which give effect to the purchase of new houses with a floor area under 125 square metres. First-time buyers who are owner-occupiers will continue to be exempt from stamp duty on the purchase of such houses under section 91A of the *Stamp Duties Consolidation Act, 1999* where a floor area compliance certificate has been issued by the minister for the environment, heritage and local government.

Partial relief under section 92 of the *Stamp Duties Consolidation Act, 1999*, based on the new rate structure outlined above, will continue to apply to first-time buyers who are owner-occupiers of new houses where the floor area of such houses exceeds 125 square metres.

**Certification**

There has been no change in the stamp duty threshold bands and the transaction certificate to be included in the instrument should continue to recite the appropriate threshold amount.

There has been a change in the certification required to avail of first-time buyer relief on the purchase of a second-hand house following the exclusion of new houses with a floor area under 125 square metres from the scope of the relief. The certificates required to be inserted in instruments where first-time buyer relief is claimed on the purchase of a second-hand house are set out in table 3 of leaflet SD 10A (certificate numbers 3A/B, 5, 6, 7B and 8A/B) and the wording of those certificates is set out in table 4 of leaflet SD 10A.

The new wording of certificate no 5 in table 4 is as follows:

**'It is hereby certified that this instrument gives effect to the purchase of a dwelling-house/apartment and that section 92B(3A) (residential property first-time purchaser relief) of the *Stamp Duties Consolidation Act, 1999* does not apply to this instrument'.**

By certifying that section 92B(3A) does not apply, it is being confirmed that the instrument does not relate to a new house with a floor area under 125 square metres and only relates to a second-hand house. The revised certificate should be included in instruments executed on or after 1 March 2005 where first-time buyer relief is claimed on the purchase of a second-hand house.

*Conveyancing Committee*

## RESIDENTIAL PROPERTY

| *Aggregate consideration* | *First-time buyer rate before 2 December 2004* | *First-time buyer rate on/after 2 December 2004* |
|---|---|---|
| Up to €127,000 | Exempt | Exempt |
| €127,001 – €190,500 | Exempt | Exempt |
| €190,501 – €254,000 | 3% | Exempt |
| €254,001 – €317,500 | 3.75% | Exempt |
| €317,501 – €381,000 | 4.5% | 3% |
| €381,001 – €635,000 | 7.5% | 6% |
| Over €635,000 | 9% | 9% |

## RENUNCIATION UNDER SECTION 191 OF THE *RESIDENTIAL TENANCIES ACT, 2004*

In response to requests from practitioners, the Conveyancing Committee has drafted a precedent renunciation pursuant to section 191 of the *Residential Tenancies Act, 2004* as follows:

***Residential Tenancies Act, 2004* –**
**renunciation under section 191**

**THIS RENUNCIATION** made the _____ day of _____ 20 _____

**I,** **AB** , of _____

_____

have, as of the date hereof, been in continuous occupation of the premises known as _____ (hereinafter referred to as 'the said premises') for upwards of _____ years.

The said premises is a 'tenement' within the meaning of the *Landlord and Tenant Acts* and is a 'dwelling' within the meaning of section 4 of the *Residential Tenancies Act, 2004* ('the 2004 act').

The landlord of the said premises is **CD** of _____ (hereinafter called 'the landlord').

I have received independent legal advice in relation to this renunciation from _____.

I have been advised that under the terms of the *Landlord and Tenant Acts*, I would be entitled to a new tenancy in the said premises at the expiry of the period provided for in section 13(1)(b) of the *Landlord and Tenant (Amendment) Act, 1980*.

**NOW I**, in consideration of the landlord granting me a part 4 tenancy (within the meaning of section 29 of the 2004 act) in the said premises under the 2004 act *(or set out such other consideration, if any, as may be applicable)* **DO HEREBY**, pursuant to section 191 of the 2004 act, **RENOUNCE** any entitlement I may have under the provisions of the *Landlord and Tenant Acts* to a new tenancy on the expiry of the term provided for by section 13(1)(b) of the *Landlord and Tenant (Amendment) Act, 1980*.

**SIGNED** by the said

_____

in the presence of

_____

*Conveyancing Committee*

# LEGISLATION UPDATE: 19 MARCH – 15 APRIL 2005

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

**ACTS PASSED**

***Finance Act, 2005***
**Number:** 5/2005
**Contents note:** Provides for the imposition, repeal, remission, alteration and regulation of taxation, stamp duties and duties relating to excise and otherwise makes further provision in connection with finance, including the regulation of customs
**Date enacted:** 25/3/2005
**Commencement date:** Various – see act and commencement sections 150(8) and 150(9). Commencement order(s) to be made for certain provisions

**SELECTED STATUTORY INSTRUMENTS**

**Civil Liability and Courts Act, 2004 *(bodies prescribed under section 15) order 2005***
**Number:** SI 168/2005
**Contents note:** Prescribes six bodies that can nominate a chairperson of a mediation conference in personal injuries actions, in the event that the parties do not agree on the chairperson (per section 15(4)(b)(II) of the *Civil Liability and Courts Act, 2004*). The six nominated bodies are: Friary Law, Mediation Forum – Ireland, Mediators Institute Ireland, The Bar Council, The Chartered Institute of Arbitrators Irish Branch, The Law Society of Ireland
**Commencement date:** 31/3/2005

**Civil Liability and Courts Act, 2004 *(bodies prescribed under section 40) order 2005***
**Number:** SI 170/2005
**Contents note:** Prescribes the non-statutory bodies that may be given documents, information or evidence when they are conducting a hearing, enquiry or investigation or adjudicating on a matter to which the *in camera* rule applies
**Commencement date:** 31/3/2005

**Civil Liability and Courts Act, 2004 *(section 17) order 2005***
**Number:** SI 169/2005
**Contents note:** Prescribes the date after which formal offers shall be made in personal injuries actions and the period after which they shall be lodged in court
**Commencement date:** 31/3/2005

**Courts and Court Officers Act, 2002 *(register of reserved judgments) regulations 2005***
**Number:** SI 171/2005
**Contents note:** Provide for the establishment and maintenance on computer by the Courts Service of a register of the judgments reserved by the Supreme Court, the High Court, the Circuit Court and the District Court and set out the location of the various parts of the register, the arrangements for getting a copy of an entry in the register and other matters relating to the register
**Commencement date:** 31/3/2005

***District Court (summonses) rules 2005***
**Number:** SI 167/2005
**Contents note:** Amend the *District Court rules 1997* (SI 93/1997) by the substitution of a new order 15, 'Issue of summonses alleging offences'. Facilitate the operation of section 49 of the *Civil Liability and Courts Act, 2004*, which amends section 1 of the *Courts (No 3) Act, 1986* to provide for the centralised electronic receipt of summons applications and the centralised issue of summonses
**Commencement date:** 12/4/2005

***European Communities (milk quota) (amendment) regulations 2005***
**Number:** SI 177/2005
**Contents note:** Amend the *European Communities (milk quota) regulations 2000* (SI 94/2000), as amended, by introducing a provision allowing for the transfer of quota without land between family members in certain situations, and by amending the provisions concerning the attachment of quota to purchased lands, dormancy, the restructuring scheme, milk production partnerships and the recording of milk deliveries
**Commencement date:** 1/4/2005 G

***Prepared by the Law Society Library***

# SOLICITORS DISCIPLINARY TRIBUNAL

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

**In the matter of Joseph W Fahey, a solicitor practising as Joseph W Fahey, Ballygar Road, Mountbellew, Ballinasloe, Co Galway, and in the matter of the *Solicitors Acts, 1954-2002* [6687/DT452/04]**
***Law Society of Ireland (applicant)***
***Joseph W Fahey (respondent solicitor)***

On 3 February 2005, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he had failed to file his accountant's report covering his financial year ended 28 February 2003 with the society, in breach of regulation 21(1) of the *Solicitors' accounts regulations*, in a timely manner.

The tribunal ordered that the respondent solicitor:
a) Do stand admonished
b) Pay a sum of €350 to the compensation fund
c) Pay the contribution of €650, being part of the costs of the Law Society of Ireland.

**In the matter of Eoin Joseph Lysaght, solicitor, of 42 Tonlegee Road, Coolock, Dublin 5, and in the matter of an application by a client of the said Eoin Lysaght to the Solicitors Disciplinary Tribunal and in the matter of the *Solicitors Acts, 1954-2002* [4617/DT455/04]**

On 24 February 2005, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he had failed to provide details of the reasons for the non-progress of his client's personal injury case.

The tribunal ordered that the respondent solicitor:
a) Do stand censured
b) Pay a sum of €1,000 to the compensation fund. G

## *eircom* and the refurbished Cork Courthouse -

# The first courthouse in Ireland enabled as a wireless internet hotspot

*Marian Quinn is Chief Clerk, Cork Circuit Court. Michael Goulding, Courts Service,Southern Regional Office, Cork. Conor Kileen, eircom account manager*

Until now, solicitors, barristers and members of media working out of the Circuit Court in Cork had no easy way to access the Internet, email or important files in their back offices. But thanks to a wireless Internet solution from *eircom*, all of that has changed.

Using properly-equipped laptop computers or personal digital assistants (PDAs), individuals working in the Washington Street building can now access wireless broadband services using Wi-Fi (802.11b) technology, which has been put in place by *eircom* and the Courts Service.

"It means that practitioners will now be able to use their laptops within the courthouse to access their email or the Internet, which was not possible before," said a Courts Service spokesman. "These are people who are out of their offices, and might need access to documentation that is back in their office. Before, they would have had to do without the documents or go back to their office to get them. But now, anything they need can be e-mailed to them."

The rollout of *eircom*'s **wireless broadband** technology comes just after the Courts Service completed its € 26 million refurbishment of the landmark building, which has included the construction of additional courtrooms and offices. The renovation has also seen the addition of state-of-the-art technology within the Washington Street Courthouse, including plasma screens and video uplinks in each courtroom, as well as the new Wi-Fi technology for legal practitioners and reporters.

To use *eircom* **wireless broadband**, solicitors, barristers and members of the media will need only a laptop computer or PDA with an Internet browser and an 801.11b wireless networking card or chipset, a feature that comes standard on many new devices. Payment options are flexible and include unlimited-use monthly subscriptions that can be set-up over the Web. Users may also purchase pre-paid cards on-site, allowing people working within the courthouse to log on to the Internet for one hour or 24 hours, depending on their requirements.

*eircom*'s **wireless broadband** service has been installed in three locations in the Washington Street Courthouse, giving legal practitioners and member of the press high-speed wireless Internet access.

- The new Wi-Fi network is linked directly to the internet over the eircom network.
- Users may access the service with vouchers purchased on-site, or through an unlimited access monthly subscription.
- The Cork Courthouse's Wi-Fi service is entirely independent from the building's own technology infrastructure ensuring that network security remains intact.

"Following discussions with eircom The Courts Service decided to put wireless technology in place on a pilot basis. We felt that barristers and solicitors would find it useful," said the spokesman. "It will be up to them to take advantage of the service; and I think they will, because it should help people working in the courthouse to have more information at their fingertips, and to get much more work done when they are away from their offices."

**For further information, please contact Deirdre McGowan, *eircom* Progamme Manager, Business Marketing, 01 701 2420, dmcgowan@eircom.ie**

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

## COMPANY

### Public procurement, security for costs

*European law – company law – security for costs – public procurement contracts – practice and procedure – litigation – delay – principle of equivalence – whether applicant should furnish security for costs – whether in public interest to grant application* – Rules of the Superior Courts 1986 – Companies Act, 1963 – Public works directive

One of the notice parties, Waterworld, had been awarded the contract to design, build and maintain the National Aquatic Centre at Abbottstown. The applicant had also submitted a tender for the contract, had been unsuccessful and brought judicial review proceedings seeking to challenge the award of the contract. The respondents brought the present motions seeking security for costs from the applicant. The applicant contended that granting the order sought would stifle its claim. Furthermore, the respondents by their conduct and delay were estopped from bringing the present application. It was also contended that security for costs was inapplicable in a case involving a review of a public contract under the European *Remedies directive* and would compromise the effectiveness of the *Remedies directive*. Attention was also drawn to the fact that an investigation into the tendering process had been ordered by the government and a comprehensive report published by the attorney general. The respondents took issue with the submissions of the applicant and also claimed that the applicant had failed to comply with the three-month time limit as set out in order 84A of the superior court rules in instituting the proceedings.

Ó Caoimh J directed that security for costs be given, holding that cases involving EC directives did not necessarily preclude an application for security for costs. No case had been established that the applicant had a legitimate expectation that the respondents would not seek security for costs. The principles of equivalence or effectiveness did not preclude the making of the present application. With regard to issue of proportionality, the applicant was a company and therefore enjoyed both the rights as a company of limited liability and also disadvantages that might apply. In the circumstances, the orders sought for security for costs against the applicant would be granted.

***Dublin International Arena Ltd v Campus and Stadium Ireland Ltd*, High Court, Mr Justice Ó Caoimh, 26/5/2004**
[FL10299]

## CONSTITUTIONAL

### Criminal law, search and detention

*Statute investing gardaí with powers of search and detention of individual without suspicion of possession of controlled substance – whether oppressive of rights of individual citizen – whether interference with rights of individual citizen disproportionate to benefits of conferring such powers* – Misuse of Drugs Act, 1977, *section 26* – Bunreacht na hÉireann, *article 40, sections 3 and 4*

Section 26 of the *Misuse of Drugs Act, 1977*, as amended, provides that 'a search warrant issued under this section shall … authorise a garda to enter the premises named in the warrant, to search the premises and any person found therein'. The plaintiff had been searched by the gardaí in a nightclub that was subject to a search warrant under section 26 of the *Misuse of Drugs Act, 1977*. She complained that the search had been conducted oppressively and sued for damages in the Circuit Court for assault, false imprisonment and negligence. Her claim was dismissed. She appealed that decision to the High Court and also instituted plenary proceedings seeking a declaration that the *Misuse of Drugs Act, 1977* was unconstitutional.

Finnegan P dismissed the appeal and the plenary proceedings, holding that:

- The plaintiff had failed to prove on the balance of probabilities that the nature of the search was such as to entitle to her to the damages sought
- The interest of the common good in combating the availability of drugs justified the creation of the power of arrest and search created by section 26 of the 1977 act and the Oireachtas had maintained a reasonable proportionality between the evil that it sought to prevent and the interference with the constitutional rights of the citizen, and
- In testing the constitutional validity of any section, the court had to assume that persons given powers under it would exercise those powers in a constitutional manner and the gardaí did so exercise those powers in a proportionate and constitutional manner.

***Devoy v Attorney General*, High Court, Mr Justice Finnegan, 1/12/2003**
[FL10391]

### Mental health

*Declaration – mental health – access to courts – restriction thereon – leave of court required – leave to be granted only where substantial grounds for contending that person against whom proceedings brought acted in bad faith or without reasonable care – plaintiff seeking declaration that provision restricting access to courts unconstitutional* – Mental Treatment Act, 1945, *section 260* – Bunreacht na hÉireann, *articles 6 and 34*

Section 260 of the *Mental Treatment Act, 1945* provides that '(1) no civil proceedings shall be instituted in respect of an act purporting to have been done in pursuance of this act save by leave of the High Court and such leave shall not be granted unless there are substantial grounds for contending that the person against whom the proceedings are to be brought acted in bad faith or without reasonable care'. The plaintiff, who was diagnosed as suffering from paranoid schizophrenia, was admitted to St John of God's hospital. He applied for and was refused leave to challenge his committal. He then applied for a declaration that section 260 of the 1945 act was unconstitutional as being a legislated denial of access to justice contrary to article 6. The state contended that section 260 was a legitimate restriction of the plaintiff's personal rights, having regard under article 40 of *Bunreacht na hÉireann* to his difference in capacity.

Carroll J declared that section 260 of the 1945 act was unconstitutional, holding that the limitation of access to the courts on two specified grounds constituted an impermissible interference by the legislature in the judicial domain, contrary to article 6 of

*Bunreacht na hÉireann* providing for the separation of powers and article 34 providing for the administration of justice in the courts.

***Blehein v Minister for Health*, High Court, Ms Justice Carroll, 7/12/2004** [FL10285]

## CONTRACT

### Conveyancing, land law

*Property – conveyancing – vendor and purchaser – sale of lands – contract – doctrine of frustration – planning permission – practice and procedure – failure to obtain planning permission – service of completion notice – whether vendor entitled to rescind contract*

The plaintiff had entered into a contract of sale with the defendant regarding the sale of lands. As part of the contract, it was stipulated that the purchaser was to obtain planning permission for the lands. The local authority granted planning permission but this was refused by An Bord Pleanála on appeal. Thereafter, the vendor (the plaintiff) returned the deposit together with interest accrued and rescinded the contract for sale. The vendor maintained that planning permission was a fundamental term, this condition could not now be complied with and the contract stood discharged by operation of the doctrine of frustration. On the other hand, the purchaser maintained that it had the right to waive the planning clause and could elect to go ahead with the contract without the benefit of planning permission.

Clarke J determined the following issues. The contract was stated to be conditional on the obtaining of a grant of planning permission on foot of a specified planning register reference number. When An Bord Pleanála refused permission on this particular application, the condition regarding planning permission became incapable of being fulfilled. As from the date of refusal by An Bord Pleanála, the vendor was entitled to treat the contract as at least voidable and had then issued the purchaser with notification to that effect. There was nothing in the facts of the case on which it could be said that the vendor had treated the contract as still in being. On foot of the notification to the purchaser, the contract of sale had come to an end.

***Hand v Greaney*, High Court, Mr Justice Clarke, 15/12/2004** [FL10337]

## CRIMINAL

### Delay, judicial review

*Practice and procedure – delay – prejudice – violent disorder – charging of young persons – whether defence of applicants prejudiced by delay – whether special duty owed to young persons* – Criminal Justice (Public Order) Act, 1994 – Bunreacht na hÉireann

Both the applicants had been charged with an offence of violent disorder allegedly committed on a date in March 2000. Various delays had arisen in the prosecution of the applicants and they initiated judicial review proceedings seeking orders of prohibition preventing the respondent from proceeding with the prosecution. Both applicants contended that the delay on the part of the respondent had caused them specific prejudice and was in violation of their right to a trial with reasonable expedition, in accordance with the provisions of article 38.1 of *Bunreacht na hÉireann*. In addition, it was submitted that, as the applicants were children or young persons at the time of the alleged commission of the offences, there was a special duty on the state to bring them to trial speedily. On behalf of the respondent, it was argued that, even if there had been culpable delay, the rights of the applicants were not outweighed by that of the community to have serious crime prosecuted.

Quirke J granted the orders of prohibition sought. The explanations tendered on behalf of the respondent to explain the delay were wholly inadequate. There had been a degree of prejudice caused to the applicants by reason of the inordinate period of time that had passed. Where a child or young person had been charged with a criminal offence, there was a special duty on the state authorities to ensure a speedy trial. Although no specific prejudice had been proved, a degree of prejudice may be presumed, having regard to the age of each applicant at the material times. Both applicants were entitled to the relief sought.

***Jackson and Walsh v DPP*, High Court, Mr Justice Quirke, 8/12/2004** [FL10341]

### Detention, *habeas corpus*

*Statutory interpretation – whether applicants in possession of forged identity documents at time of application for asylum – whether applicants lawfully detained* – Refugee Act, 1996, *section 9(8)*

Section 9(8) of the *Refugee Act, 1996*, as amended, provides that 'where an applicant [for asylum] is in possession of forged identity documents, the person [may be detained] in a place of detention'. The applicants were arrested and forged identity documents that they had on them at the time were impounded by the gardaí. They applied for asylum subsequently while in detention in prison. They were then brought before the District Court, where they were further detained on the basis of section 9(8) of the 1996 act. They brought applications enquiring into the lawfulness of their detention pursuant to article 40.4.2 of the constitution, on the grounds that at the time they applied for asylum they were not then in possession of forged identity documents and therefore section 9(8) did not apply to them.

Peart J declared the detention of the applicants to be unlawful and ordered their release, holding that there was a clear meaning capable of being gleaned from the ordinary meaning of the words used in section 9(8) of the 1996 act and there was no ambiguity to be resolved. To interpret section 9(8) as covering the applicant's detention would go beyond giving meaning to the words used in the section. Possession of the forged documents ceased on their removal from the applicants when they were impounded by the gardaí, at which time they were not asylum-seekers.

***Simon and Todea v Governor of Cloverhill Prison*, High Court, Mr Justice Peart, 24/12/2004** [FL10358]

## FAMILY

### Capacity, annulment

*Nullity – capacity – immaturity – whether respondent capable of entering into and sustaining normal marital relationship – evidence – psychiatric examination – scope of examination – whether sufficient ground for annulment of marriage*

The petitioner sought an annulment of her marriage to the respondent on the grounds that he lacked capacity to sustain a normal marital relationship owing to his psychological immaturity. A psychiatrist was appointed to carry out an examination of the petitioner and respondent and to report back to the court. His conclusion was that the respondent had a personality disorder to such an extent as to make it impossible for him to sustain a marriage with the petitioner.

O'Higgins J refused the petition, holding that it was the duty of the court to determine whether the inadequacy of the emotional relationship was such as to nullify the marriage and it would be wrong of the court to accept unquestioningly the evidence of an expert and to substitute expert opinion for the independent judgment of the court. The matters that were the basis of his opinion had not been accepted by the court as valid material on which reliance should be placed. The totality of the evidence did not disclose that the personality traits of the respondent were so outside the

norm as to constitute a personality disorder as would preclude him from contracting to a valid marriage.

***LB v T MacC*, High Court, Mr Justice O'Higgins, 20/12/2004** FL10317]

## LANDLORD AND TENANT

### Easements and rights of way

*Land law – property – landlord and tenant – rights of way – easements – damages – whether landlord had wrongfully destroyed rights of tenants – whether tenants entitled to damages*

The plaintiffs held two retail units and a storage unit as tenants of the first defendant. Subsequently, the first defendant sold an area to the second defendant, who then carried out a development. The plaintiffs claimed that this development had wrongfully destroyed rights in the nature of easements for the delivering of stock to their units. They instituted proceedings against the defendants, claiming damages for alleged breaches of their rights. It was agreed that the court should determine the issue of liability first.

Laffoy J made the following order. There had been a real and substantial interference with the express and implied rights under the leases. It was no answer for the defendants to say that other routes were available to the plaintiffs. The plaintiffs had been deprived of the only suitable route for efficient bulk deliveries in contravention of their rights and had established liability.

***Conneran and O'Reilly v Corbett and Sons Ltd*, High Court, Ms Justice Laffoy, 15/12/2004** [FL10402]

## PERSONAL INJURIES

### MIBI agreements

*Practice and procedure – MIBI agreements – tort – personal injury – appeal from Circuit Court*

The plaintiff had been allegedly injured while on a bus in which an uninsured driver of a car was wholly or partly responsible for the accident. The Motor Insurers Bureau of Ireland applied to and succeeded in the Circuit Court by motion to be removed as a party to the proceedings. The first-named defendants appealed.

Judge O'Leary held that the MIBI agreement prevented an aggrieved party from suing both the alleged wrongdoer and the MIBI in one set of proceedings. The plaintiff retained the right to maintain two sets of proceedings and did not appeal the Circuit Court ruling. The first-named defendant was insisting that the second defendant remain as co-defendants despite the plaintiff's acceptance of the Circuit Court decision. The plaintiff was the initiator of the proceedings and the competent party to decide who the proper defendants were. The appeal was dismissed.

***Byrne v Bus Átha Cliath and MIBI*, High Court, Judge O'Leary, 2/2/2005** [FL10424]

## REFUGEE AND ASYLUM

### Deportation, judicial review

*Judicial review* – certiorari – *refugee law – immigration and asylum – deportation – leave to seek judicial review – practice and procedure – whether all relevant issues considered by minister – whether applicants had established substantial grounds* – Immigration Act, 1999 – European Convention on Human Rights Act, 2003

The second-named applicant was Kosovan and had been deported from Ireland in May 2003. Thereafter, the first-named applicant, an Irish citizen, travelled to Kosovo and married him in September. At this stage, the couple had a child, which was born in August 2003. They instituted proceedings seeking leave to bring a judicial review to challenge the refusal by the first-named respondent to revoke the deportation order in respect of the husband. In addition, leave was sought in respect of granting the husband either a visa or leave to reside in the state. Furthermore, leave was sought regarding a declaration in respect of the entitlement of the applicants to reside as a family under the constitution and the *European Convention on Human Rights Act, 2003*. The basis for the minister's decision was that the husband and wife had not resided together for an appreciable period of time since their marriage.

Mr Justice Clarke made the following order. In respect of the first two issues, the applicants had failed to reach the necessary thresholds in order for leave to be granted. The minister, in basing his decision on the fact that the husband and wife had not resided together for an appreciable period of time since their marriage, had failed to take into account other appropriate factors that he was arguably required to do by law. Leave would be granted in respect of this aspect. Interlocutory relief permitting the husband to return to Ireland pending the substantive hearing was refused.

***Gashi v Minister for Justice, Equality and Law Reform*, High Court, Mr Justice Clarke, 3/12/2004** [FL10430]

## TORT

### Duty of care

*Negligence – duty of care – licensed premises – assault by security staff on disorderly patron causing loss of eye – whether force used unreasonable in circumstances – public policy – whether behaviour of plaintiff so egregious as to preclude duty of care being owed to him – whether duty of care to plaintiff breached – occupier of licensed premises*

The plaintiff lost the use of his right eye as a result of a heavy blow to his face from security staff allegedly employed by the first- and second-named defendants at the entrance to licensed premises owned and/or occupied by the said defendants. The second-named defendant, who was the license-holder for the said premises, denied that he employed the bouncers or that he was liable for the plaintiff's injuries. All defendants denied that they owed the plaintiff a duty of care and/or that he was guilty of contributory negligence through his disorderly conduct.

Peart J held the plaintiff to be 50% contributory negligent and awarded him €50,000 in damages against the first and second defendants, holding that there could be no public policy consideration that would result in no duty of care being owed by employers of security staff to the public when dealing with disturbances outside licensed premises. It was fair and reasonable that such persons should carry out their duties in a manner consistent with a reasonable use of force and restraint and there was no reason why any special dispensation should be extended to them in the manner in which they carry out their tasks. Such duty of care extended to avoiding causing injury to the plaintiff through an unreasonable or unnecessary use of force or violence in dealing with disturbances outside licensed premises. There was such a mingling of functions between them and such a relationship created by the agreement between the first and second defendants that both defendants were occupiers of the said premises and each owed a duty of care to the visiting public, including the plaintiff.

***Hackett v Calla Associates Ltd*, High Court, Mr Justice Peart, 21/10/2004** [FL10309] G

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

# Eurlegal

**News from the EU and International Affairs Committee**

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

## At the IP/competition interface: the compulsory licensing of intellectual property rights after *Microsoft* (part 2)

Against the background of the first part of this article (which appeared in last month's *Eurlegal*), this part poses a number of questions, the answers to which, it is submitted, will play a crucial role in advising on this area:

- Are we witnessing an apparent move away from the 'exceptional circumstances' test enunciated in *Magill*?
- What is a 'reasonable non-discriminatory royalty'?
- Does the *Microsoft* decision signify a move further away from the US approach towards the compulsory licensing of IPRs?

### 'Exceptional circumstances' v 'totality of the circumstances'

In reaching its conclusion in the Microsoft infringement decision, the commission appeared to signal a move away from the 'exceptional circumstances' test enunciated in *Magill*, preferring a test that considered the 'totality of the circumstances', based on the results of a comprehensive investigation. In doing so, the commission indicated that it does not consider itself bound by an exhaustive list of exceptional circumstances.

Whether the commission's 'totality of the circumstances' test will ultimately stand up to the scrutiny of the ECJ when the appeal is finally heard will depend on whether the conditions identified in *Magill* are deemed cumulative and necessary or merely sufficient to justify the granting of a compulsory licence of an IPR.

The recent decision of the ECJ in *IMS Health* (29 April 2004 – delivered just over a month after the Microsoft infringement decision) offers an insight into the current thinking of the ECJ on the matter. The decision suggests that other types of abusive conduct, other than the specific circumstances identified in *Magill*, can fall firmly within the category of 'exceptional circumstances'. This is positive from the commission's perspective, as it would be extremely difficult for it to establish that all the *Magill* criteria were satisfied in the Microsoft infringement decision.

For example, the commission would have some difficulty in arguing that access to Microsoft's technology is indispensable; competition in the downstream market has been fierce for many years and case law has firmly established that it must be demonstrated that supply must not simply be convenient; it must be indispensable for competitors to be able to compete on the downstream market.

It is also difficult to see how Microsoft's refusal would have the effect of eliminating 'all' competition in the downstream market. Microsoft may have a 60% share of the downstream market, but its competitors have market shares (which continue to grow) that are each estimated at between 5-15%. Some observers also question whether Sun, as potential licensee, envisaged bringing a 'new' product to the market as a result of the granting of a compulsory license and argue that all Sun was seeking to do was to make its products more like Microsoft's. This argument is a little less sustainable. Sun appears to have been offering a product for which there was demonstrable consumer demand and which was not a mere clone of the Microsoft offering.

It is interesting to note that the commission's attitude towards the 'exceptional circumstances' test is similar to the approach recently taken by the English Court of Appeal. In *Intel Corp v VIA Technologies Inc* (Court of Appeal [Civil Division], 20 December 2002, [2003] UKCLR 106), the court concluded that both *Magill* and *IMS Health* indicate the circumstances that the ECJ and the president of the CFI respectively regarded as exceptional. It did not follow, however, that other circumstances in other cases would not be regarded as exceptional. Interestingly, the court also stated that it is at least arguable, as the president of the CFI concluded in *IMS Health*, that the ECJ will assimilate its jurisprudence under article 82 more closely with that of the essential facilities doctrine as it has come to be applied in the United States.

### What is a 'reasonable non-discriminatory royalty'?

Once it had been decided that a compulsory licence should be granted, it would seem obvious that the licence should be available on fair, reasonable and non-discriminatory terms. However, the ECJ has provided scant guidance as to how those terms are to be assessed (perhaps because of reluctance to cast itself in the role of a day-to-day price regulator). This caused considerable difficulty for the UK Copyright Tribunal following the ECJ decision in *Magill*, which was left to assess what was a fair price for access.

When compulsory IPR licenses are ordered, it is common for licensors to claim that royalty rates should be set so as to reflect the value of the IPR to the licensor and should bear little relation to the costs incurred by the licensor in accumulating the IPR in issue. Licensors often claim that the relevant royalty rate should be set to compensate them for anticipated lost profits as a result of the admittance of the licensee into the market. Thus, determining a fair price for access will frequently involve a balancing exercise between the interests of the licensor, who will argue for a price level that will avoid any confiscation of its profits, and the potential licensee, who will argue that the reason that such profits have been accumulated relate solely to the licensor's monopoly position and that the price set should reflect that reality.

In the Microsoft infringement decision, the commission added the further criterion of 'no strategic valuation' to the already established reasonableness and non-discrimination criteria, but unfortunately went no further. This might suggest that a standard based on compensation for lost profits on the secondary market is unacceptable. If that is the case, the approach would appear correct in principle. The price for access should not approximate existing

monopoly conditions for the IPR holder on the secondary market. On the other hand, there is also the argument that no court should be willing to impose a duty to deal that it cannot explain or reasonably supervise and, further, that the problem should be deemed irremediable by competition law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory authority.

Of course, this approach also presupposes that protected IP has been identified. However, in the infringement decision, the commission merely referred to the possibility of Microsoft being entitled to royalty payments 'to the extent that' the interface information is protected by IP in the European Economic Area. It did not conclusively identify whether it considered that the interface information was actually protected and, if so, by what category of IPR(s). In addition, the CFI pointed out in the interim measures decision that the IPRs on which Microsoft relied had not been declared valid by a national court. Given that the fundamental starting point has not been firmly identified, negotiating a reasonable, non-discriminatory, non-strategic royalty may cause a few headaches for Microsoft and potential licensees.

**Compulsory licensing of IPRs?**

The United States' approach to the compulsory licensing of IPRs stands in marked contrast to the current approach in Europe. The language may be similar, in that the holder of an IPR is under no duty to license a third party in the absence of 'exceptional situations', but the practical application of the test is very different. The circumstances that may amount to 'exceptional situations' are much narrower in the US than they are in Europe. In *Independent Services Organisation Antitrust Litigation* (F3d 1322, Federal Circuit, 2000), the United States Court of Appeal for the Federal Circuit held that the only 'exceptional situations' that would justify the grant of a compulsory license of an IPR were:

- Where the holder of the IPRs in issue acquired the right through knowing and wilful fraud, and
- Sought to gain a monopoly in a market beyond the scope of the right or attempted to exert its monopoly through a 'sham' infringement action.

Indeed, the US Department of Justice and the Federal Trade Commission *Antitrust guidelines for the licensing of intellectual property* expressly state that an IP owner will not be required to create competition in its own technology. Further, the deputy assistant attorney general of the Antitrust Division of the Department of Justice stated recently: 'Compulsory licensing as a merger remedy is a well-established tool and has not been particularly controversial. Compulsory licensing imposed by an agency or the courts, though, should be a rare beast'.

Thus, the Microsoft infringement decision would appear to move the European approach to compulsory licensing even further away from the established United States position.

**Considerations before ordering a compulsory license**

Instead of attempting to fit a request for a compulsory licence into the 'exceptional circumstances' or some other variant form of that test, a helpful starting point might be to consider the following basic questions:

- Can the market accommodate distortions (if any) flowing from the refusal to licence and, if not, is the grant of a compulsory licence the least restrictive means of tackling marketplace problems?
- Will the relevant authorities have to assume, initially, the role of a price regulator and thereafter will the grant of a compulsory licence require continual supervision? If so, there should be some reluctance to grant a compulsory licence
- Are cases of natural or persistent monopoly better dealt with by a system of *ex-ante* regulation rather than by competition law?
- Will the grant of a compulsory licence have a seriously detrimental impact on the unwilling licensor's future commitment to innovation?

The answers to such questions can only be a starting point in licence negotiations or litigation. Litigating at the interface between competition and IP law will be time consuming, expensive and complex. Raising competition law issues may seem appropriate, but it needs to be done carefully and with some foundation.

Competition is not just about rivalry. It also implies circumstances tending toward innovation, increased output and reduced prices. The grant of a compulsory licence of an IP-protected right should be strictly controlled. That appeared to be the case in Europe, but recent decisions of both the European courts and now also the English Court of Appeal have cast doubt on the strictness of the *Magill* 'exceptional circumstances' test.

As a result, it now appears that the respective paths of the European courts and their US counterparts seem destined to meander in different directions. A compulsory licence may be a useful tool in merger cases and could be seen as less restrictive than divesture, but, outside merger situations, the grant of a compulsory licence should be strictly controlled. There must be an extraordinary level of market dominance and, if the grant of a compulsory license is considered justified, it should be drafted in the narrowest possible terms. That said, while we now have examples of what circumstances are considered sufficient to justify the grant of a compulsory licence, we unfortunately do not have any definitive test.

What has not received the attention it deserves in the decisions to date is the substance of the material that was deemed to amount to protected IP. The grant of a compulsory licence in both *Magill* and *IMS* could be explained as remedies to aberrations in the application of national copyright laws. The Irish courts' decision to afford copyright protection to TV listings in *Magill* had met with some criticism and it is also interesting to note that the US equivalent of the EU *Database directive* has expressly excluded the type of material that attracted the protection of database copyright in *IMS*. That said, it would seem unimaginable that a truly innovative piece of technology (novel source code or a pharmaceutical patent) would be treated in such a manner.

Bearing that in mind, will Microsoft fare any better when its appeal is finally heard? We are not dealing with source code, which would undoubtedly be protected by copyright. On the other hand, is not entirely clear whether the interface information is actually protected by IP. Microsoft probably has copyright over the implementation of the interfaces that it creates, but it remains uncertain as to whether it has IP protection over the interface definitions themselves – the interface definition language files that contain the description of the interfaces. If it is true that the information has not been previously disclosed, it may amount to a trade secret and be protected as such. Microsoft also claims that several of its patents (including a number of its pending patent applications) would be infringed by rival vendors who use the interoperability information, though rival vendors have questioned whether this would be the case.

Perhaps another 'super dominant' firm is destined to become the victim of its own success. G

*Niall Collins is with the EU and Competition Law Practice Group at the Dublin law firm Arthur Cox.*

# *Forum non conveniens* and the *Brussels convention*

The common law rule of *forum non conveniens* broadly speaking sets out that the UK and Irish courts will not accept jurisdiction where another state would be the more appropriate forum. It is a discretionary principle. The House of Lords accepted this doctrine in *The Abidin Daver* ([1984] AC 398) and it was accepted by the Irish courts in *Doe & Anor v Armour Pharmaceutical Co Inc and Ors* ([1994] ILRM 416).

There are a number of decisions of the English courts reaching different conclusions on the question of whether *forum non conveniens* is consistent with the *Brussels regulation* (44/2001). One view is that article 2 of the regulation (which sets out the rule of jurisdiction that one sues a defendant where he is domiciled) is mandatory and that a member state court must take jurisdiction over a dispute, even where a court in a non-member state may be the more appropriate forum to hear the dispute – *S and W Berisford plc v New Hampshire Insurance Co* ([1990] 2 QB 631). The other view is that the rule can continue to be applied where to do so is not inconsistent with the regulation – *Re Harrods (Buenos Aires) Ltd* ([1992] Ch 72). The English Court of Appeal had reached that determination. The case concerned an application to stay winding-up proceedings in respect of an English-incorporated company that carried on business exclusively in Argentina. The Court of Appeal was satisfied that Argentina was the most appropriate forum for trial and stayed the English proceedings. The House of Lords referred the matter to the European Court of Justice, but the reference was withdrawn when the proceedings were compromised.

The Irish courts have taken the view that *forum non conveniens* did survive the *Brussels convention*. In *Intermetal Group Ltd and Trans-World (Steel) Ltd v Worslade Trading Ltd* (unreported, [1998] IR 1), O'Sullivan J held that the Irish courts have jurisdiction to stay and grant proceedings on the basis of *forum non conveniens*. It had been asserted that the discretion was abolished by the *Brussels convention* both in relation to EU and non-EU proceedings. On appeal, the Supreme Court did not expressly rule on whether the discretion was consistent with the convention and indicated that, in order to do so, a reference to the ECJ would be needed.

In case C-281/02, *Owusu v Jackson* (unreported, 1 March 2005), the ECJ has definitively ruled on this question. Mr Owusu was a British national domiciled in England. He hired a holiday villa in Jamaica from Mr Jackson, another British national domiciled in England. While on holiday, he waded into the sea and when the water reached waist height he dived in. His head struck a submerged sand bank and the resulting injury to his spine left him without the use of his limbs. He sued Jackson in the English courts for breach of an implied term that the private beach where the accident occurred would be reasonably safe or free from hidden dangers. He also sued in the same action several Jamaican companies that had an interest in the resort and the management and upkeep of the beach facilities. On being served with the proceedings, the defendants applied for a stay on the basis that Jamaica was the proper forum for the trial. The High Court judge refused leave for a stay, despite the connecting factors to Jamaica. He held that the *Brussels convention* applied and that the English courts could not decline jurisdiction conferred on them by the convention. The case was appealed to the Court of Appeal, which referred the matter to the ECJ.

The ECJ rejected an argument put by the defendants and the UK government that article 2 did not apply as the claimant and the defendant were domiciled in the UK and the other defendants were domiciled in a non-contracting state. The court held that article 2 did not require a legal relationship involving a number of contracting states. For the convention to apply, there must be an international element. This is satisfied where a plaintiff and defendant live in the one state but the claim derives from events that took place in a non-contracting state.

The ECJ held that the doctrine of *forum non conveniens* was incompatible with the *Brussels convention*. Article 2 of the convention is mandatory in nature and can only be derogated from in ways expressly provided for in the convention. The doctrine had been discussed when the UK and Ireland acceded, but no exception was provided in the convention for it. One of the main objectives of the convention is to provide legal certainty. To allow the rule to co-exist with the convention would undermine the predictability of the rules of jurisdiction and thus legal certainty would not be fully guaranteed. A defendant is generally better able to conduct his defence before the courts of his domicile and would be unable to reasonably foresee before which other court he might be sued. The concept is recognised only in a small number of contracting states, so its use is inconsistent with the convention's aim to lay down uniform rules of jurisdiction that override national laws.

The court acknowledged the benefits of this rule and appreciated that this ruling might create genuine difficulties in terms of the cost of proceedings, the availability of witnesses and the other factors taken into account in making decisions on foot of the doctrine. Nonetheless, these difficulties were not such as to call into question the mandatory nature of the fundamental rule of jurisdiction contained in article 2 of the convention. The ECJ declined to rule on whether the application of *forum non conveniens* is ruled out in all circumstances. G

*TP Kennedy is the Law Society's director of education.*

## Land Registry
## Clarlann na Talun

# Scheme Maps

The Land Registry is pleased to announce the introduction of a new procedure for the processing of Scheme Maps. This initiative will allow for the allocation of plan reference numbers for each site at the time the scheme map is approved. The new plan numbers will be shown on a legend attached to the scheme map a copy of which will be returned to the lodging party. When each site is subsequently transferred the approved Scheme Map application number and the plan reference number should be quoted in the deed of transfer. No further mapping of these cases will be required.

Only one copy of a scheme map should be lodged.

The new procedure will apply to Scheme Maps lodged after Tuesday the 10th of May 2005

**For further information please refer to www.landregistry.ie**

# Recent developments in European law

## INTERNATIONAL TRADE

Case C-377/02, *Léon Van Parys NV v Belgisch Interventie-en Restitutiebureau*, 1 March 2005. The applicant is a Belgian company that has imported bananas into the EU from Ecuador for more than 20 years. In 1998 and 1999, the Belgian authority refused to issue it with import licences for the full quantity applied for. This refusal was based on EC regulations governing the import of bananas into the EC. Van Parys challenged this decision in the Belgian courts, arguing that the regulations in question are unlawful in light of certain provisions of the World Trade Organisation agreements. The Dispute Settlement Body of the WTO had declared the legislation of the EC incompatible with the WTO rules on the matter. The ECJ considered whether the WTO agreements give EC nationals a right to rely on them in legal proceedings challenging the validity of EC legislation. It pointed out that, in principle, these agreements are not among the rules that the court must take into account when reviewing the legality of measures adopted by EC institutions. It is only where the EC had intended to implement an obligation assumed in the context of the WTO, or where the EC measure refers expressly to a particular provision of WTO agreements, that it is for the court to review the legality of an EC measure in light of the WTO rules. In the present case, the EC did not intend to assume a particular obligation in the context of the WTO. The regulations in question do not expressly refer to particular provisions of the WTO agreements. Even where there is a decision of the WTO Dispute Settlement Body holding that measures adopted by a member states are incompatible with the WTO, the WTO dispute settlement system accords considerable importance to negotiations between the parties.

## TAXATION

Joined cases C-453/02 and 462/02, *Finanzamt Gladbeck v Edith Linneweber; Finanzamt Herne-West v Savvas Akriditis*, 17 February 2005. Linneweber operated gaming machines in restaurants and amusement arcades owned by him in Germany. Akriditis ran an amusement arcade in Germany, where he organised card games. The tax authorities took the view that income from the operation of gaming machines and the organisation of card games was subject to VAT. German legislation provides for the exemption of such turnover only where it derives from the operation of a licensed public casino. The German Federal Finance Court referred several questions to the ECJ. The ECJ looked to the sixth *VAT directive* (77/399 EEC) for guidance. Article 13B(f) of the directive provides that the operation of games of chance and gaming machines must be exempt from VAT. Member states retain responsibility for determining the conditions and limitations to which this exemption is subject. In exercising that responsibility, the member state must respect the principle of fiscal neutrality. This means that comparable services must be treated equally for the purposes of VAT and must be subject to a uniform rate. In assessing whether services are comparable, the identity of the provider of those services and the legal form under which he exercises his activities are generally irrelevant. Thus, member states cannot make the benefit of the VAT exemption dependent on the identity of the operator of the games of chance or gaming machines. The ECJ held that the directive precludes national legislation that grants exemptions to gaming machines and games of chance held in licensed public casinos but does not give such an exemption to other traders operating the same activity. The court also held that these provisions of the directive had direct effect and could be relied on by an operator of games of chance in national courts to prevent the application of rules of national law that are inconsistent with that provision. The ECJ did not limit the temporal effect of the judgment. G

# Annual dinner of the Law Society 2005

Law Society president Owen Binchy and Chief Justice John Murray

Judge Pat McCartan, finance minister Brian Cowen and Law Society director general Ken Murphy

Justice minister Michael McDowell, past president of the Law Society of Northern Ireland, Joe Donnelly, chief executive of the NI Law Society John Bailie, and director general Ken Murphy

Gerard Doherty, chair of the Registrar's Committee, and the director of consumer affairs Carmel Foley

Past president of the Law Society of Northern Ireland, Joe Donnelly, and solicitor Eimear Binchy

Council members Moya Quinlan and Andrew Cody with attorney general Rory Brady

AIB chairman Dermot Gleeson SC and Competition Authority member Edward Henneberry

The Northern Ireland Law Society's senior vice-president John Pinkerton, and president, Attracta Wilson, our own deputy director general Mary Keane and High Court president Joseph Finnegan

Judge Con Murphy, Law Society Council member Kevin O'Higgins and president of the State Solicitors' Association Michael Murray

**The Mayo clinic**

Pictured at a well-attended meeting of the Mayo Solicitors' Bar Association in Castlebar are *(front row, from left)* Law Society director general Ken Murphy, president Owen Binchy, association president Fiona McAllister, Pat Gillespie and James Cahill

**In the garden of Ireland**

Law Society president Owen Binchy and director general Ken Murphy spent some quality time with the Wicklow Solicitors' Association in March. Pictured are *(front row, from left)* Barbara Smyth, Finola Freehill (treasurer), Ken Murphy, Rosemary Gantly (secretary), Cathal Louth (association president), Owen Binchy, Rachel Liston, Aine Hogan, Siona Mooney; *(middle row, from left)* June Greene, Maria Byrne, Pauline Kennedy, Gus Cullen, Joseph Maguire, Neville Murphy, Jennifer Haughton, Toni Monaghan, Denis Hipwell, Brendan Connolly, Ciara Lennon, Josephine O'Sullivan, Mary Flynn; *(back row, from left)* Bernadette Goff, Donal O'Sullivan, Thomas Honan, Karl Carney, Edmund Louth, Richard Joyce, Bernard O'Beirne, Laurence Cullen, Patrick O'Toole and David Lavelle

**Shooting stars and hired guns**
Some of the delegates at the recent annual conference in Kracow took time out from their busy schedules to pop a few caps

**Kracow dawn**
Even more delegates with their own interpretation of 'shots'

**The fields of Athenry**
Pictured with members of the County Galway Solicitors' Bar Association at a recent meeting are *(seated, from left)* association secretary Dermot Murphy, Law Society president Owen Binchy, association president Louis Bourke, director general Ken Murphy, and association treasurer Valerie Corcoran

**One of ours**
Edward Nally *(left)*, whose grandparents were from Mayo and who, as current president of the Law Society of England and Wales, is the elected leader of 120,000 solicitors, receives his parchment from Owen Binchy as he becomes a member of the Law Society of Ireland

## LOST LAND CERTIFICATES

*Registration of Title Act, 1964*

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

*(Register of Titles), Central Office, Land Registry, Chancery Street, Dublin (Published 6 May 2005)*

Regd owner: Breda O'Brien; folio: 3079F; lands: Chapelstown and barony of Carlow; **Co Carlow**

Regd owner: Carlow Urban District Council; folio: 2338F; lands: east of Patrick's Avenue and barony of Carlow; **Co Carlow**

Regd owner: Catherine Corah Fitzpatrick (deceased); folio: 1802L; lands: townlands of Tullyglass and Tullyvarraga and barony of Bunratty Lower; **Co Clare**

Regd owner: John James Keown; folio: 1038; lands: townland of Ballybroghan and barony of Tulla Lower; **Co Clare**

Regd owner: Francis Lynch; folio: 27497; lands: townland of Finanagh and barony of Bunratty Upper; area: 0.2428 hectares; **Co Clare**

Regd owner: Sean Barry; folio: 40153; lands: plots of ground being part of the townland of Carrigyknaveen in the barony of Muskerry East and county of Cork; **Co Cork**

Regd owner: Denis and Teresa Collins; folio: 15983; lands: plots of ground being part of the townland of Kilcoe in the barony of Carberry West (west division) and county of Cork; **Co Cork**

Regd owner: Hanno Meier; folio: 9396F; lands: plots of ground being part of the townland of Dromderaown in the barony of Bear and county of Cork; **Co Cork**

Regd owner: Joanne Bowen; folio: 36689; lands: plots of ground being part of the townland of Lehenagh More in the barony of Cork and county of Cork; **Co Cork**

Regd owner: Eileen Horgan; folio: 18715; lands: plots of ground being part of the townland of Moneygurney in the barony of Cork and county of Cork; **Co Cork**

Regd owner: Frank Leahy and Marie Ronan; folio: 9210F; lands: plots of ground being part of the townland of Ballyleary in the barony of Barrymore and county of Cork; **Co Cork**

Regd owner: Denis and Yvonne Murphy; folio: 100962F; lands: plots of ground being part of the townland of Castleinch in the barony of Muskerry East and county of Cork; **Co Cork**

Regd owner: Paul J O'Mahony; folio: 53041; lands: plots of ground being part of the townland of Derrycreigh in the barony of Bantry and county of Cork; **Co Cork**

Regd owner: Matthijs Van Zanten; folio: 35422 and 59016F; lands: plots of ground being part of the townland of Faunkill and the Woods in the barony of Bear and county of Cork; **Co Cork**

Regd owner: Rose Foley; folio: 92316F; lands: plots of ground known as 36 The Rise, Dun Coran, Sweetfields in the parish of Youghal and in the urban district of Youghal and county of Cork; **Co Cork**

Regd owner: Ann Carroll, Baun, Dunmore, Kilkenny, Co Kilkenny; folio: 43676; lands: Manorcunningham; area: 0.2023 hectares; **Co Donegal**

Regd owner: John Noel McGinley, Ballyboes, Creeslough, Donegal; folio: 41199; lands: Kill; area: 0.8599 hectares; **Co Donegal**

Regd owner: Kevin McLaughlin, Ardaravan, Buncrana, Co Donegal; folio: 67F; lands: Ardaravan; area: 0.1492 hectares; **Co Donegal**

Regd owner: Oliver McSharry, East End, Bundoran, Co Donegal; folio: 14914; area: 0.8680 hectares; lands: Magheracar; **Co Donegal**

Regd owner: North Western Cattle Breeding Society Limited, Doonally House, Sligo; folio: 35707; lands: Churchland Quarters; area: 0.05817 hectares; **Co Donegal**

Regd owner: Anita Sharpe, Main Street, Ardera, Co Donegal; folio: 8232; lands: Drumbaran; area: 0.0259 hectares; **Co Donegal**

Regd owner: Robert Roulston Davis, Cloghroe, Drumkeen, Co Donegal; folio: 16214; lands: Cloghroe; area: 27.2900; **Co Donegal**

Regd owner: Michael Kavanagh and Louise Somerville; folio: DN99505F; lands: property situate in the townland of Clonsilla and barony of Castleknock known as 6 Willow Drive, Clonsilla, Dublin 15; **Co Dublin**

Regd owner: James O'Reilly and Valerie Woodbyrne; folio: DN36982L; lands: property situate west of Oldbawn Road in the parish and town of Tallaght in the townland of Oldbawn and barony of Uppercross; **Co Dublin**

Regd owner: Bassam Nasr and Iman Turk-Nasr; folio: DN88521L; lands: property known as apartment no 23, Fourth Floor, Block 1 and car-park space no 32, Harcourt Green, Charlemont Street, situate in the parish of St Peter and district of South Central; **Co Dublin**

Regd owner: Michael Farrell and Eileen Farrell; folio: DN36374L; lands: property in the townland of Jobstown and barony of Uppercross situate to the north of Blessington/Tallaght Road in the town and parish of Tallaght; **Co Dublin**

Regd owner: Brian and Deirdre Buttimer; folio: DN48131F; lands: property situate on the south side of Braemor Road in the parish and district of Rathfarnham; **Co Dublin**

Regd owner: Barry Harbison and Anne Harbison; folio: DN33034L; lands: property situate north of Dungriffin Road in the townland of Howth and barony of Coolock; **Co Dublin**

Regd owner: Joseph Harrell and Helen Harrell; folio: DN17169L; lands: property situate in the townland of Carrickhill and barony of Coolock; **Co Dublin**

Regd owner: Elizabeth Kavanagh and Patrick Kavanagh; folio: DN63127L; lands: property known as 13 O'Donoghue Street; **Co Dublin**

Regd owner: Thomas Buckley; folio: 4579; lands: townland of Gortnaskeha and barony of Iraghticonnor; **Co Kerry**

Regd owner: Frances Kennedy; folio: 31397F; lands: townland of Straffan Demesne and barony of North Salt; **Co Kildare**

Regd owner: Martina Kelly; folio: 31396F; lands: townland of Straffan Demesne and barony of North Salt; **Co Kildare**

Regd owner: Patrick Gill (junior); folio: 15548F; lands: townlands of Derrycrib, Newtownhortland and Hortland and baronies of Clane and Ikeathy and Oughterany; **Co Kildare**

Regd owner: Alan McManus and Noeleen Casey; folio: 26249F; lands: townland of Monread South and barony of Naas South; **Co Kildare**

Regd owner: Daniel Wall; folio: 1661L; lands: Smithsland North and barony of Shillelogher; **Co Kilkenny**

Regd owner: Peter and Patricia O'Brien; folio: 18342; lands: Borris Little and barony of Maryborough East; **Co Laois**

Regd owner: Nuala O'Mara; folio: 10142F; lands: townland of Sluggary and barony of Pubblebrien; **Co Limerick**

Regd owner: Denis Malone and Veronica Malone, Lemisseagh, Carlingford, Co Louth; folio: 2907F; lands: Liberties of Carlingford; area: 0.1647 hectares; **Co Louth**

Regd owner: Aileen Sandys, Killally, Dundalk, Co Louth; folio: 2761; lands: Killally; area: 1.4897; **Co Louth**

Regd owner: John Judge; folio: 43971; lands: townland of Bunnyconnellan East and barony of Gallen; area: (1) 4.300 hectares and (2) 3.7380 hectares; **Co Mayo**

Regd owner: Michael Fitzpatrick, Arden Vale, Tullamore, Co Offaly; folio: 24300F; lands: Abbeyland; **Co Meath**

Regd owner: Patrick Mulchrone and Dina Mulchrone, 24 The Drive, Mulhuddard, Dublin 15; folio: 9125F; lands: Powderlough; **Co Meath**

Regd owner: James Duffy, Corcuillogoue, Carrickmacross, Co Monaghan; folio: 1000; lands: Corcuilloge; area: 5.5770 hectares; **Co Monaghan**

Regd owner: James and Mary McLoughlin; folio: 10573F; lands: Gallen and barony of Garrycastle; **Co Offaly**

Regd owner: Thomas Walsh; folio: 2324F; lands: Kildangan and barony of Ballycowan; **Co Offaly**

Regd owner: Hugh Martyn (deceased); folio: 7478; lands: townland of Slieveroe or Siberia and barony of Carbury; area: 15 acres, 1 rood, 20 perches; **Co Sligo**

Regd owner: Brian Mulllen; folio: 1795F; lands: townland of Cornageeha and barony of Carbury; area: 0.0177 hectares; **Co Sligo**

Regd owner: Patrick J Waters; folio: 13355; lands: townland of Carrownyclowan and barony of Tirerrill; area: 40 acres, 3 roods, 13 perches; **Co Sligo**

Regd owner: John Bowe; folio: 2014; lands: townland of Longfordpass North and barony of Eliogarty; **Co Tipperary**

Regd owner: IDA Ireland; folio: 38007; lands: townland of Fethard and barony of Middlethird; **Co Tipperary**

Regd owner: Michael Lyons; folio: 16333;

lands: townland of Scragg and barony of Owney and Arra; **Co Tipperary**

Regd owner: Thomas Power; folio: 591; lands: plots of ground being part of the townland of Kilmoyemoge West in the barony of Middlethird and county of Waterford; **Co Waterford**

Regd owner: Declan McGrath; folio: 6511; lands: plots of ground being part of the townland of Knocknacrooha in the barony of Decies without Drum and county of Waterford; **Co Waterford**

Regd owner: John Doyle; folio: 3937F; lands: Shelbaggan and barony of Shelburne; **Co Wexford**

Regd owner: Vincent and Breda McMahon; folio: 8370F; lands: townland of Ballydowling Hill and barony of Ballinacor North; **Co Wicklow**

Regd owner: Valerie Smyth; folio: 807F; lands: townland of Slievecorragh and barony of Talbotstown Lower; **Co Wicklow**

## LOST WILLS

**Browne, Mary (deceased),** late of 21 Lacey Avenue, Templemore, Co Tipperary. Would any person with any knowledge of a will executed by the above named deceased, dated 10 June 1977, who died on 12 July 1977, please contact Butler Cunningham & Molony, Solicitors, Templemore, Co Tipperary; tel: 0504 31122/31569, fax: 0504 31635

**Casey, Joseph (deceased),** late of 19 Hartstonge Street, city of Limerick. Would any person having knowledge of a will made by the above named deceased, who died on 13 September 2005, please contact O'Gorman, Solicitors, Munster House, 75A O'Connell Street, Limerick; tel: 061 418 214, fax: 061 418 624, e-mail: kerstinhau@ogorman.ie

**Daly, Catherine (deceased),** late of 7 Market Street, Clogheen, Co Tipperary. Would any person having knowledge of an original will made by the above named deceased, who died on 2 October 1977, please contact JG Skinner and Co, Solicitors, 3 Dr Croke Place, Clonmel, Co Tipperary, in writing or tel: 052 21123/21966 or fax: 052 25193

**English, Therese (née Smullen) (deceased),** late of 120 Knocknacarra Park, Salthill, Galway, who died on 11 February 2005. Would any person having knowledge of the whereabouts of a will made by the above named deceased please contact Frances Mahon, Foley & Mullery, Solicitors, 33 Woodquay, Galway; tel: 091 565 136, fax: 091 566 611, e-mail: frances@foleyandmullery.com

**English, Seamus (otherwise known as James/Shay) (deceased),** late of 120 Knocknacarra Park, Salthill, Galway, who died on 11 February 2005. Would any person having knowledge of the whereabouts of a will made by the above named deceased please contact Frances Mahon, Foley & Mullery, Solicitors, 33 Woodquay, Galway; tel: 091 565 136, fax: 091 566 611, e-mail: frances@foleyandmullery.com

**Healy, Rose (otherwise Roseleen) (deceased),** late of 13 Willowbrook, Mullingar, Co Westmeath, formerly of Newcastle West, Co Limerick. Would any person having knowledge of a will made by the above named deceased, who died in or about December 2004 (date to be determined by inquest), please contact Patricia Harney & Co, Solicitors, Shortcastle, Mallow, Co Cork; tel: 022 20140, fax: 022 20289

**McTeggart, Vincent (deceased),** late of 128 Woodlands, Navan, Co Meath. Would any person having knowledge of a will made by the above named deceased, who died on 14 November 2004 at St Vincent's Hospital, Elm Park, Dublin 4, please contact the personal representative Marie McTeggart, c/o Oliver Shanley & Co, Solicitors, 11 Bridge Street, Navan, Co Meath; tel: 046 902 8333, fax: 046 902 9937

**Meaney, Mary (deceased),** late of 26 The Golf Links Road, Ennis, Co Clare. Would any person having knowledge of a will made by the above named deceased, who died on 21 June 1995, please contact WG Keating & Co, Solicitors, 4 Old Church St, Cahir, Co Tipperary; tel/fax: 052 45649, e-mail: wgksolrs@ eircom.net

**Mulready, Richard (deceased),** late of 19 Hope Avenue, North Street, Dublin 3, who died on 9 November 2004. Would any person having knowledge of the whereabouts of a will made by the above named deceased please contact Liam Staunton of Liam Staunton & Co, Solicitors, 11 Sea Road, Galway; tel: 091 587 070 or fax: 091 587 071

**O'Connor, Thomas (deceased),** late of Mill House, Clonmacnoise, Co Offaly. Would any person having knowledge of a will executed by the above named deceased, who died on 16 November 1980, please contact Thomas W Enright, Solicitors, John's Place, Birr, Co Offaly; reference number 0180/1/TWE/LPH/ EOR; tel: 0509 20252

**Woodcock, Joseph (deceased),** late of 29 Collins Avenue West, Donnycarney, Dublin 9, truck driver (retired). Would any person having knowledge of a will made by the above named deceased, who died on 12 May 2004 at Beaumont Hospital, Dublin, please contact Gore & Grimes, Solicitors, Cavendish House, Smithfield, Dublin 7, reference KH/AB, tel: 01 872 9299

## 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. Contact Norville Connolly, D&E Fisher, Solicitors, 8 Trevor Hill, Newry; tel: 048 3026 1616, fax: 048 3026 7712, e-mail: norville@dandefisher.com

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***Registration of Business Names Act, 1963*; certificate of registration. Business name: Ashford Temple & Co, 29 Buckingham Village, Dublin 1.** I hereby certify that a statement of particulars in respect of the above business name, pursuant to section 4 of the above mentioned act, was registered on 9 August 1993.
*Date: 21 September 1999; signed: Registrar of Business Names*

## TITLE DEEDS

**In the matter of the *Landlord and Tenant (Ground Rents) Acts, 1967-1984*; premises: 'Sibabu', Garden Vale, Ballymahon Road, Athlone, Co Westmeath; applicant: Niall McCormack**

Notice is hereby given of the intention of the applicant to purchase the fee simple interest in the premises hereinafter described.

Any person claiming to be a person entitled to the next superior interest to that of the applicant, or a person who is a superior lessor to the applicant, or a person who is the owner of an encumbrance in the premises hereinafter described is requested to make themselves known to the undersigned within 14 days from the date hereof, providing details of the nature of the said interest.

Premises: 'Sibabu', Garden Vale, Athlone, Co Westmeath, in the occupation of the applicant and more particularly described in an indenture of lease dated 9 December 1946 made between Athlone Printing Works Company Limited and Thomas Paul Chapman and comprising:

1) The dwelling house with appurtenances known as St Paul's, situate at Garden Vale, Ballymahon Road, in the town and urban district of Athlone, parish of St Mary's, barony of Brawney and county of Westmeath, as particularly delineated on the map contained in the said lease and thereon edged red, and
2) The plot of ground situate at Garden Vale as aforesaid and adjoining the premises firstly demised as particularly delineated on the map contained in the said lease and thereon edged blue.

Any person who is or who is aware of the successors in title of the following persons is requested to make themselves known to the undersigned within 14 days from the date hereof, providing details of the nature of the said knowledge or succession:

a) Irvine Towers McMullin and Catherine McMullin (otherwise Reilly), both of Killester in the county of Dublin, residing in or about September of 1778
b) Athlone Printing Works Company Limited, having its former registered office at Ballymahon Road, Athlone, County Westmeath.

*Date: 6 May 2005*
*Signed: Hugh J Campbell & Co (solicitors for the applicant), Shannon House, Athlone, Co Westmeath*

**In the matter of the *Landlord and Tenant (Ground Rents) Acts, 1967 and 1994* and in the matter of an application by Joseph Cosgrave, Peter Cosgrave and Michael Cosgrave**

Take notice that any person having an interest in the freehold estate of the premises described in the schedule hereto, and which are held under indenture of lease dated 9 September 1760 made between Martha Kane of the one part and Sophia Hamilton of the other part for the term 900 years from 29 September 1760, should give notice of their interest to the undersigned solicitors.

And take notice that Joseph Cosgrave, Peter and Michael Cosgrave intend to submit an application to the county registrar for the city of Dublin for the acquisition of the freehold interest and all intermediate interests in the property described in the schedule hereto, and any party asserting that they hold a superior interest in the said premises is called upon to furnish evidence of title to the said premises to the undersigned within 21 days of the date of publication of this notice.

In default of any such notice being received, the said Joseph Cosgrave, Peter Cosgrave and Michael Cosgrave intend to proceed with the application before the county registrar at the earliest opportunity and will apply to the county registrar for the city of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion to the said properties are unknown and unascertained.

**Schedule: 1a and 1b Granby Place in the parish of St Mary and city of Dublin**

*Date: 6 May 2005*
*Signed: Sheehan & Co (solicitors for the applicant), 1 Clare Street, Dublin 2*

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

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

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

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

*Date: 6 May 2005*
*Signed: Haughtons Solicitors (solicitors for the applicant), Ashton House, 6 Martello Terrace, Dun Laoghaire, Co Dublin*

**In the matter of the *Landlord and Tenant Acts, 1967-1994* and in the matter of the *Landlord and Tenant (No 2) Act, 1978* and in the matter of an application by Peter Horrigan of 22 Olivemount Grove, Windy Arbour in the city of Dublin: an application by Brian Horrigan**

Take notice that any person having interest in the freehold estate of the following property: 22 Olivemount Grove, Windy Arbour, Dublin 14.

Take notice that Brian Horrigan of 22 Olivemount Grove, Windy Arbour, Dublin 14 intends to submit an application to the county registrar for the county of the city of Dublin for the acquisition of the freehold interest in the aforesaid properties, and any party asserting that they hold a superior interest in the aforesaid premises (or any of them) are called upon to furnish evidence of title to the aforementioned premises to the below named within 21 days from the date of this notice.

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

*Date: 6 May 2005*
*Signed: Daly Lynch Crowe & Morris (solicitors for the applicant), The Corn Exchange, Burgh Quay, Dublin 2*

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

Notice to any person having any interest in the freehold interest of the following property: all that and those the hereditaments and premises known as 294A and 294B North Circular Road, comprised in and demised by assignment dated 31 July 1967 between Frederick Fowler, Englebert George Buckley and James Gibson of the one part and Leah Woolfson and Bertha Woolfson of the other part.

Take notice that the applicants, Leah Woolfson, Denise, Brian and David Green, intend to submit an application to the county registrar for the county of the city of Dublin for the acquisition of the freehold interest in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid property are called upon to furnish evidence of title to the aforementioned premises to the below named within 21 days from the date of this notice.

In default of any such notice being received, the applicant intends to proceed with the application before the county registrar for the county/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 above premises are unknown or unascertained.

*Date: 6 May 2005*
*Signed: Arthur Cox & Co (solicitors for the applicants), Earlsfort Centre, Earlsfort Terrace, Dublin 2*

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### Hi-tech
Ref: SR12634 to €85k

Reporting to the Corporate Counsel, you will advise on corporate and commercial law, compliance, company secretarial issues and employment law queries. You will also supervise the legal department. The ideal candidate will be a qualified solicitor or barrister with at least 5 years' pqe and a solid background in commercial law.

### Funds
Ref: RC13454 €65K

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### Risk Management
Ref: AW13201 €45k

Candidate sought for a challenging position in risk management. You will ensure adequate coverage for Quality Review and review effectiveness of internal controls in relation to independence, ethical, legal and regulatory requirements. You will be a newly qualified solicitor, with excellent interpersonal and communication skills.

### Funds
Ref: AW13552 to €50k

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Ref: AW12498 to €35k

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### Funds – Luxembourg
Ref: SR13512 70k

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## PRIVATE PRACTICE

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Ref: RC12747 circa €65k

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**Investment Funds**
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Ref: PF 0504-181

**Commercial Property**
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## ■ IN-HOUSE

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**Senior Counsel**
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