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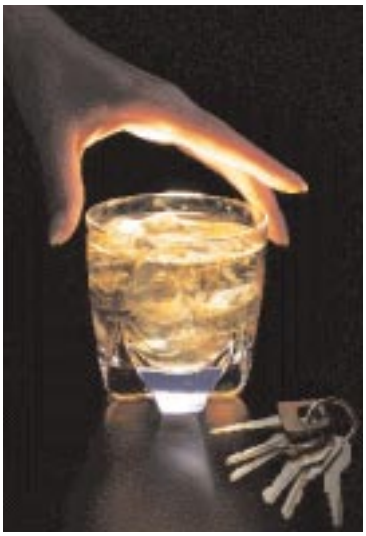

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Printing: Turners Printing Company Ltd, Longford

Published at Blackhall Place, Dublin 7, tel: 01 672 4800, fax: 01 672 4801.
E-mail: c.oboyle@lawsociety.ie Law Society web site: www.lawsociety.ie

Subscriptions: £45 **Volume 93, number 3**

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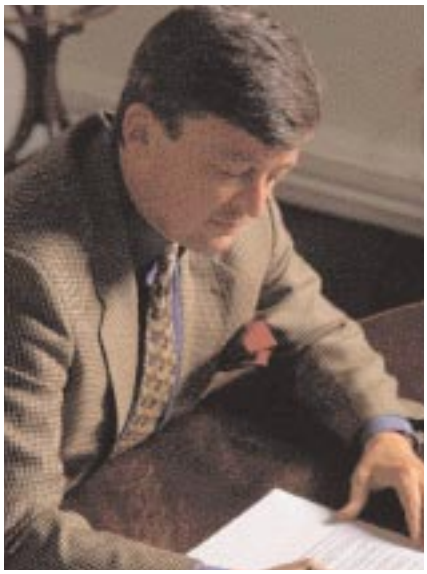
Client privilege and confidentiality

I had the pleasure of representing the solicitors' branch of the legal profession at the 27th meeting of the presidents of the law societies and bars of Europe in Vienna last month. The issues that face the legal profession in Europe are similar to those that we in this country now find before us. The European Union and individual state governments are justifiably concerned at the current level of money laundering in the world. They are determined to try to ensure that any opportunities for the criminal activity of money laundering are reduced and prevented in their jurisdictions. This objective is supported by the vast majority of law-abiding citizens who observe that money laundering is carried on by criminals who create misery for thousands of people through the sale of illegal drugs. Lawyers are supportive of the aims and objectives of the EU and national governments.



The Minister for Justice, Equality and Law Reform has indicated his intention to designate solicitors, among other professions, under section 32 of the *Criminal Justice Act, 1994*. The Minister's proposal has been the subject matter of correspondence between the Law Society and his department.

Current proposals both of the European Commission and the Irish Government are of concern to solicitors insofar as they may create a conflict between the duty of the State to fight against the unacceptable practice of money laundering on the one hand and a lawyer's duty of confidentiality and of a client's entitlement to privilege on the other. Our European lawyer colleagues are equally concerned that the principle of client privilege and confidentiality (known in Europe as professional secrecy) is gradually being undermined. These principles of privilege and confidentiality are the hallmarks and foundation stones of a free and democratic society.

There is a delicate balance to be struck between the rights and obligations of the State to protect itself, its institutions and citizens, and an individual's own fundamental rights as guaranteed under the Irish Constitution. The State must not, and should not, go too far. Solicitors will seek to defend the citizen's traditional rights and freedoms.

Continuing legal education

The Education Committee, now charged with running continuing legal education for the profession, has extended the number of seminars being held. Many seminars are held on a regular basis in venues outside Dublin.

There is a hunger and desire in the solicitors' branch of the legal profession for regular updating seminars in areas of law that practitioners deal with on a daily basis. I hope that you will continue to support the CLE seminars.

While the Law Society has not yet decided whether to make attendance at legal education seminars mandatory, it is something that must be considered early in the new Millennium.

Courts Service

The Minister for Justice, Equality and Law Reform, John O'Donoghue, in the first edition of *Courts Service news*, states that: 'It is a time of great change for the courts with the establishment of the Courts Service – the transitional board, bringing forward an independent and unified Courts Service and the fundamental realignment of functions within the Irish legal system'.

The Minister, a colleague of ours in the solicitors' branch of the profession, is to be commended for the dedication of himself, the staff in his department and the Government in general for the work they have done in the area of change for the courts thus far. Much still remains to be done.

PJ Fitzpatrick, the new Chief Executive of the Courts Service, and his staff are wished every success. The standard of court accommodation, to mention but one matter that will be of concern to the Courts Service Board, is greatly in need of attention. The facilities are grossly inadequate for a modern democratic society.

The Minister and his colleagues at Cabinet will hopefully seek to implement the recommendations of the *Report of the working group on qualifications for appointment as judges of the High and Supreme Courts* soon. These are undoubtedly exciting times for the courts and lawyers in this country.

The legal system in Ireland

Mrs Justice Susan Denham of the Supreme Court, psychologist Maureen Gaffney, with our colleagues, John O'Donoghue, Minister for Justice, Equality and Law Reform, Frank Lanigan from Carlow and Brendan Cooke, legal costs accountant, will be the main speakers at the annual conference of the Law Society to be held next month.

The theme of the conference is *Lawyers in a changing Ireland*. The Irish legal system, despite its shortcomings, is reasonably sound, though there are blemishes and systematic issues that need to be addressed. Discrimination, of whatever kind, whether within or outside the legal profession, needs to be eliminated now. The solicitors' branch of the profession does embrace changes that are in the public interest.

Murder most foul

The murder of solicitor Rosemary Nelson in Lurgan on 15 March strikes at the very heart of the rule of law in these islands. Words cannot adequately express the abhorrence that all right-thinking people have for this dastardly act. I attended her funeral in the company of the President of the Law Society of Northern Ireland and representatives from the law societies of Scotland, England and Wales and other lawyers on these islands, in St Peter's Church, Lurgan, Co Armagh.

The assassination of a lawyer hits at the very core of democratic society. The inquiry into the assassination of Rosemary Nelson must be thorough and transparent.

Patrick O'Connor
President

Why the European Commission must be completely replaced

Gone but not forgotten: the Commission which resigned *en masse* after experts criticised their 'loss of control' over their administration

The primary task of the committee of independent experts set up by the European Parliament, as defined in its terms of reference, was to seek to establish to what extent the European Commission as a body, or Commissioners individually, bear specific responsibility for recent examples of fraud, mismanagement or nepotism which had been raised in the parliament. The result, as we all know, was the mass resignation of the entire 20-member Commission.

Almost immediately, however, many of the individual commissioners were claiming that he or she had not been named by the report as being guilty of fraud or nepotism and would like to be re-appointed. The British government gave broad hints that both its commissioners, Sir Leon Brittan and Neil Kinnock, would be re-appointed. Indeed, Brittan was touted as a possible replacement president, as was the Belgian Commissioner, Karel van Meirt.

Damning indictment

What is the logic of this? If individual commissioners were not found at fault by the committee of experts, then why did they resign? If there was a good reason to resign, then why should they be re-appointed? The answer, in my opinion, is simple. The committee found the entire Commission guilty of mismanagement. There is a damning indictment throughout the report of the failure by the Commission to comply with its collective responsibility of efficient management of European Union programmes and funds. It follows that the inescapable conclusion is that this entire Commission should go. None of them should remain.

Let me say at the outset that I have the greatest regard for many individuals working in the Commis-sion. Lawyers in private practice will mostly encounter Commission officials from the Competition Directorate-General (DGIV) and the Legal Service. Nothing in the report even mentions DGIV, and its hard-working and highly-respected officials will continue to be regarded as the finest example of public servants. Members of the Legal Service also work extremely long hours and are very highly regarded by other lawyers. No doubt it has caused them grave discomfort that the report criticises the Legal Service for being slow to deliver its opinion on some important and urgent matters.

The report, however, is not concerned with fraud or incompetence within the Commission's services. That will be the subject of a second report later in the year, although the feeling of insecurity and distress in the Commission's offices during the week of St Patrick's Day was tangible.

Open secret for years

But what has the report to say about the commissioners, collectively? It has been an open secret for years that within the Commission there have been elements of fraud, incompetence, nepotism and corruption. Each of the commissioners denied any individual knowledge of this. The committee of experts retorted thus: *'Protestations of ignorance on the part of commissioners concerning problems that are often common knowledge in their services, even up to the highest official levels, are tantamount to an admission of a loss of control by the political authorities over the administration that they are supposedly running'.*

A number of Commission programmes involved a substantial financial commitment from the European Union. Fraud became rampant because the Commission, rather than providing proper internal resources, outsourced the operation of these programmes to private companies. The report found that *'the Commission deserves serious criticism (as in other cases under review) for launching a new, politically important and highly expensive programme without having the resources – especially staff – to do so'.*

This mismatch between policy and resources is central to the report. In this context, the report emphatically places responsibility not on individual commissioners but on the Commission as a whole. It concluded that the commissioners had undermined the integrity of the European public service. *'The Commission did not try to lay down in advance how each new policy would have to be implemented and to make the necessary arrangements accordingly. It reacted as each individual problem emerged, without a guiding philosophy and with no overall view of the situation'.*

No-one above criticism

Nowhere in the report does the committee of experts exonerate any individual commissioners as being above criticism. Quite the opposite, in fact: *'The studies carried out by the committee have too often revealed a growing reluctance among the members of the hierarchy to acknowledge their responsibility. It is becoming difficult to find anyone who has even the slightest sense of responsibility. However, that sense of responsibility is essential. It must be demonstrated, first and foremost, by the commissioners individually and by the Commission as a body. The temptation to deprive the concept of responsibility of all substance is a dangerous one. That concept is the ultimate manifestation of democracy'.*

The only credible response from the governments of the Member States is to appoint a completely new Commission. G

Conor Quigley is a barrister practising at Brick Court Chambers, London and Brussels, specialising in European Union law.

Dishonest politicians

Allegations that certain Irish politicians acted dishonestly have been the stuff of recent inquiries. Dishonesty may be as old as man himself, but the charge of financial dishonesty rankles. A charge of financial dishonesty against a politician who purports to serve in the public interest is one of the most serious in the dictionary of unacceptable behaviour.

This note examines a case where the charge of dishonesty was made against politicians in general and resulted in proceedings in the High and Supreme courts.

'A charge of dishonesty rarely penetrates the epidermis of seasoned politicians'

The *Dillon* case

Andrew Dillon, a prominent solicitor, now of Kinsale, County Cork, and a former member of the Council of the Law Society, stood as a candidate in the general election of 1981 as a founding member of the Young Ireland Party. He chose Dublin North Central, the constituency of Charles J Haughey, then Taoiseach. Like other duly nominated Dáil candidates, Dillon was entitled, free of charge, to send to each person on the register of electors in the constituency one postal communication relating to the election. A precondition was that the communication had to be deposited in advance with the officials of the Department of Posts and Telegraphs.

In the communication to the electorate, Andrew Dillon included the words: 'To-day's politicians are dishonest because they are being political and must please the largest number of people'. Officials in the Department of Posts and Telegraphs considered that the words were of a grossly offensive character and must be deleted. The Attorney General, Anthony Hederman SC (subsequently a judge of the Supreme Court), was consulted and agreed with the department's views. Dillon refused to delete the passage, instituted legal proceedings against the Minister for Posts and Telegraphs seeking injunctive relief. Harry Whelehan SC (subsequently Attorney General) appeared for Dillon. Paddy Connolly SC, then in failing health but regarded as one of the great constitutional lawyers of his time, appeared for the Minister for Posts and Telegraphs. Ellis J of the High Court heard the case. Counsel for Dillon argued that the contentious words, when read as a whole, were not grossly offensive and submitted that the passage was no more than acceptable rhetoric.

Ellis J considered that he would decide the case on matters of law and as a juror deciding the issue as a question of fact. Ellis J in a reserved judgment on 2 June 1981 held that the word 'dishonest' when applied particularly to politicians at election time associated politicians in the mind of any fair-minded person with possible corruption, cheating, deceit or lack of fair dealing and many other possible forms of wrongdoing, many of which would or could be offences under the criminal law, and warrant prosecution and sentence. Ellis J considered that Dillon sought to solicit votes by discrediting the good character of others while presumably excepting himself from the stigma of dishonesty which he attached to other politicians. In fact, Ellis J considered that it was difficult to think of a word more likely to be of a grossly offensive character, insult, displeasure or annoyance than the allegation of dishonesty about politicians. The High Court held the officials of the department were totally correct in refusing to grant Dillon free postage in the circumstances.

Rarefied atmosphere

Dillon appealed. Senior counsel Harry Whelehan and Paddy Connolly argued their case in the rarefied atmosphere of the Supreme Court before a powerful court of three judges: Henchy, Griffin and Kenny JJ. The Supreme Court heard the case on the afternoon of 2 June 1981 (the same day the High Court delivered judgment). The Supreme Court reserved judgment until the following morning.

In a powerful judgment, Henchy J considered: 'Those who practise what is often dubbed the art of the possible would not feel grossly offended by [the expression of the opinion that politicians are dishonest] which, denigratory and cynical though it might be thought by some, is no more than the small coinage of the currency of political controversy'.

Immortal words

In words that deserve to be immortalised, he continued: 'Some of the most revered and successful politicians who have lived have failed, at least in the eyes of reputable historians, to align great political acumen and success with moral or intellectual honesty. A charge of dishonesty is one that rarely penetrates the epidermis of any seasoned politician'.

Griffin J and Kenny J, in separate judgments, agreed with Henchy J. Kenny J in his judgment noted that the main item on the RTE news bulletin on the evening of the hearing was that Garrett FitzGerald, then leader of the Opposition, had said it was 'dishonest' of the Taoiseach Charles Haughey to refuse to meet him in a face-to-face confrontation on television.

Dillon won in the courts, contributed to our jurisprudence but lost in the general election, to the extent, at least, that he failed to get elected. (Unfortunately, the written judgments of the various judges have not been formally reported in any series of reports.)

The tendency for anyone writing on the topic of dishonest politicians is to preach on the virtues of honesty. While resisting the temptation to preach, allegations of financial dishonesty on the part of politicians, or anyone else, are regarded with grave seriousness. In relation to intellectual dishonesty, well, few can claim to be intellectually honest at all times. Let us be careful about casting the first stone! G

Dr Eamonn Hall is Chief legal Officer with Telecom Éireann plc.

The use of Irish in the courts: can we learn from Canada?

There is a very strong connection between the status of a language and people's inclination to adopt it.

The use of Irish in public life and official business is very much an exception and a rarity, even in the Gaeltacht. The exclusive use of English is acquiesced to in the State and the semi-State sectors, in business, by the churches, in education and training, in the administration of justice, and in public life in general on the grounds that such acquiescence is 'practical'. This would seem to have more to do with people's laziness and reluctance to break with the tradition of 'anglo-conformity' in public life than with practicality.

The most obvious result of the effective exclusion of Irish from public life over the past centuries has been the decline of the language historically, and more recently the lack of any significant revival.

Until the use of Irish in public life is normalised, until Irish again becomes a 'dialect of power', Irish speakers will have little reason to transmit the language to their children and non-Irish speakers will have little reason to adopt it.

Anglophone State

To that end a *Language Act* is needed to vindicate and defend the rights of Irish-speaking people to conduct public and official business through their own language.

It is not satisfactory that Irish-speaking people are treated as exceptions to the norm within an anglophone State for an anglophone people. Parity of esteem with a generosity of spirit is required.

The position of the Irish language in the administration of justice was deduced by O'Hanlon J in *An Stát (Mac Fhearraigh) v Mac Gamhnia (*High Court, unreported, 1 July 1983). When a court or tribunal is seized of a case affecting the personal or property rights of the parties before it, each party has the constitutional right to conduct his or her own side of the case through the medium of Irish – by submission, giving evidence, or examining witnesses. If the other party's Irish is insufficient, an interpreter must be appointed.

Having it both ways: primary documents and decisions are automatically available in Canada's two official languages

However, the party that chooses Irish hasn't the right that the decision-makers – judge, jury or tribunal – understand Irish, even if the hearing is conducted in the Gaeltacht (*Ó Monacháin v An Taoiseach* [1986] ILRM 660, *Mac Cárthaigh v Éire*, Supreme Court, unreported, 15 July 1998). It is worth pointing out here that the ruling of the Supreme Court in *Mac Cárthaigh* that an Irish-speaking jury would be unrepresentative and therefore unconstitutional is based on a disputed conclusion of fact and may well be reversed at some future point, perhaps even as the result of a referral under article 26 of the Constitution.

This, of course, prejudices the rights of the person who wishes to use Irish. Those who determine law and fact cannot fully comprehend the submissions or evidence, hearing them second-hand through an interpreter. Much worse, they may feel that he or she is being troublesome. This acts as duress to pressurise the Irish-speaking citizen to 'conform' and use English, further narrowing the areas of life in which Irish may be used.

Bilingual justice

As the Government here puts the finishing touches to its forthcoming *Language Act*, perhaps it might be useful to take a look at how another country – Canada – has dealt with bilingualism in the context of the administration of justice and to see if there are any lessons that we could learn.

Under Canada's *Official Languages Act (Canada) 1988*, civil proceedings in the Canadian federal courts must ensure that anyone can conduct their side of the proceedings in the official language of their choice and, when giving evidence, not be placed at a disadvantage by not being heard in the other official language. Simultaneous translation must be provided on request of any party and may also be provided where the court believes that a matter of public interest is being discussed. In addition:

- Every federal court (except the Supreme Court) must ensure that the judges or other officers who hear the proceedings are sufficiently proficient in the official languages used (English, French or both) to understand those proceedings without the assistance of an interpreter. It is taken for granted that Canadian Supreme Court justices must become fully bilingual
- When the Federal Government or a federal institution is a party, it uses the official language chosen by *the other parties* in oral and written pleadings, provided that the other parties give reasonable notice of this
- Final decisions of federal courts are generally made available simultaneously in both languages where both languages are used in the proceedings or where the decision determines a question of law of general public interest. Exceptions to simultaneity are permitted (for example, where the delay of translation would lead to prejudice) but the second-language version must follow as soon as possible.

In criminal proceedings, the accused (or his counsel) and all witnesses may use either official language for all purposes. The court has the duty to make interpreters available to help them. In addition:

- The accused has the right that the judge (and jury) speak in the official language of his choice provided he gives reasonable notice of this, and that the prosecutor speaks in the official language of his preference (except in the case of a private prosecution)
- The record of the preliminary investigation and trial includes a transcript of everything that was said in the official language in which it was said, as well as the transcript of any interpretation into the other official language

and the documentary evidence in the official language in which it was furnished
- The court makes available any written judgment, including any reasons given, in the official language of the accused's preference. It may also make it available in the other official language.

All rules, orders and regulations which regulate the practice and procedure of Canada's federal courts must be drafted and published in both official languages. The rules of the Irish superior courts were only published in an Irish version on foot of litigation (*Delap v An tAire Dlí agus Cirt, Éire agus an tArd-Aighne*, High Court, unreported, 13 July 1990), and an Irish version of the appendices (the precedents) has yet to be published, even though they are an integral part of the rules.

The dearth of pre-printed legal forms in an Irish version is easily remedied. All preprinted legal forms should be dual-language (Irish/English), both versions of equal size. If liberty is given to publish preprinted legal forms in English only and in Irish only, the Irish versions will not be printed, distributed nor received given the evidence of recent history. Dual language forms are the norm in Canada.

Absolute right

The right of citizens to translations of proceedings which are served on them is very narrow in this jurisdiction at present. Gaeltacht residents have the right to an Irish translation of a limited range of documents relating to proceedings in the superior courts and the Circuit Court and served personally on them in English. But there is no practical reason why citizens should not have an absolute right to translations, in the official language of their preference, of proceedings which are served on them, given the probable low volume of such requests.

Comhdháil Náisiúnta na Gaeilge has proposed (in *Toward a* Language Act*: a discussion document*) that the Gaeltacht be designated as a specific District Court and Circuit Court jurisdiction

administered through Irish, with the provision of translation facilities for those who prefer to deal with court services through English. Normalising the use of Irish within one judicial 'domain' would effectively 'legitimise' the use of Irish in all judicial domains by acting as a normative model.

An Chomhdháil proposes that when a case in the higher courts refers to the Gaeltacht or to its residents, arrangements should automatically be put in place to ensure that the case can be administered and heard through Irish without the parties having to demand that right. It also recommends that, as in Canada, all citizens are made aware of their linguistic rights before the courts and that the arrangements to ensure that legal practitioners can carry out their duties through Irish (and those relating to legal terminology in Irish) be reviewed.

Irish court reports are as near anglophone as makes no difference. Canadian federal court reports are dual language (English and French). This dearth of primary legal material in Irish leaves even the most competent and fluent practitioner at a disadvantage when it comes to legal argument in the first official language.

Are we ready to take these steps, or are we to continue with our (unofficial) policy of 'anglo-conformity'? G

Dáithí Mac Cárthaigh is a practising barrister and editor of I dTreo Deilbhcháipéise d'Acht Teanga Éireannach (Toward a *Language Act* for Ireland), *Coiscéim, 1998.*

Judiciary and the Bar: too close for comfort?

From: Chris Ryan, Dublin

The recent controversy between a leading senior counsel and Mr Justice Flood in the Flood Tribunal has prompted me to put pen to paper in relation to the relationship that exists between barristers and members of the judiciary.

I believe the relationship between judges and the Law Library has always been a matter of unease to the public, and I believe also to solicitors. I believe the Bar sees the judges as members of its profession who are now judges, and the judges seem to see themselves as men who have been elevated to the ranks of the judiciary but who are still members of the Bar. I am sure many solicitors have seen judges, both of the Circuit Court and the High Court, strolling into the Law Library without hindrance during the court sittings.

I believe that there should be a distinction and a clear demarcation between practising lawyers and members of the judiciary, and that judges should not be seen simply as members of the Bar who are not practising at present.

The relationship between judges and the Bar has been brought to light recently during the dispute between the chairman of the Flood Tribunal and one of the leading barristers. No doubt we all heard the comments of the Bar Council to the effect that it was prepared to become involved to see if it could resolve the matter between the barrister and the judge. It seems to me that the relationship, as seen by the Bar, was that there was a dispute between two senior members of the Bar, rather than a barrister and a judge.

I believe that the Bar has no part to play in any discussions with the judge, as he is totally independent.

I also believe that it is not only members of the Bar who get the situation confused, and that some of the judges still see themselves as members of the Bar. I am sure many solicitors have experienced the situation where, in the middle of a case, the judge asks both barristers to come into his chambers to discuss matters with them. I believe that the judges see themselves as members of the Bar and that they are discussing the problems with existing members of the Bar. I believe that the demarcation and the separation of judges and lawyers should be much clearer and that judges should not be seen as members of the Bar or members of the Law Society.

By the same token, I do not believe that solicitors who are elevated to the ranks of judges should be encouraged to mix freely with either the Law Society or solicitors during the court sittings.

The separation of the judiciary from practising lawyers should be encouraged by all practising lawyers.

Murders of Rosemary Nelson and Pat Finucane

From: Michael Farrell, Michael E Hanahoe & Company, Dublin

The murder of Lurgan solicitor Rosemary Nelson not only took her life and deprived her husband and three young children of a loving wife and mother, but it also struck a deadly blow at the whole system of justice and the rule of law. Ms Nelson defended her clients to the best of her considerable ability, which is what we are all supposed to do. As a result, she received frequent threats, even from members of the security forces, and she ultimately paid for her dedication to her clients with her life.

If lawyers can be murdered with impunity for doing their job, we are only a few steps from barbarism. If there are suspicions that elements in the security forces have colluded in the killing, we are even closer to the abyss.

Unfortunately, this was not the first such murder in Northern Ireland. Just over ten years ago, Pat Finucane, another prominent and talented young solicitor, was murdered in very similar circumstances and after similar threats. To restore any confidence in the rule of law in Northern Ireland, there must be a fully independent judicial inquiry into all the circumstances surrounding the murders of Rosemary Nelson and Pat Finucane.

Last month Amnesty International, the International Commission of Jurists and over 1,200 lawyers in Northern Ireland, the Republic and further afield called for an inquiry into Pat Finucane's murder. The Law Society of England and Wales and the bar councils in Northern Ireland and the Republic backed this call, but the law societies in the Republic and Northern Ireland did not.

Surely the professional bodies representing solicitors should be the first to come to their members' defence when they are attacked for doing their job? I hope the Law Society will now support the call for an independent inquiry into both murders.

Dumb and dumber

From Jim Dennison, Limerick

I recently received a list of closing documents from a practice in Dublin. One of the requested closing documents was in relation to a right of way and what was requested was a 'statutory declaration from Mr X to the effect, *seeing* that his predecessors in title *abused* this right of way for more than 20 years'.

I hope the solicitor will be satisfied with a declaration from Mr X *stating* that his predecessors in title *have used* the right of way for more than 20 years.

From: Colette Bryson, O'Scanaill & Co, Co Dublin

While acting for a lady who sustained injuries in a road traffic accident as a passenger in the back of an ambulance, I received a medical report which stated the following: 'on impact, she was thrown to the ground and her but impacted against the stretcher. She was shocked and unable to get up'.

Jim Dennison wins the bottle of champagne this month.

A bottle of the finest champagne will go to the reader who sends in the funniest contribution to *Dumb and dumber* each month.

Send your examples of the wacky, and wonderful to the Editor, *Law Society Gazette*, Blackhall Place, Dublin 7, or you an fax us on 01 672 801, or e-mail us at gboyle@lawsociety.ie

BRIEFLY

Lawyers invited to join corporate games

Lawyers are being invited to tog out and join the UK and Ireland Corporate Games in Limerick next June. The games will be the largest multi-sport event ever to be held in this country, and the organisers have pledged a weekend of business, sport and tourism. There are 20 sports on the programme, including six-a-side soccer, tennis, a triathlon and dragon-boat racing. Small and large organisations can take part, while teams can include employees, family members, colleagues and even clients. All events are open equally to men and women. The money raised will go to various charities, including Cerebral Palsy Ireland. For more information, contact the games' head office at 0044 1733 380888.

***Finance Bill* 'fails to tackle pension fund risks'**

This year's *Finance Bill* fails to deal with the risk that pension funds could run out during a pensioner's lifetime, the Irish Insurance Federation warns in its latest newsletter. The IIF says it is concerned at the lack of safeguards in the section of the legislation which changes the rules governing pension funds. 'Given the small size of the approved minimum retirement fund – £50,000 – and the fact that it can be encashed at age 75, there is a real danger that retirement funds could run out during the pensioner's lifetime. This *Finance Bill* fails to address this concern', it says.

Nelson murder sparks fears for NI lawyers' safety

There are growing fears in Northern Ireland for lawyers' safety following the brutal murder of solicitor Rosemary Nelson by loyalist paramilitaries last month. The personal safety of members – particularly criminal practitioners – was one of several issues raised by the Northern Ireland Law Society with RUC Chief Constable Ronnie Flanagan in the wake of the car-bomb attack.

'An attack of this type inevitably gives rise to a heightened degree of concern within the legal community', Northern Ireland Law Society Chief Executive John Bailie told the *Gazette*. He added that all the implications of the attack, including that of lawyers' personal safety, were raised with Flanagan during talks held in the immediate aftermath of the murder.

Rosemary Nelson: her murder has increased fears for lawyers' safety in Northern Ireland

Because their work mainly involves dealing with paramilitaries, criminal defence lawyers are considered to be an at-risk group in Northern Ireland. Like Rosemary Nelson and Pat Finucane, who was murdered by loyalists ten years ago this year, many of them are frequently threatened and have to take extra precautions to protect their lives and safety.

But Bailie stressed that his members would continue to serve their clients in spite of this. 'None of these concerns will dilute the absolute commitment of our members to the rule of law and will strengthen their determination to carry out their professional responsibilities', he said.

The Lurgan-based solicitor's murder was condemned by the Law Society of Ireland. President Pat O'Connor described her killing as a 'mindless attack on democracy'. 'It was not only a tragedy for Rosemary Nelson and her family, it was also a tragic day for democracy. She was targeted for defending her clients to the best of her ability, and for her commitment to her duty as a lawyer and to the rule of law'.

Arthur Cox tops law firm league

Arthur Cox tops the league of Irish law firms, according to a European survey of corporate practices. The European Counsel 3000 study 'highly recommends' the Dublin firm in 13 areas of practice, ranging from banking and corporate finance to litigation and tax.

The European Counsel 3000 survey is used by in-house corporate lawyers to gauge potential legal advisors. Using a range of key specialities, the survey grades the performance of individual firms under each heading as either 'highly recommended' or 'strong area of practice'. The headings are banking, corporate finance, mergers and acquisitions, insolvency, employment, pensions, intellectual property, IT, product liability, commercial property, environment, advertising, agency, general contracts, arbitration, litigation, tax, and EU/competition.

Apart from Arthur Cox, big firms such as McCann Fitzgerald, A&L Goodbody, Matheson Ormsby Prentice, and William Fry were highly rated by the survey. The study does not limit itself strictly to the Pale. Cork firms Ronan Daly Jermyn, PJ O'Driscoll, O'Flynn Exhams and GJ Moloney are all featured. Similarly, Limerick practices Sweeney McGann and Holmes O'Malley Sexton earn mentions, as does Waterford-based Kenney Stephenson Chapman.

New 'reprimand system' for errant solicitors urged

The Law Society should consider establishing a system of reprimands for members who are guilty of undue delay and poor communication with their clients, according to the Society's Independent Adjudicator, Eamon Condon. In his first annual report, Condon suggests that a reprimand system could cover cases that did not necessarily warrant referral to the Disciplinary Tribunal.

He also recommends that the Society should issue a code of conduct on client care for members and run practice management courses for solicitors who find themselves carpeted by the Registrar's Committee.

But Condon also praises the work of the Society's Professional Practice Directorate, which handles complaints on a day-to-day basis. In his report, he stresses that the directorate staff, led by solicitor Linda Kirwan, take a professional approach to their responsibilities. 'Their responsibility is to ensure the day-to-day administration of the unit is performed to a high standard and I am satisfied that this is being achieved – notwithstanding the volume of work', his report says.

Eamon Condon: Law Society has 'professional approach' to handling complaints

The biggest single cause for concern, he adds, continues to be poor communications between solicitors and their clients, and between solicitor colleagues.

Condon reviewed 59 cases during his first year in office. Of these, two were re-submitted to the Registrar's Committee, and one of these two cases was ultimately referred to the Disciplinary Tribunal of the High Court. Inadequate professional service was at the root of 25 of complaints, while 19 related to misconduct and 15 to excessive fees.

The office of the Independent Adjudicator was established in 1997 to provide an independent forum to which members of the public can apply if they are not satisfied with the way in which the Law Society has dealt with a complaint made against a solicitor. His role is to ensure that the Society handles such complaints fairly and impartially, and to recommend changes he feels are needed to maintain the highest standards.

Commenting on the Adjudicator's first-ever report, Law Society Director General Ken Murphy said: 'We are happy that Mr Condon's report highlights the excellent work carried out by the Society. We have recently conducted a root and branch review of our complaints procedures, and the general public can rest assured that we thoroughly investigate every single complaint made against members of the profession. Where we find any evidence of unprofessional conduct, we act firmly and decisively. The Adjudicator's report proves the system works'.

Wards of Court office to tackle delays

A staff shortage causing serious delays in the Wards of Court office is set to be tackled. Last month, the *Gazette* (page 15) revealed that beneficiaries under ward-of-court estates were losing out because the staff shortage left the office unable to deal with dismissal orders. These orders are needed to allow solicitors to finish administering estates.

But Assistant Registrar Michael Moriarty confirmed this month that management plans to increase overall staff numbers in the office. 'It is intended that people who have left will be replaced and we will be hiring extra staff as well, so that means that numbers will be increased', he said.

Moriarty acknowledged that dismissal order processing had been badly hit, but said it was the most obvious symptom of the crisis caused by the labour shortage. 'We have to keep dealing with applications for wardship along with a lot of other day-to-day difficulties. Pretty much everything has been hit because the staff situation is so extreme, but the delays with dismissal orders have very much highlighted the problem', he said.

Last month Law Society President Pat O'Connor said hundreds of beneficiaries were losing out on their entitlements because of the delays in processing the dismissal orders. He warned that the problem could land the State in court. O'Connor wrote to Justice Minister John O'Donoghue last month highlighting the problem and warning him about its possible consequences.

Compensation Fund payouts

The following claim amounts were admitted by the Compensation Fund Committee and approved for payment by the Council at its meeting in March: Conor McGahon, 19 Jocelyn Street, Dundalk, Co Louth – £4,523.77; Dermot Kavanagh, 2 Mary Street, New Ross, Co Wexford – £155.

BRIEFLY

Land and deeds registries to go semi-State

The Land Registry and Registry of Deeds will be converted to semi-State commercial bodies by the end of the year. According to Justice Minister John O'Donoghue, the necessary legislation is now being prepared and there are plans to discuss personnel and industrial issues with the staff in both offices. The Minister said that the plan to convert both registries to semi-State bodies was in line with plans laid out in the Government's strategic management initiative. He added that the conversion would aid the registries in delivering and developing their services.

IBA legal practice conference

The International Bar Association's section on legal practice will hold its 25th anniversary conference in the prestigious Harvard Law School in Boston, Massachussets, USA, from 1 to 4 June next. The programme features a wide range of subjects, including areas such as environmental law, land law, human rights and practice issues. Medical law, family law, tax law, public law and practice management and technology will be discussed at various meetings and sub-committees. For more information, contact the IBA (tel: 0044 171 6291206).

In-house lawyers told to get tough

In-house lawyers were warned recently to get tough on private practitioners who do not submit sufficiently detailed bills. Delegates at this year's International Company Lawyer's Conference in Madrid were told by one speaker, GE Medical general counsel Jean Claude Najor, to refuse to pay bills that were not fully itemised. He added that his company – a division of General Electric – insists on negotiating fees before outside firms start work, and also demands that they fill out detailed forms, dealing with every stage in a deal.

Drunken

A number of recent Supreme Court judgments seem to suggest a significant change in the way the highest court in the land is interpreting and applying legislation, particularly the drunken driving provisions of the *Road Traffic Acts*. Gerard Gannon reviews some recent judicial decisions and asks whether the Supreme Court is rewriting the rules

Up until recently, the way our courts dealt with drunken driving cases – from the procedures for stopping vehicles and breathalysing their drivers, the provision of blood or urine samples, through to conviction or acquittal in court – was firmly rooted in strict compliance with the law as enacted by the legislature and set out in the relevant statutes.

In a dissenting judgment in the case of *DPP v Kemmy* (1980), O'Higgins CJ stated: *'Where a statute provides for a particular form of proof or evidence in compliance with certain statutory provisions, in my view it is essential that the precise statutory provisions be complied with. The courts cannot accept something other than that which is laid down by the statute or overlook the absence of what the statute requires. To do so would be to trespass into the legislative field. This applies to all statutory requirements but it applies with greater general understanding to penal statutes which create particular offences and then provide a particular method for their proof'*. In the High Court case of *DPP v Fanagan* (unreported judgment in December 1991), Denham J said: *'The statute should be interpreted reasonably but strictly, as it is a penal statute and as it affects the fundamental rights of the person'.*

The judgments in these cases and all of the intervening court determinations had their *ratio decidendi* (the reason for a judicial decision) in the rights of the individual as provided for in the Constitution and interpreted in judicial decisions of the superior courts. Among other things, these decisions embraced the constitutional rights to free movement and passage (*Ferguson v O'Gorman* [1937 IR]), the constitutional right of liberty, the constitutional right to bodily integrity, the constitutional right of inviolability of the dwelling, and the constitutional right to fair procedures. Many of these have to a lesser or greater extent been restricted or impinged upon by the *Road Traffic Acts* and on the basis of the greater interest of the common good.

driving:

Is the Supreme Court rewriting the rules?

The interference with these rights of the individual have been authorised by the enactment of legislation by Dáil Éireann. Nobody would disagree with the concern of the legislative authority for the common good, but when the legislative authority passes laws which impinge on or restrict the constitutional right of the individual – and particularly where a breach of these provisions results in criminal sanctions and penalties – then it is entirely reasonable that these constitutional rights should be restrained or interfered with only to the strict limit and in the strict circumstances which the legislative authority provided.

The legislative authority has available to it the skills and expertise to draft the legislation it considers appropriate and, having done so, it is reasonable to argue that only the provisions of (and procedures contained in) the legislation and regulations are authorised. As Chief Justice O'Higgins said: *'[to] accept something other than that which is laid down by statute or overlook the absence of what the statute requires is a trespass into the legislative field. If, in the course of time, an inadequacy appears from the legislation in that an end intended or now desired has not been provided for, then the legislative body has the authority to amend, extend or repel any legislative provision which is not achieving the end desired by the legislature'*.

The *ratio decidendi* (that is, the building bricks) on which this principled approach to judicial interpretation and decision had evolved appears from recent superior court decisions not only to have been arrested but, in fact, replaced. Supreme Court decisions in a number of recent cases seem to support the view of a sea-change in the basis on which judgments are now to be reached. While this approach appears to pervade all Supreme Court decisions, whether in civil or criminal matters, it is most clearly apparent from the following recent judgments. These seem to be at odds with the legal principle of *stare decisis* (the doctrine which says that previous judicial decisions must be followed).

DPP v Colman McNeill

Take the following case, for example. On 22 July 1998, the Supreme Court delivered judgment in the case of *DPP v Colman McNeill*. Among other things, the defendant was charged with driving with excess alcohol on 15 January 1996. While application for the issue of summons was made on 10 April 1996 (within six months, and in compliance with subsection 4, section 10, of the *Petty Sessions Ireland Act 1851*), the issue – through no fault of the defendant – did not come before the court until 18 February 1997. The district judge, adopting decisions of the superior courts, held that such a delay breached the constitutional right of the defendant to a speedy trial and dismissed the charge. At the prosecution's request, he stated a case for the opinion of the High Court as to whether he was correct in holding that the delay was excessive and that the constitutional right of the defendant to fair procedures and a speedy trial was impinged. The High Court judge agreed, and said: *'While there is no expressed declaration in the Constitution of an entitlement of an accused person to a speedy trial, nevertheless it is now taken as a requirement of having a trial in due course of law in accordance with article 38, section 1, of the Constitution that a trial should be brought on with reasonable expedition'*.

The prosecution appealed to the Supreme Court, which reversed the decisions of the District and High Court judges, saying: *'Courts of law exist to do justice between the parties and not to act as disciplinary tribunals over the conduct of litigation'*. While holding that the delay did not impinge on the constitutional rights and protection of the individual, the Supreme Court added: *'There is a solemn responsibility on anyone having anything to do with prosecuting a case to make sure that they are brought to court with all due expedition'*. And it further commented that: *'It is most likely that the learned District Court judge and learned High Court judge allowed themselves to be over-influenced by what they both regarded as a degree of ineptitude in relation to "the prosecution"'*.

DPP (at the Suit of Garda Anthony O'Driscoll v Noel O'Connor)

Two more recent decisions illustrate the point further. In *DPP (at the Suit of Garda Anthony O'Driscoll v Noel O'Connor)*, District Judge Mangan had held that a defendant arrested under section 49 of the *Road Traffic Act, 1961*, who had been required to provide a sample of blood or urine and had opted for the latter, was not allowed to exercise his statutory choice. The prosecution accepted that he had made every reasonable effort to do so but because the designated doctor was under external pressure and could not be delayed the defendant opted to provide a blood specimen. The District Court held that the defendant had been deprived of his statutory choice to provide a sample of blood or urine. On a case stated at the request of the prosecution, Geoghegan J in the High Court found that the district judge could not be said to have fallen into any error in point of law. He added that he could not possibly say that the view taken by the district judge *'was not open for him to take, and still less could I say that such a view was in any way perverse having regard to these surrounding factors so that there was no question of law to be determined by the High Court'*. In effect, Geoghegan J affirmed the judgment of District Judge Mangan. On appeal to the Supreme Court, this finding was reversed. The full Supreme Court judgment is awaited.

DPP (at the Suit of Garda K Trainer v Jenny Lennon)

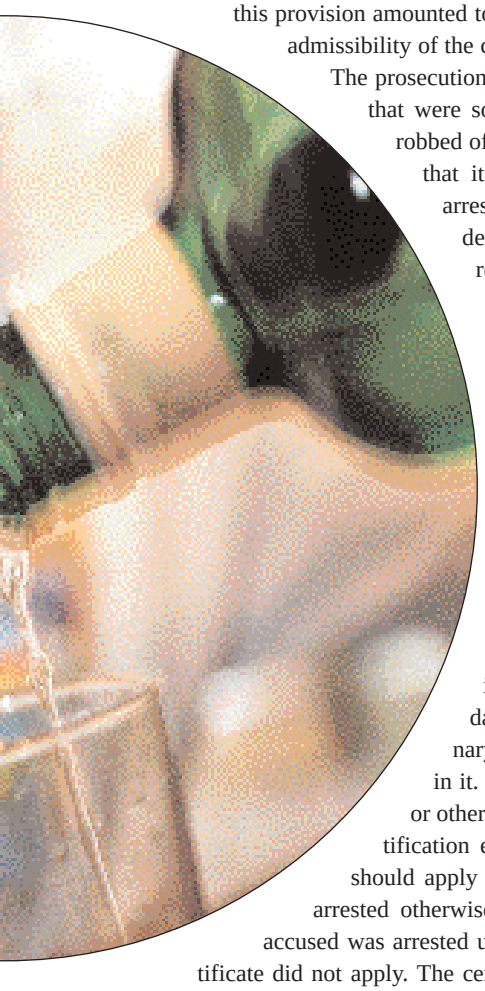
In *DPP (at the Suit of Garda K Trainer v Jenny Lennon)*, the female defendant had been arrested under section 49 of the *Road Traffic Act* and was taken to a garda station. She was required to provide a sample of blood or urine and opted for the latter. There was no female member of the Gardaí available, and the facility for the defendant was 'a toilet in a cubicle in the left rear portion of a room. There was a door in the front of the cubicle, with a division at the bottom and also on the top between the ceiling'. When the defendant saw the facilities, she felt inhibited from providing a urine sample and was therefore required to provide a blood sample. The district judge viewed the facility and concluded that the defendant's privacy had not been adequately respected, especially since there had been no female garda available. The judge held that in those circumstances her statutory choice to provide a blood or urine sample was not granted, and the prosecution was dismissed.

Again on application of the prosecution for case stated, the matter came before Morris P who held that: *'It is clear that the respondent could not provide a sample and, in the circumstances, in my view it must follow that she was deprived of the opportunity to exercise her option and, in the circumstances, evidence harvested as a result of the blood sample was improperly obtained and in violation of her statutory rights'*. The district judge's decision to dismiss the prosecution was affirmed. On the matter recently coming before the Supreme Court, both decisions were reversed. Judgment is awaited.

The Supreme Court appears to have set its mind, wherever possible, against 'technical points' and very often 'specious technical points' as was stated by O'Flaherty J in the Supreme Court in *DPP v Colman McNeill*.

DPP (at the Suit of Garda John Ivers v Angela Murphy)

These developments are not solely confined to drunken driving cases. For example, in *DPP (at the Suit of Garda John Ivers v Angela Murphy*), the *ratio decidendi* of interpretation of statutes appears to have been significantly watered down. The case arose out of the construction of section 6(1) of the *Criminal Justice Miscellaneous Provisions Act, 1997* which was to the effect that evidence of arrest, charge and caution could be given to the District Court under certificate signed by a member of the Garda Síochana. The wording in the section specified that it applied to a person 'who has been arrested otherwise than under warrant'. The certification did not specify that the defendant had been arrested otherwise than under warrant and it was submitted for the defendant that this provision amounted to a condition precedent to the admissibility of the certification procedures.



The prosecution's main argument was that, if that were so, then the section would be robbed of its effectiveness on the basis that its purpose was to avoid the arresting garda having to give evidence in court. If he was required to give evidence that the person was arrested otherwise than under warrant, the objective of the section would be defeated.

Following the *ratio decidendi* of numerous previous decisions and judicial precedent, McCracken J in the High Court held that the primary rule in constructing a section of any statute is that the court must interpret the statute in accordance with the plain and ordinary meaning of the words used in it. The legislature in its wisdom or otherwise had decided that the certification evidence in relation to arrest should apply only where the accused was arrested otherwise than under warrant. If the accused was arrested under a warrant, then the certificate did not apply. The certificate did not state that the accused had been arrested otherwise than under warrant, and, indeed, even if the certificate did state that, it was not a matter which had been catered for by the section.

McCracken J held that the section was clear and unambiguous and was a condition precedent to the admissibility of the evidence. In the course of his judgment, he said: *'I would accept that the legislature probably did not intend that evidence of the nature of the arrest would have to be given but I cannot construe a statute which is quite clear in its wording in accordance with what I might perceive as the intention of the legislature. I must give the words their normal meaning. It would have been very easy to have avoided the problem, for example, by providing at paragraph A in the sub-section that the member "arrested that person otherwise than under warrant for specified offence"'. I do not think that it is open to me to add those words to the section, which, in effect, is what the prosecution is asking me to do'.*

On appeal to the Supreme Court, McCracken J's approach, which had its roots in volumes of judicial precedent, was totally reversed. In the course of the Supreme Court judgment, O'Flaherty J stated: *'It needs to be said that we are here dealing with a purely procedural matter antecedent to the holding of any trial. Therefore, the matters of burden of proof and so forth are of little or no relevance to the issue in debate'*. He also said: *'The district judge is entitled to assume that persons in authority will act in accordance with what is required to be done by them in obeying the law and that they would not think of bringing a person before the court under the procedure in debate if there is in existence to their knowledge an unexecuted warrant'*. And he added: *'While it is so that* in general *a party wishing to establish a fact constituting a condition precedent to the admissibility of any item of evidence bears the burden of establishing that fact, nonetheless that is more pertinent to matters to be established in the course of a trial rather than procedural matters'*.

Denham J, in the course of her judgment, quoted the principle of interpretation in the case of *R v Judge of the City of London Court* to the effect that if the words of an Act are clear, you must follow them – even if they lead to manifest absurdity.

She said: *'This was described as the golden rule of interpretation. In recent times, however, a very different approach is being adopted and called the "purposive approach" as enunciated in the case of* Pepper v Harte *([1993] 1 All English Reports) and wherein Lord Griffiths stated:* "The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language". *The courts now adopt a purposive approach which seeks to give effect to the purpose of the legislation. On the basis that the purpose of the legislation was to dispense with the attendance of the guard to give oral evidence of arrest, charge and caution, the section would be rendered absurd if the same guard was required to give evidence that it was not an arrest by warrant'*.

So on the basis of the purposive approach, Denham J held that the section did not require the guard to attend and that the effect of the provision in section 6(1) concerning *'arrested otherwise than under warrant'* can be ignored or deemed not to be part of the section.

The effect of the decision in *DPP (Ivers v Murphy)* is markedly at variance with – indeed, if not in conflict with – the approach of O'Higgins CJ, and his words in the case of *DPP v Kemmy* quoted above. The replacement of such strict rules, with all the certainty that resulted from them, with the uncertainty of 'the purposive approach' creates considerable difficulties for lawyers.

A moveable feast

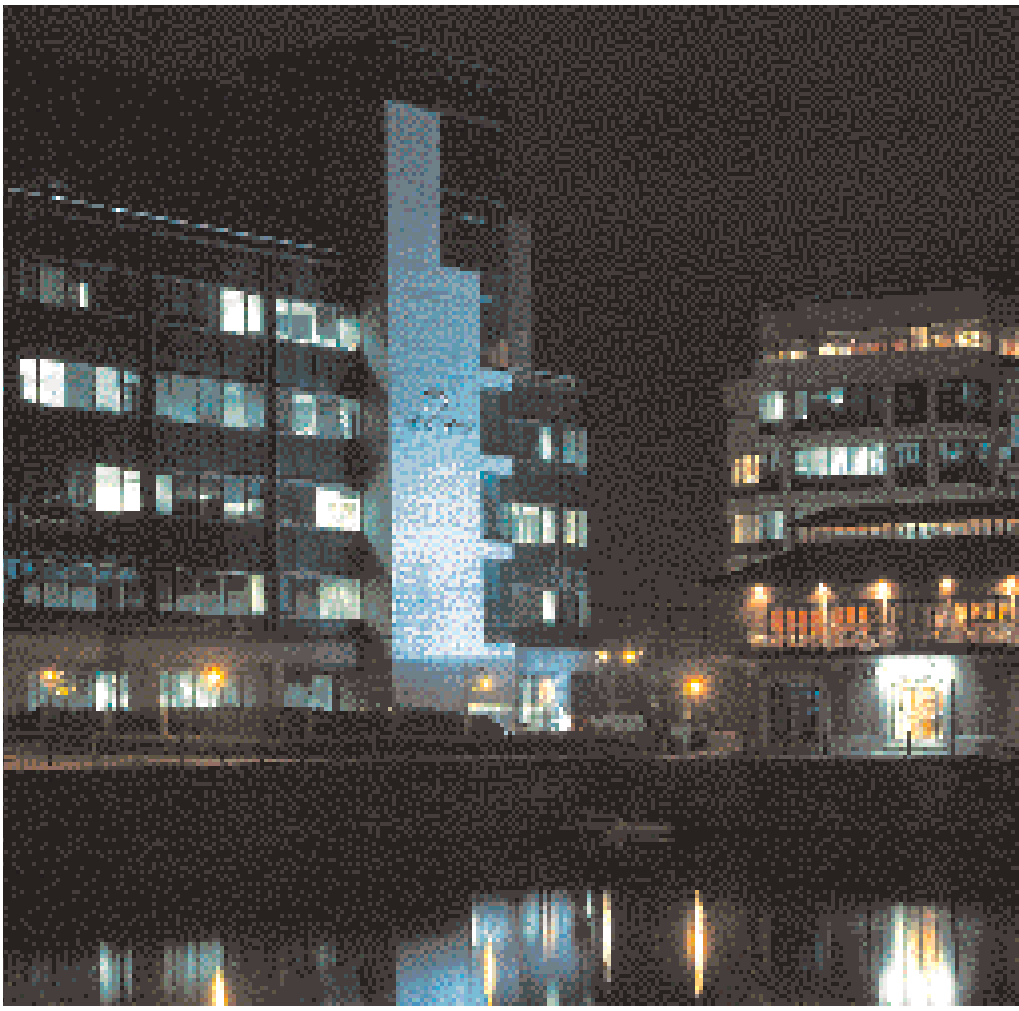
Are we in danger of reaching a situation where judicial interpretation and judicial precedent are to be replaced by a new concept to the effect that the end justifies the means? 'The end' is, of course, a totally abstract concept, a moveable feast. What may be one person's 'desired end' will frequently (if not universally) be to another's disadvantage. Who is to say which is fair? Surely those alleged to have broken the law are entitled to claim that the law should be stated clearly at the time of the alleged breach.

This development seems to be in conflict with the views expressed by Mr Justice O'Flaherty in his paper *Restraining government: the judiciary and the executive*, which he delivered to the Australian Bar Association: *'At the root of separation of power is Acton's dictum that power tends to corrupt and absolute power corrupts absolutely. The quintessence of the separation of power is the existence of branches of government which are sufficiently independent of one another to act as counter-weights controlling each other'*. G

F Gerard M Gannon is the principal in the solicitors' firm Claffey Gannon & Company of Castlerea, Co Roscommon.

Banking la

The last ten years have seen an unprecedented growth in this country's prosperity, and developments in banking law over that period have unarguably helped to strengthen the position. Here, William Johnston reviews those developments and assesses their impact on the economy's health



The 1990s began with the physical move by banks into the International Financial Services Centre beside the 1790s construction of the Custom House. The continuing stream of new arrivals and activity in the IFSC has been greatly helped by the completion of numerous double-tax treaties between Ireland and other jurisdictions.

One of the beneficial impacts which the IFSC has had on banking law here is the reduction in stamp duty for borrowers. In 1990, stamp duty was payable on security for borrowers at the rate of one-eighth of 1% (of the principal amount secured) – not apparently a significant amount but nonetheless a real cost of borrowing. This was reduced to one-tenth of 1%, subject to a cap of £500, and when it became clear that this cost would affect the continued existence of some IFSC companies, the *ad valorem* rate was abolished for loan agreements and guarantees (stamp duty has been abolished also for releases and discharges).

Court protection

1990 will be most remembered, though, for Iraq's invasion of Kuwait. Its impact on Ireland was that one of this country's largest corporate conglomerates ran into financial difficulties due to its financial exposure to Iraq (one of its principal customers). Because a significant business was at stake, along with many jobs, the Government moved swiftly and enacted what has become known as the examinership legislation.

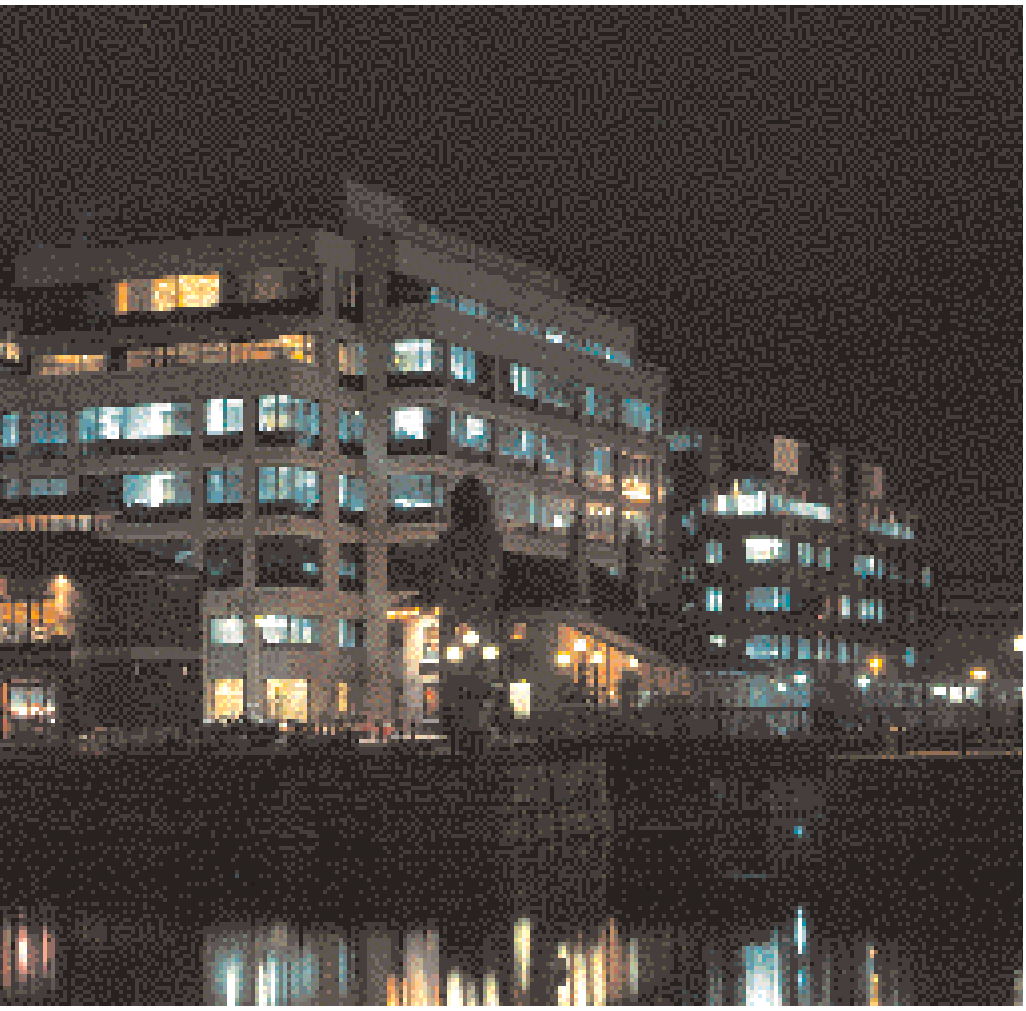
The *Companies (Amendment) Act, 1990* enables an insolvent company to seek the protection of the court from its creditors for a three or four month period during which time an examiner, appointed to it, examines the company's affairs and prepares – and seeks the court's approval for – a scheme of arrangement which, if it is successful, will enable the company to continue trading once the court's protection is lifted.

This legislation enabled the Goodman group of companies to be saved with obvious benefits not just to its employees but also to the farmers who supply produce to the group. It worked for everyone's benefit in the case of the Goodman group because no creditors had security. It was not until the Supreme Court's decision in *re Atlantic Magnetics Limited*, confirmed in *re Holidair Limited*, that it became clear the legislation had the effect of overturning a century of established priorities among creditors.

The enactment of this legislation, and its initial application by the courts, meant that a bank's power of appointing a receiver, granted freely to a bank by a company when obtaining funds from the bank, could be vetoed by the court almost at the asking by the board of the company. Furthermore, the priority given to a bank or other creditor by a fixed charge is no longer absolute, but must be shared even with the shareholders. These decisions, in conjunction with the court's decision in *re Presswell Limited*, which wrote down guarantors' liabilities, had the immediate effect of banks pulling back from providing finance – so much so, indeed, that an taoiseach of the day publicly criticised the banks for failing to provide more credit.

The legislation in discouraging secured

w in the 1990s



lending retarded the growth of the economy until Mr Justice Costello's decision in *re Wogan (Drogheda) Ltd*, where he pointed out that advisors and others involved in the process of seeking court protection have a duty to use the utmost good faith in bringing an application to court. Subsequently, the Minister for Enterprise and Employment, Ruairí Quinn, appointed a Company Law Review Group to consider the legislation and to make recommendations for reform.

In the aftermath of Mr Justice Costello's decision, the use of the legislation was curtailed. Nonetheless, its existence and continued use has had the effect that banks have moved earlier to support and assist in the re-structuring of companies that encounter financial difficulties. Accordingly, although in need of some amendment, the legislation has helped to support corporate enterprise.

Swaps and other instruments

The court protection legislation was used by some, particularly in London, to highlight a potential difficulty of entities doing business with Irish corporations. A significant part of managing debt finance is the use of swaps and similar instruments. At its simplest, it might involve a company borrowing sterling entering into a contract with another entity agreeing to exchange sterling for Irish pounds. If the company's earnings are in Irish pounds, it will avoid a currency risk (that is, the potential revaluation of sterling), notwithstanding that it has borrowed in sterling. The court protection of an entity involved in a chain of swaps would have an adverse domino effect on other entities, as the solvent counterparty could not enforce security to recover amounts owed to it by the protected company. Accordingly, the *Companies (Amendment) Act, 1990* was made subject to the *Netting of Financial Contracts Act, 1995* whereby parties to a swap may set-off each other's liability and enforce security (given specifically for the swap) for the net balance even if the debtor is under the protection of the court. How such an enforcement will affect the examinership of such a company remains to be seen. Nevertheless, this legislation has alleviated concerns on swap transactions and has facilitated the entry of further banks to the IFSC. In practice, its impact has been the requirement to prepare additional security for each entity entering a swap, specifically to secure its obligations under that swap.

Exchange control

Emerging economies have tended to implement exchange control restrictions to ensure funds are not siphoned out of the economy. Ireland was no different, and a loan made from outside the State to an Irish entity required the permission of the Central Bank to ensure that the loan could be repaid with interest. These exchange control restrictions were abolished on the last day of 1992. However, practitioners should bear in mind that the *Exchange Control Acts* have effectively been replaced by the *Financial Transfers Act, 1992* under which the Minister for Finance may make orders prohibiting the transfer of funds to jurisdictions which are the subject of his order (a number of orders have been made).

The abolition of exchange control restrictions made it easier for Irish companies to raise funds from outside the State (particularly from investors in the USA).

Cross-border banking

On New Year's Day 1993 – the day following the abolition of exchange controls – the *Second European banking directive* was implemented in Ireland. This established the mutual recognition of banking services throughout the European Union, thus enabling a credit institution licensed in an EU Member State to carry on banking business in Ireland under the supervision of the central bank of its home state. This has not had an immediate impact on business but is part of the process of integrating Europe.

Ministerial orders granting class exemptions and the repeal of the *Moneylenders Acts* by the *Consumer Credit Act* have made it easier to obtain non-consumer loans from abroad. No longer does an entity without a banking or moneylender's licence have to apply to the Department of Enterprise, Trade and Employment and have its application scrutinised by the Central Bank before obtaining an exemption under the *Moneylenders Acts* in order to make a commercial loan.

Ombudsman for Credit Institutions

In banking, 1990 was important not only for the commencement of the IFSC and the establishment of a court protection procedure, but also for the establishment of the Ombudsman for Credit Institutions. In that year, anyone who might have had a complaint against a bank was first given the opportunity of taking it to the Ombudsman for Credit Institutions. Under his terms of reference, any award of up to £30,000 made by the ombudsman may be accepted or rejected by the customer. If the customer accepts the award, the bank is bound by it. Since 1994, this service has been available to small limited companies. Not only does the ombudsman provide a useful service to bank customers, but his annual report is a useful feedback for banks in highlighting areas of banking practice that have been the cause of difficulty.

Consumer Credit Act

But the greatest protection for the individual customer has arisen from the enactment of the *Consumer Credit Act, 1995*, some 21 years after similar legislation was introduced into Ireland's neighbouring jurisdiction. Essentially, its implementation was precipitated by directives emanating from Brussels. No legislation in the history of the State has undergone more amendments in the course of its passage through the Oireachtas than the *Consumer Credit Act*, and there is no doubt that many of these amendments have improved its workability.

While the Act had the beneficial effect of repealing the *Moneylenders Acts* for commercial loans, contrary to the directives it contains no minimum or maximum thresholds. Accordingly, a person lending £10 to a consumer is subject to the same restrictions as a person lending £10 million to a consumer. Failure to comply with the Act's detailed requirements can in many instances render the loan void and irrecoverable – a nightmare for any lawyer instructed to prepare the documentation. Much time has been spent by banks and other financial institutions conforming their standard documentation to the Act's requirements.

Unfair terms regulations

Even more difficulty is presented to a lawyer who is asked to advise whether an agreement complies with the *European Communities (Unfair Terms in Consumer Contracts) Regulations 1995* (purportedly given retrospective effect when implemented). Its language is imprecise, which is unhelpful to lawyers, and guidance from the courts is awaited.

Independent advice for third party security

The Irish courts have traditionally been favourably disposed towards a party which has given security to support a loan to another. In the 1990s, the English courts have increasingly upheld the claims of third parties in overturning security through lack of informed consent. The principles applied by the English Court of Appeal in *Barclays Bank plc v O'Brien* were adopted by the High Court in *Bank of Ireland v Smyth and Smyth*, where Mr Justice Geoghegan held that a wife's consent to a mortgage (pursuant to the *Family Home Protection Act, 1976*) was not a true consent as she was not advised to obtain independent legal advice and that she did not have a proper understanding of the consent she had signed. In dismissing the bank's appeal, the Supreme Court held that the spouse's consent must be a fully-informed consent. Procedures need to be carefully followed to ensure that security can withstand a challenge due to lack of informed consent.

Confidentiality and the banks

Where a person entrusts his or her financial affairs to another acting in a professional capacity, there is an implicit duty that the recipient of the information will keep it confidential. This duty of confidentiality which exists between banks and their customers has been continually eroded by legislation and by the courts. In the early 1990s, the courts were busy hearing challenges to an inspector appointed in connection with the Johnston, Mooney & O'Brien site in Ballsbridge, Dublin. A bank's difficulty was highlighted by Mr Justice Murphy when he said: 'Obviously the bank and the solicitor are in an awkward position; if they neglect to produce books or documents which should properly have been produced, they expose themselves to the risk of penalties which might be imposed on them for contempt of court. On the other hand, if they hand over books or records which do not fall within the terms of the Act, they may be liable to their clients for damages for breach of contract'.

Shortly afterwards, a bank which declined to disclose information to an inspector about its customer for fear of breaching its duty of confidentiality was told by Mr Justice Costello that not only should it supply the information but that it should pay the costs of the court hearing for having originally declined to supply the information.

One of the principal exceptions to the duty of confidentiality arises where there is a duty to the public to disclose. The law on this exception took a major leap forward in 1998 when a 3–2 majority of the Supreme Court decided (in *National Irish Bank Limited and Anor v Radio Telefís Éireann*) that the names of customers of the bank could be publicly disclosed notwithstanding that such disclosure could imply that these customers were guilty of tax evasion. In welcoming this decision, the *Irish Times* stated: 'The Supreme Court has a proud and distinguished record of affirming individual rights and liberties'. This is undoubtedly true, but it is difficult to understand how the majority decision that took away a person's right to have his or her financial affairs kept private can be said to be an affirmation of individual rights and liberties. The public interest in stamping out tax evasion was already served in this case by disclosures having been made to the Revenue Commissioners and the Central Bank.

It is for everyone's benefit that public interest is not confused with public curiosity. But the decade is concluding gloriously for the curious amidst much publicity concerning the banking arrangements of a former taoiseach, ironically without whom there may not have been an International Financial Services Centre. At the time of writing, it appears the final *Finance Act* of the decade will grant the Revenue Commissioners wider powers to breach the confidential relationship between bank and customer. For these provisions to be effective against tax evasion, there will need to be a co-ordinated approach in Europe to ensure that no jurisdiction gives more protection to bank customers than in Ireland.

Interest and fees charged to borrowers

The *Consumer Credit Act, 1995* has done much to put the fees and charges of a bank under scrutiny, and the Director of Consumer Affairs has been empowered to oversee any increases. Following the enactment of the legislation, it

has been alleged that a number of branches of a particular bank, on a continuing basis prior to the 1995 Act, overcharged for its services. This is subject to an on-going investigation. It has been suggested to me by a journalist that this could not happen now because of the requirements of the *Consumer Credit Act, 1995* as to APR. This, of course, is not true, as it would be surprising if even one-tenth of 1% of the population understood how APR is calculated. Those who check their bank statements can only make a rough guess as to whether the interest which they have been charged is correct. An explanatory guide by the Director of Consumer Affairs as to how APR works would be a most welcome development.

Money laundering

Banks spent a great deal of time in the early 1990s familiarising themselves with the *Criminal Justice Act, 1994* and the money-laundering regulations that followed it. The chore of producing a passport and other means of identification when opening a bank account is nothing compared to the increased record-keeping and reporting mechanism required by banks to ensure that they do not handle money which has been procured as a result of criminal activity.

Mareva injunctions

Although a person has a right to have his or her financial affairs kept private (apart from appropriate disclosures to the Revenue Commissioners), the need to ensure that banks are not used as safe havens for a person's assets has given rise to the increasing use of *Mareva* injunctions by the courts and the attachment of bank deposits. The *Proceeds of Crime Act, 1996* enables the High Court to grant orders prohibiting persons from dealing with, inter alia, monies which are the proceeds of crime. The Criminal Assets Bureau has been active in the implementation of this legislation.

Absence of reform

One of the most striking impediments to the development of small business is the prohibition under section 31 of the *Companies Act, 1990* on companies giving guarantees (subject to certain exceptions). It is undoubtedly true that the provision (conceived in the early 1980s to attack abuses of the 1970s) has hindered small family-owned businesses in raising finance – indeed, there may be many transactions concluded which have unwittingly contravened the section, with possible horrendous consequences for legal and other advisers involved in completing the security.

A further legislative provision which hinders finance for small business, as highlighted by the *Report of the Task Force on Small Business*, is section 1001 of the *Taxes Consolidation Act, 1997* (formerly section 115 of the *Finance Act, 1986*). Briefly, this section gives the Revenue Commissioners super-preferential status (for VAT and PAYE arrears) over a creditor holding a fixed charge on book debts. A half-hearted effort was made to reform these provisions in the middle of the decade but its basic provisions remain unchanged to the detriment of small business (as they cannot effectively offer a first priority fixed charge over book debts, one of their principal assets, as security for bank finance).

Finally, the inability of banks to set-off the accounts of their customers which are under the protection of the court has resulted in finance structures which drive funds out of the economy and add to the financing cost for industry.

In pure banking terms, there has been reform – the provisions of the *Central Bank Acts* of 1997 and 1998 as well as the *Economic and Monetary Union Act, 1998* will make banking better prepared for the next decade. Of more immediate beneficial effect has been the reform carried out in appropriate areas during the 1990s to facilitate the securitisation of home loans. This has had the effect of freeing-up funds which may be made available to new customers generating further growth and profitability into the next decade. G

William Johnston is a partner in solicitors' firm Arthur Cox and the author of Banking and security law in Ireland *(1998, Butterworths).*

Planning for your *golden years*

Recent legislation affecting pensions has improved the tax regime for pension schemes, including the Law Society's Solicitors Retirement Trust Scheme, as Member Services Executive Claire O'Sullivan explains

Even if eligible for a State pension, it is desirable – if not absolutely necessary – that a solicitor in private practice starts to plan for retirement as early as possible. Since 1975, there has been a pension scheme available for members of the Law Society. Established under a trust between the Society and the Bank of Ireland, this scheme provides retirement annuities and ancillary benefits for contributing members.

Under the plan, members who are self-employed or in non-pensionable employment can make contributions to a tax-exempt fund. The fund is managed on their behalf by Bank of Ireland Asset Management and monitored by the trustee (that is, Bank of Ireland Trust Services) and the Society's Retirement Fund Committee. In the past, on retirement, the ultimate accumulated value of these contributions, together with growth thereon, was used to provide to the contributor a tax-free cash lump-sum of up to 25% of the final value, together with an annuity for life purchased on the open market.

The scheme has a number of significant features: a contributor's personal costs are very low, there is no period of nil allocation of units and no loading in the early years. Amounts contributed are at the contributor's discretion, and there are no penalties where contributions are increased, decreased, suspended or missed. There is a choice of three funds into which contributions can be made, namely, the managed fund, the cash fund and the pension protector fund. It is possible to switch between funds as appropriate, depending on personal risk preference and financial needs at that time. Investment growth is tax free and no medical evidence is required.

Up to now, the income tax contribution limit for pension scheme contributions has been 15% of a contributor's net relevant earnings. However, under the recently passed *Finance Act, 1999*, changes have been made to the tax regime applying to accumulated savings for

pension purposes, the principal of which are the following:

- From 6 April 1999, annual contribution limits will be increased from 15% to 20% for those aged between 30 and 40, 25% for those aged between 40 and 50, and 30% for those aged 50 and over, all subject to an earnings cap of £200,000 a year
- The age by which a pension annuity must be purchased has been extended from 70 to 75 years
- There is now a right to transfer the savings accumulated in one approved retirement fund to another such fund
- On retirement, 25% of the accumulated fund may be taken as a tax-free cash sum, but if the retiree has a total guaranteed income for life of at least £10,000 a year including the State pension, the balance of the accumulated fund may be cashed in immediately (subject to payment of the appropriate rate of income tax at that time) or, alternatively, invested in an approved retirement fund (ARF) to be drawn down at the retiree's discretion
- If the retiree's income is less than £10,000, the same options will apply except that a minimum of £50,000 (or the fund balance, if lower) must be either invested in an annuity or in an approved minimum retirement fund (AMRF). Income can be drawn from an AMRF only to the extent that it does not reduce its value below £50,000. At age 75, this restriction will be lifted and the retiree will have complete freedom to draw down remaining AMRF assets (subject to payment of the appropriate rate of income tax at that time)
- Income and capital gains earned within an ARF or an AMRF will be taxed in the usual way *depending on the type of investment vehicle chosen*
- On death, any balance remaining in an ARF or AMRF can either be paid to the retiree's estate (subject to payment of the appropriate rate of income tax at that time) or passed to the retiree's surviving spouse to be invested under the same rules as applied to the retiree. If the retiree's surviving spouse elects to take the balance (as opposed to taking a pension from the ARF or AMRF), the income tax payable on such balance will be subject to a reduced 25% rate.

A more detailed discussion of the retirement provisions of the *Finance Act, 1999* and how they are likely to be applied in practice will be published in a subsequent issue of the *Gazette*. G

Claire O'Sullivan is the Law Society's Member Services Executive.

Cry freedom!

The latest technology means that you can now carry around a virtual office in your briefcase, or even your pocket. Grainne Rothery looks at the hardware and software that will get you going – and how much it will set you back

Rapid developments in mobile phone and portable computing technology mean that it is becoming increasingly possible to continue working regardless of location. Not so long ago, time spent in transit, whether it was between meetings or waiting outside court, was often time wasted. Nowadays, with the right equipment and connections, traditional downtime can be used productively. You can make arrangements over the phone, compose and send e-mails, receive faxes, browse the Web, hook into your firm's network or even just check the time and location of your next appointment.

Of course, it was always possible to make calls or to check up on appointments by finding a public phone or looking through a filofax. But finding a phone that worked, never mind finding the right change, was a hassle which mobile phones eliminated. Filofaxes still have their place but, when they're used properly, electronic organisers can be more efficient and can even be programmed to issue reminders before appointments.

The most basic piece of equipment for mobile communications is probably the mobile phone. Once they were considered a bit of a luxury and something of a status symbol in this country because both handsets and charges were too high for ordinary users, but over the last two years competition between Digifone and Eircell has stimulated the market to the point where Ireland now has one of the highest rates of mobile phone use in Western Europe. The introduction of pay-as-you-use packages by both operators has helped to make mobiles affordable for almost everybody.

The most basic application of a mobile phone is obvious – it's a device for carrying out telephone conversations when you're on the move. But handsets are becoming increasingly sophisticated and the majority of GSM phones (those with digital 086 or 087 connections) now have **short messaging services (SMS)** and are data-compatible.

Ericsson MC16 Solution: one of the integrated mobile computer packages available

SMS is a handy function for sending and receiving messages of up to 160 characters, to and from digital mobile phones, for the price of single unit call. Software packages are also available so that messages can be sent between PCs and mobiles. With SMS, messages can be sent to your phone, even if it is switched to silent mode. When a message arrives, a note to this effect will appear on your handset's display and you can read your correspondence straight away or later on. So if you're in an important meeting or sitting in court, urgent messages can still reach you without disturbing anyone else. Likewise, you can compose and send messages by simply keying in letters on your handset's numberpad.

Confusing communication

Because the digital networks can send and receive data as well as voice messages, data-compatible phones can be connected to laptop computers or **personal data assistants (PDAs)** in order to send and receive e-mails, faxes and files without having to link up to a landline. To ensure that the phone and the laptop can communicate with each other, additional hardware such as a cable and PC Card, as well as communications software, is normally needed. But some of the more sophisticated phones have infrared capability which allows them to com-

Nokia 6110 Solution: phone, laptop and the software needed for fax and e-mails

municate with infrared-ready laptops or PCs without the need for any cable or data card. Devices such as the **Nokia Communicator**, meanwhile, integrate the phone and portable computing functions within a single unit.

The mobile phone networks have not been slow to recognise the growing market for mobile data and fax communications. They also recognise the fact that it's a relatively confusing area for many people who would like to use the technology. Late last year, Eircell introduced its **Networker** range of complete mobile communications packages.

The Networker packages range in price from £299 to £599 for first-time connections and connection upgrades, and include a GSM phone and 30 days' free access with Indigo's Internet service. Two of the packages – incorporating the **Nokia 9110** and the **Ericsson MC16** – provide all the hardware and software needed for hooking-up to the Internet, sending e-mails and downloading files. The **Nokia 9110 Communicator package** costs £599 and consists of a GSM phone, which opens up into a hand-held computing device with 'qwerty' keyboard and VGA screen. The Communicator allows basic word-processing and has its own calendar facility for tracking appointments. Without connecting up to any other device, it is possible to compose, send and receive e-mail messages and faxes and surf the Internet. A PC suite is also provided so that users can connect up to their desktop PC to transfer and back up files.

The **Ericsson MC16 Solution** includes an **Ericsson GH688 GSM phone** and an **Ericsson MC16 palmtop** computer, which includes Windows Compact Edition (CE), an infrared port, fax and Internet Explorer software and a modem. The palmtop can use cut-down versions of standard Microsoft applications, including *Pocket Word*, *Pocket Excel* and *Pocket PowerPoint*. Data can be synchronised with a desktop computer.

The other packages in the Networker range include **Ericsson SH888** and **Nokia 6110** phones. With the SH888, the **Ericsson Mobile Office Suite** is included, allowing the user to connect to a laptop via infrared or a cable connection. It provides all the software needed to send and receive faxes and e-mails. The Nokia 6110 package includes **Nokia Data Suite 2.0**, which provides similar functionality to the Ericsson version.

Unlike Eircell, Esat Digifone does not currently package data products. 'It would be very difficult to come up with something to meet everyone's requirements', says Digifone's Pat O'Connell. 'There are so many different variations of phones, cards and software'. Instead, the network's customer care executives in the Grafton Street and Henry Street Digicentres in Dublin explain the technology that is required and how it works.

Worldwide wait

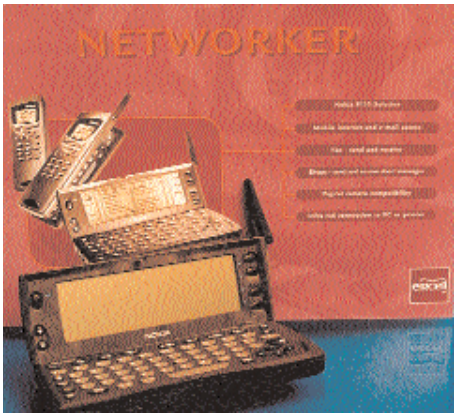
But how practical is the job of hooking up to the Internet and sending and receiving faxes and e-mails using a mobile phone connection? 'Going on-line is grand for doing things like checking e-mail when you're away from the office', O'Connell says. 'Likewise, you can prepare e-mails when working off-line and then dial in to send these messages. But nobody believes that life is long enough to surf the Web using your mobile phone – it's more like the worldwide wait'. He also points out that users may need to specify the maximum file size for downloading within their e-mail programs, otherwise they could be waiting around during the transmission of particularly large files.

O'Connell says that Digifone has noted a big increase in the amount of data traffic over the network in the last few months. 'Our market research shows that the main component of this traffic is the transmission of e-mail', he says. 'We see emerging technologies making Web access more usable in the future'. One technique will allow your browser to recognise the device you're using and filter the content, so if you're browsing the Internet with a mobile phone and a PDA, you'll see a cut-down version of the web site you are trying to access. On the other hand, if you're using a more powerful machine and are connected via an ISDN line, you will be able to view the pages in their full animated glory.

Of course, accessing e-mail and downloading files remotely does not necessarily have to involve a mobile phone. If you're working from home – or indeed anywhere that has a convenient telephone line – it makes more sense, both in terms of cost and speed, to dial in from the landline rather than a mobile.

Ultimately, the kind of computing device you use during your travels will depend on what you are using it for, and on the level of

'Mobile phone networks have not been slow to recognise the growing market for mobile data and fax communications'



Nokia 9110 Solution: a GSM phone which opens into a handheld computer/fax (£599)

information you want to access if you're sending and receiving data. Entry-level devices include PDAs and handheld machines. These are small and extremely mobile but they are usually far less functional than full-blown laptop or notebook PCs. One of the most popular examples of a PDA is **3Com's Palm Pilot**, which includes a diary, to-do list, address book, memo pad and e-mail reader. The Palm Pilot does not have a keyboard so information is inputted with a stylus pen directly onto the screen. This will not be suitable if you are planning to input sizeable amounts of information. E-mails, addresses and appointments can be synchronised very easily with a desktop machine via an infrared facility. The Palm Pilot costs less than £300.

Handheld computers like the **Philips Velo 500** and the **LG Phenom** are more powerful machines and typically include 16 megabytes (MByte) of random access memory (RAM), Windows CE and their own modems. The LG Phenom retails at just under £700, has a full keyboard and pocket versions of *Word*, *Excel* and *PowerPoint*. With this kind of device, it's possible to send and receive e-mails, browse the Internet and compose and send faxes.

Generally these machines are used in conjunction with – rather than instead of – desktop PCs. At the upper end of the market there are more sophisticated laptops, which are often as powerful as PCs. For example, IBM has just launched a new range of **ThinkPad notebook computers**. The **ThinkPad 600** series includes 13.3-inch active matrix screens, up to 64MByte of standard memory (expandable to 288MByte), up to 10 gigabytes (GByte) hard drives and integrated 56K V.90 modems. The 600Es also incorporate DVD with movie playback support for delivering multimedia presentations. Prices start at IR£2,367.

These machines can be used for normal communications, such as e-mail and faxing, and also for accessing and downloading files from company networks or intranets. Rather than working on-line over the network, it is usually cheaper to use a replication program which allows the user to dial in and download an exact copy of a particular application. 'The ability to synchronise and replicate data is more beneficial than dialling in, and it's also more cost effective', says Gavin Reynolds, marketing strategist in IBM's personal systems group. 'IBM ThinkPads with *Lotus Notes* allow users to replicate their full working environment onto their laptop, thus allowing them to work as effectively out of the office as in the office. When returning to base, the user needs to replicate back to the server, thus converting all the work carried out on the laptop onto the server and onto the external environment'.

'However, most applications that people dial into are not built with the mobile user in mind', says Reynolds. 'Companies need to address this issue when they start to build applications that mobile users will dial into, such as sales force automation or, in the case of solicitors, case management software. *Lotus Notes* is an example of an application built with the mobile user in mind'.

Satisfactory back-up

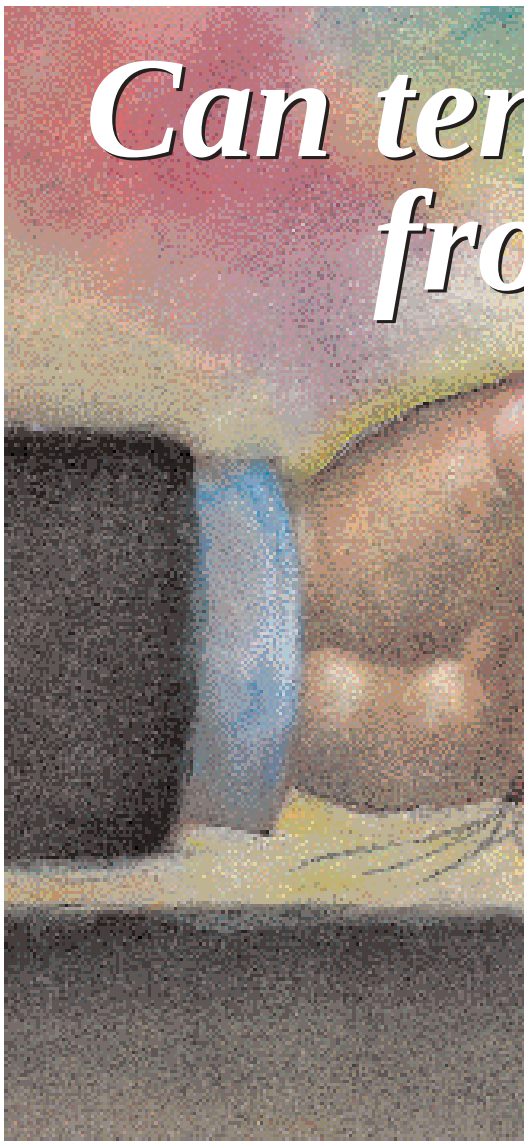
A wide choice of technology is available for the mobile office and this can cause confusion. Also, the range of different hardware and software needed to send and receive faxes and e-mails using mobile devices means that doing it is not always easy. Would-be users who do not have in-house technical support should ensure that their suppliers provide satisfactory back-up and after-sales support.

Finally, be warned: mobile office technology will improve over the coming years. As was the case with the mobile phone, this will help to ensure that we're never too far away from work. Some people may cry 'Freedom!'– others may just feel like crying! G

Grainne Rothery is a freelance journalist specialising in technology issues.

The grea

The traditional view is that a landlord's failure to perform his duties under a lease does not release the tenant from his obligations, but this has been challenged successfully in the English courts. Professor JCW Wylie discusses the relevant cases and asks: could it happen here?



Recent English cases have raised a fundamental issue concerning leases: if the tenant becomes fed up with the landlord's failure to perform his obligations, can he say 'enough is enough', hand back the keys and walk away without facing the risk of the landlord succeeding in action to enforce the lease?

According to traditional theory, the answer is 'no' because a lease is not just a contract but rather creates an interest in land and various obligations to which the ordinary principles of contract law do not necessarily apply.[1] According to contract law, the parties' obligations are essentially bilateral, that is, mutually dependent on each other, whereas leasehold obligations are said to be independent, so that a breach by one party does not entitle the other party to regard himself as released from any of his obligations. This distinction was recently recognised by Kinlen J in *Riordan v Carroll* ([1996] 2 ILRM 263, 275), where he accepted the long-held view that a tenant is not entitled to withhold his rent because the landlord is in breach of his obligations under the lease.[2] This view of the nature of a lease has now been called into question by English judges. Three cases are of particular interest.

Hussein v Mehlman

This case ([1992] 2 EGLR 87; [1992] 32 EG 59) was decided by the then Stephen Sedley QC, sitting as an assistant recorder in the county court. It involved a short-term residential tenancy of a property in a deplorable state of repair. For example, one of the bedrooms was uninhabitable because the ceiling had collapsed. The landlord was clearly in breach of his obligations, particularly repairing obligations implied by section 11 of the English *Landlord and Tenant Act 1985*. Despite repeated complaints by the tenants, he refused to take any action to remedy the breach. Eventually the tenants decided that they had had enough, returned the keys and vacated the property. They then brought proceedings seeking a declaration that the landlord had been in repudiatory breach of the lease, which they were justified in accepting and, thereby, treating the lease as at an end, and claiming damages for breach of covenant. In upholding the tenants' claims, Sedley QC engaged in a comprehensive review of the law governing leases and concluded that modern caselaw supported the view that it was time to abandon the traditional approach.[3] Instead, a lease should be regarded as simply another form of contract whereunder, in consideration of payment of rent and performance of other obligations, the tenant is allowed to occupy the landlord's property. Applying then the ordinary rules of contract, he held that a lease can be terminated by one party accepting the other party's repudiatory breach.

Sometimes this is referred to as 'rescission', but it should not be confused with the equitable remedy of that name granted by a court on the basis of some vitiating factor such as fraud, duress or undue influence. That remedy involves *restitutio in integrum*, that is, restoring the parties, so far as possible, to their original position so that they are treated as if a contract never came into existence (it is void *ab initio*) and therefore there can be no question of an award of damages for breach of contract.[4] On the other hand, rescission in the sense of a repudiatory breach by the other party involves the aggrieved party treating himself (without the need for any court order) as discharged from any *further* performance of the contract. Since a contract has clearly existed up to that point, it remains open to the aggrieved party, as Sedley QC recognised, to sue the other party for damages arising from the repudiatory breach.[5]

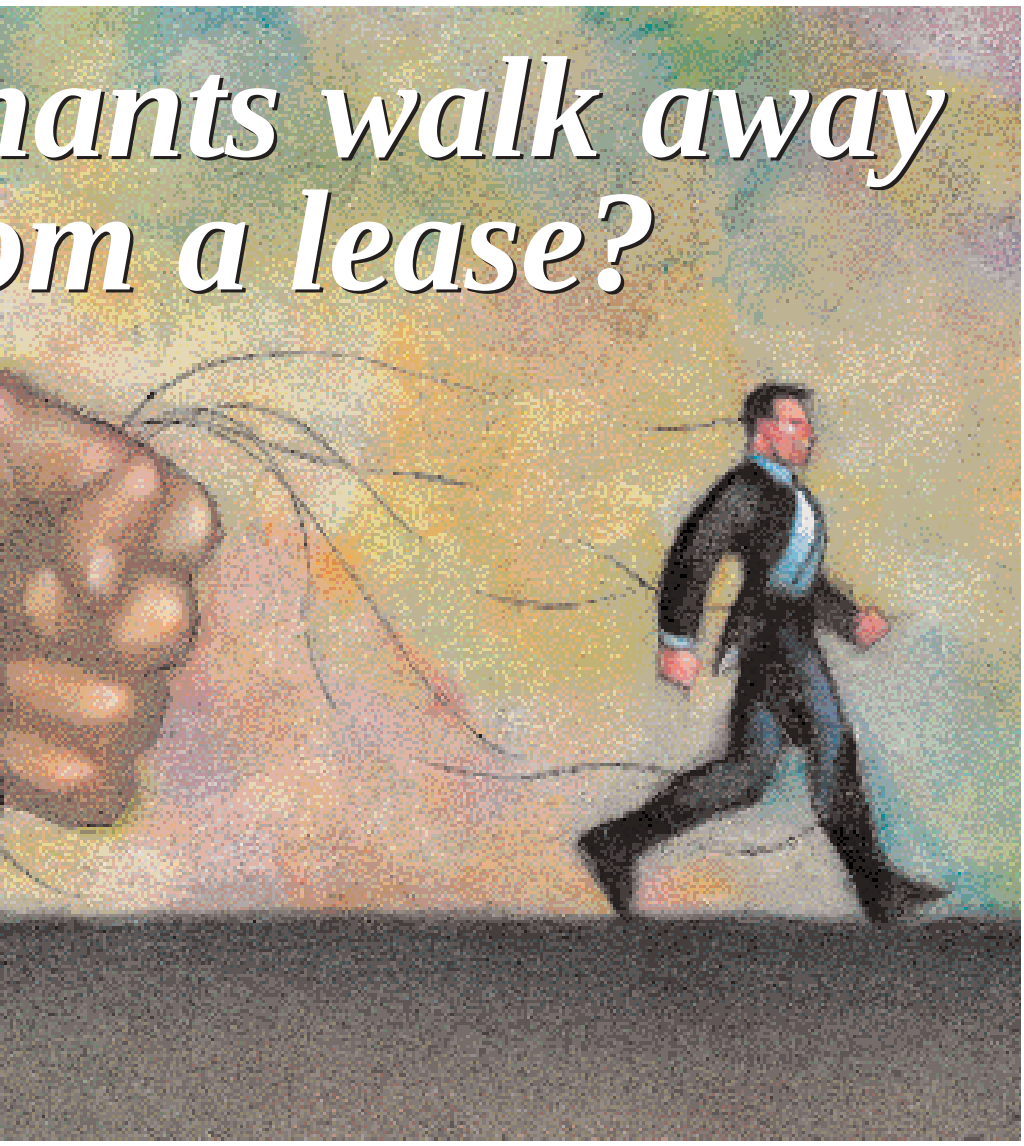
Perhaps not surprisingly, given the lowly status of the court and the lack of reporting in the more established series, the decision in *Hussein v Mehlman* did not initially get the attention its judgment clearly merited. However, the next case certainly made the English property world sit up and take notice.

Chartered Trust plc v Davies

This case ([1997 2 EGLR 83; [1197] 49 EG 135) involved a small shopping mall comprising two double units sited on a high street on either side of a dog-leg passage which led to three single units inside. One of the inside units

t escape!

nants walk away om a lease?



was a specialist shop selling puzzles and executive toys. The tenant was a business woman whose daughter ran the business in the unit. An adjoining unit was let to a pawnbroker. Over time, the toy shop experienced considerable trading difficulties. This was put down to the activities of tenants of other units in the shopping mall. The tenant complained numerous times to the common landlord. In particular, she complained that the pawnbroker's actions deterred customers in a variety of ways. For example, because his unit did not trade during normal hours and, when open, only one customer was allowed in at any one time, queues of 'threatening' groups of young men tended to block the access passage and often, to kill time, they would wait in the toy shop without buying anything. The windows of the pawnbroker's unit were obstructed to prevent people seeing inside, but had the effect of reducing light to the passage. The pawnbroker was allowed to erect the traditional three balls sign at the high street entrance to the passage, making it look as if it led exclusively to a pawnbroker's arcade. Another complaint was that the tenant of the coffee shop in one of the double units on the high street put plastic garden furniture outside for customers, obstructing the passage entrance and access to the inside single units.

After the landlord failed to take any effective action on the complaints made by the toy shop tenant, she withheld her rent and purported to 'disclaim' the lease on the basis that the landlord, by derogating from its grant, had repudiated the lease. When the landlord sought to recover the rent[6] and an order that the tenant should comply with her covenants, the county court judge rejected the claim and his decision was upheld by the Court of Appeal. In its view, a tenant in such a case had three possible causes of action: breach of the covenant for quiet enjoyment, derogation from grant and nuisance. Whatever label was used, the essential point was that the landlord had failed to manage the shopping mall as he should have. In particular, he had failed to exercise the power reserved in all the leases to regulate trading in the units or to enforce the covenant in each lease not to commit a nuisance or annoyance which would interfere with other tenants' enjoyment. The argument that there was nothing to stop the aggrieved tenant suing the offending tenants directly for nuisance was given short shrift in the following passage from the leading judgment of Henry LJ: *'Where a landlord is granting leases in his shopping mall, over which he has maintained control, and charged a service charge therefor, it is simply no answer to say that a tenant's sole protection is his own ability and willingness to bring his individual action. Litigation is too expensive, too uncertain and offers no proper protection against, say, trespassing and threatening members of the public. The duty to act should lie with the landlord'.*

The judge then reviewed the various actions the landlord could have taken against the other tenants and concluded: *'Instead, the landlords prevaricated and did nothing. They could have acted effectively and they should have done so. Instead, they chose to do nothing and thereby made the premises materially less fit for the purpose for which they were let. In failing to act to stop the nuisance, in my judgement, the landlords continued the nuisance and derogated from their grant'.*

In the court's view, the trial judge had been justified in regarding this as repudiation of the lease, that is, 'a substantial interference with the tenant's business driving her to bankruptcy'.

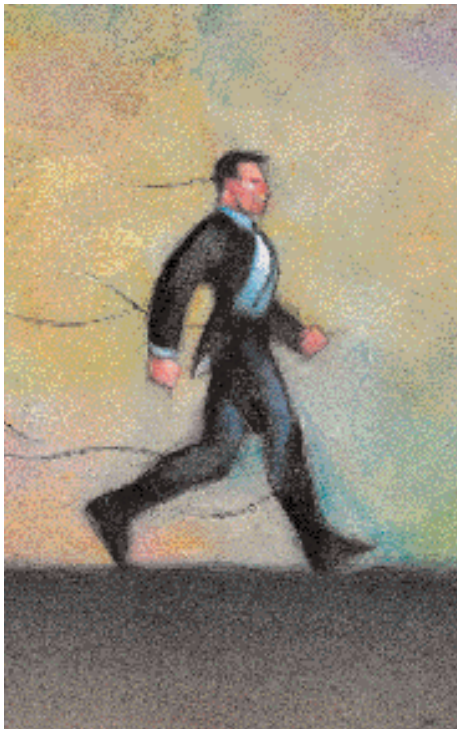
Not surprisingly, this decision has caused landlords of substantial multi-let properties

(such as shopping centres) and their professional advisors some concern. In particular, it seems to put a premium on good management by the landlord and to expose them to the risk that a disgruntled tenant might succeed in walking away from a lease of a failing business on the grounds of 'bad management' by the landlord. This makes the third, and most recent, case all the more significant.

Nynehead Developments Ltd v R H Fibreboard Containers Ltd

This case ([1999 02 EG 139) involved a small industrial estate comprising seven units. Each unit had its own exclusive parking area immediately in front of it, but the lease also gave the tenant the right, jointly with tenants from the other units, to park on the forecourt running between the units and the estate road. However, each lease expressly limited this additional parking right to 'loading and unloading vehicles'. The tenant of three of these units manufactured cardboard packaging, a process involving regular deliveries of raw materials and dispatches of finished product. He complained over a period of some two years to the common landlord about the activities of tenants of two other units on the estate. One operated a business involving service and repair of mobile refrigeration units housed in 40-foot trailers which were left on the forecourt while the work was being done. The other tenant had a waste disposal business and used the forecourt for servicing and washing down of refuse lorries and skips, which were also parked there sometimes while repairs were being done. Despite the numerous complaints, the landlord took no effective action. Indeed, evidence was produced later in court that the landlord's agent made it clear to the other tenants that the complainant was regarded as a nuisance. In due course, the complainant decided to move its business to larger premises to allow for expansion and put its lease of the three units on the market. However, it was unable to find another tenant to take on the lease and eventually it stopped paying the rent. When the landlord sued for arrears of rent, it argued that the landlord had been guilty of a repudiatory breach which justified it terminating the lease, that is, the landlord had authorised or encouraged the other tenants in committing a nuisance.

Judge Weeks QC, sitting as a High Court judge, accepted the authority of *Hussein v Mehlman* and *Chartered Trust plc v Davies*. Furthermore, he found that the landlord's conduct, in particular its agent's connivance at the other tenants' clear breach of covenant and creation of a nuisance, constituted a derogation from grant. It was also, in his words, 'conduct which is incompatible with the efficient management of the industrial estate' (the leases



expressly obliged the landlord to do whatever was reasonably incidental to the industrial estate's efficient operation). However, there remained the question of which of the landlord's breaches were 'repudiatory' and here the judge departed from the findings in the earlier cases. In his view the cases on contract law established that a 'repudiation' does not arise unless either the other party by his words or actions clearly indicates that he is not going to carry out the contract, or his actions deprive the complainant of 'substantially the whole benefit' which it was intended that he should have under the contract. Neither of these had been established in the case before him. Despite the landlord's agent's reprehensible behaviour in conniving at the breaches by the other tenants, at no time had it indicated an intention to abandon the leases. Furthermore, as regards the effect of the unjustified parking on the complainant, this was 'an irritant and minor interference with Fibreboard's business activities. There is no evidence that they lost even an hour's production as a result'. It had also been argued that the unjustified parking deterred potential new tenants taking on the complainant's lease after it moved its business to a new venue, but the expert evidence did not clearly substantiate this. Rather, it suggested that a major factor was a downturn in the market for such units.

No doubt the *Nynehead* decision will be greeted with some relief by landlords of multi-let properties. It is a salutary reminder that, even if the principles of ordinary contract law are to be applied to leases, they do not justify a tenant *rescinding* the lease simply because the landlord is in breach of his obligations. It must be a *repudiatory* breach, that is, one which is major and has a very serious effect on the tenant's business.

There remains, of course, the question of how far the English courts' recent approach to leases reflects Irish law. Notwithstanding the lack of any authority directly on the point, I believe that there are good grounds for thinking that the Irish courts would take the same approach. One reason is, of course, that arguably the theoretical difficulty initially faced by the English courts was removed in Ireland by the provision in section 3 of *Deasy's Act 1860*, founding the relationship of landlord and tenant on contract.[7] Another reason is that apart from *Deasy's Act*, the Irish courts have also in recent times seemed willing to apply contractual principles to leases. Thus, in *Nelville and Sons Ltd v Guardian Builders Ltd* ([1995] 1 ILRM 1), the Supreme Court accepted as correct the proposition that the doctrine of frustration of contract can apply to a lease.

So landlords in Ireland, particularly those involved in the management of multi-let properties, you have been warned! G

JCW Wylie is Professor of Law at Cardiff Law School and a consultant to solicitors A&L Goodbody.

Footnotes

1 *One obvious illustration of this is the extent to which a lease creates an exception to the traditional doctrine of privity of contract, that is, the rights and duties created by it are generally equally enforceable by and against the original parties' successors in title: see Wylie,* Landlord and tenant law *(Butterworths, second edition, 1998, chapter 21).*

2 *See also* Corkerry v Stack *([1947] 82 ILTR 60).*

3 *He cited cases like* CH Bailey Ltd v Memorial Enterprises Ltd *([1974] 1 WLR 728), especially at page 732 (per Lord Denning MR) and the House of Lords' decisions in* United Scientific Holdings Ltd v Burnley Borough Council *([1978] AC 904) and* National Carriers Ltd v Panalpina (Northern) Ltd *([1981] AC 675).*

4 *See Delaney,* Equity and the law of trusts in Ireland *(1996), chapter 16.*

5 *This distinction in the different forms of 'rescission' was decisively confirmed by the House of Lords in* Johnson v Agnew *([1980] AC 367) and recognised by Irish judges, see* Vandeleur v Dargan *([1981] ILRM 75) and* Taylor v Smyth *([1990] ILRM 377).*

6 *In fact, the landlord had gone into receivership and the plaintiff was the mortgagee which held a charge over the freehold of the site.*

7 *For discussion of this provision, see Wylie,* op cit, *chapter 2.*

Gazette reader survey 1998

Last December we invited readers of the *Gazette* to tell us what they really think of the magazine through our first-ever reader survey. Here, *Gazette* Editor Conal O'Boyle summarises the results

Two years ago saw the biggest shake-up in the long history of the *Law Society Gazette*. The magazine was refocused, redesigned and relaunched to meet the needs of a modern solicitors' profession. With its emphasis on sensible structure, attractive design and lively articles written in plain English, the magazine proved to be a hit with readers. In its first year it even won a number of awards.

While we were delighted with the reaction of readers to the new-style *Gazette*, we were also acutely aware that we had by no means achieved perfection. A magazine is something of a work-in-progress: we try to get things right, sometimes get it wrong, but can never afford to become complacent. That is why we decided to run our first-ever reader survey, which was contained in the December 1998 issue. It was a chance for you – the reader – to tell us what we are doing well and where we are going wrong.

The response rate to the survey was 1.4% of readers, which is about average for magazine surveys and, as you will see below, the overall reader response was very positive indeed. But there were also sufficient indicators to show that we must do more to make our articles more directly relevant to the profession in the future.

So thank you to everyone who took part in the exercise. We intend to repeat it this year and every year from now on so that we will have a constant yardstick against which to measure our progress in meeting our main objective – to produce a magazine that readers find useful, relevant and look forward to reading.

Profile of respondents

Q1: How long have you been in practice?
Most respondents had between one and five years' experience (29%), although those with between 15 and 20 years' (24%) and over 20 years' (16%) were well represented.

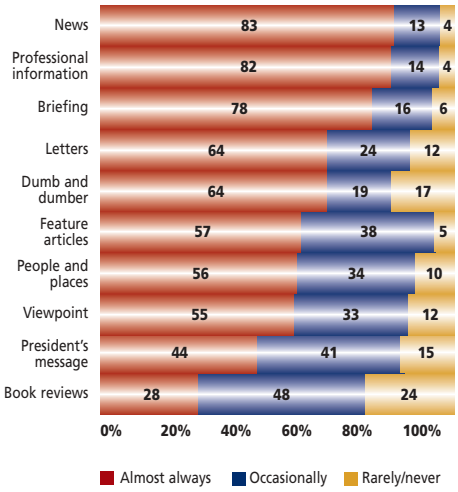


Figure 1: Frequency with which sections of the *Gazette* are read

Q2: How often do you read the *Gazette?*
Virtually all respondents (98%) said that they read every issue of the *Gazette.*

Q3: Does anyone else read your copy of the *Gazette?*
Almost three-quarters of the respondents said that no-one else reads their copy of the *Gazette*, with 19% saying that one other person reads their magazine and 7% saying that two others read their copy.

Readers' views on the *Gazette*

Q4: How often do you read each section?
For each of ten listed sections, respondents were asked to indicate how often they read each, using the scale: 'almost always', 'occasionally', 'rarely', and 'never'. **Figure 1** shows the results, ordered according to their popularity. The results for 'rarely' and 'never' are merged for the sake of simplicity.

Clearly, there is a huge difference in the frequency with which the sections are read and there is a certain amount of clustering. The most popular sections were *News*, *Professional information* and *Briefing*, with approximately 80% of respondents almost always reading these. There was a marked drop in frequency of reading for the *Letters* and *Dumb and dumber* sections, even though it should be pointed out that approximately two-thirds almost always read these. Feature articles, *People and places* and the *Viewpoint* section were equally popular, with over half of respondents almost always reading them. Next in popularity was the *President's message*, and by far the least popular was *Book reviews*.

One inference from these results might be that the most professionally updating, relevant and practical sections are the most popular. The less these elements apply to a section, the less frequently it is read. But it must be remembered that all but two of the listed sections were almost always read by over 55% of the respondents.

Q5: Indicate agreement or disagreement with statements listed
Respondents were asked to indicate their level of agreement with six statements describing the *Gazette*, using the scale: 'strongly agree', 'agree', 'no opinion', and 'disagree'. **Figure 2** illustrates the results, and statements are ordered

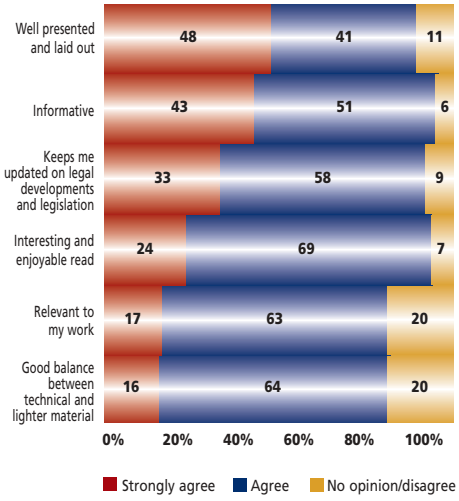


Figure 2: Level of agreement with statements listed

GAZETTE READER SURVEY: SUMMARY OF MAIN POINTS

- Virtually all respondents (98%) read each issue of the *Gazette*
- Up to 26% of readers' copies are read by one or two other people
- The most popular sections of the *Gazette* are *News, Professional information*, and *Briefing*
- Over half of respondents always read feature articles and *People and places*
- The item in the magazine least read by respondents is the *Book reviews* section
- The majority of respondents agree with all the positive statements about the *Gazette* – 48% 'strongly agree' that the *Gazette* is well presented and laid out, while 43% 'strongly agree' that it is informative. In most cases, fewer than 11% have no opinion or disagree with the statements
- When asked to rate coverage of topics listed, the response was very positive, with most respondents rating coverage of each item 'very well' or 'good'. 'Business and management issues' is the only item where over half of the respondents rated the *Gazette's* coverage as adequate or poor
- Over half of respondents rated the *Gazette* overall as 'very good' with 17.7% rating it 'excellent'. Only 10% of readers rate it average or below.

according to the level of agreement with them. As before, the results for 'no opinion' and 'disagree' are merged for the sake of clarity and due to low percentages.

The highest level of agreement was with the statements 'The *Gazette* is informative' and 'The *Gazette* is well presented and laid-out'. (On a strictly numerical basis, giving equal weight to each response, these statements received virtually identical levels of agreement.) While the proportion of respondents indicating that they agreed with the statements was consistently high (80-94%), the proportion 'strongly agreeing' varied considerably (16-48%).

It should be noted that the numbers indicating 'strong agreement' with the statement 'The *Gazette* is informative' (43%) contrasts to the number indicating 'strong agreement' with 'The *Gazette* is relevant to my work' (17%). However, in combining the statements 'strongly agree' and 'agree', 94% found the *Gazette* informative while 80% found it relevant to their work.

Q6: How well does the *Gazette* cover the topics listed?

Respondents were asked to grade the *Gazette* on how well it covered five listed topics, using the scale: 'very well', 'good', 'adequately' and 'poor'. **Figure 3** below summarises the results. As 'poor' was very rarely the response, it has been merged with 'adequately'.

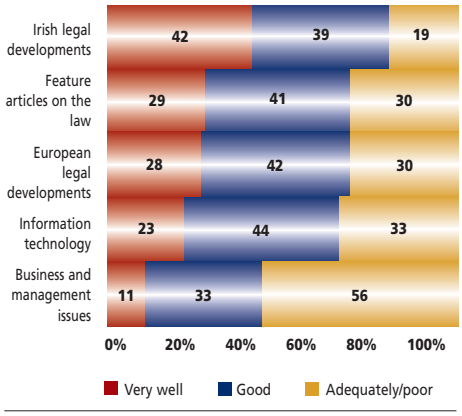


Figure 3: How well does the *Gazette* cover the topics listed?

Coverage of 'Irish legal developments' was viewed very highly. Coverage of 'feature articles on the law' and 'European legal developments' were also well graded, while the responses regarding 'information technology' are somewhat mixed. Clearly, in the opinion of the respondents, 'business and management issues' were not very well covered. However, it must be pointed out that across all topics, the proportion that felt that coverage was 'poor' never exceeded 10%.

Q7: Overall, how would you rate the *Gazette?*

When asked to give an overall rating for the *Gazette*, the responses were quite positive (as shown by **Figure 4**). Half of all respondents gave the rating 'very good' and more than one in six ticked 'excellent'. Just 5% felt that the *Gazette* was either 'poor' or 'fair'.

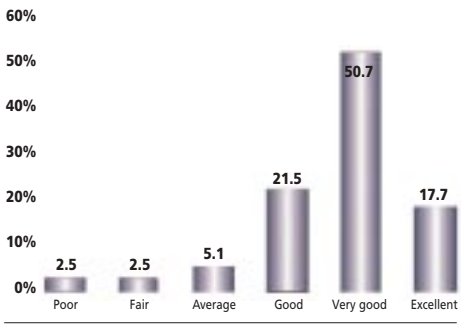


Figure 4: How would you rate the *Gazette?*

Q8: Indicate your opinion of the *Gazette* in a word or phrase?

When asked to indicate their opinion of the *Gazette* in a word or phrase, the vast majority of responses were positive (82%) while 14% were negative, and the remaining 4% mixed.

The majority of the negative opinions, of which there were very few, could be summarised as indicating that the *Gazette* was 'too glossy and/or light on practical legal articles'.

To summarise the results to this question, the positive comments were classified into six groups to represent distinct opinions, although some overlap was inevitable. The results are summarised in **Figure 5**. The labels describe

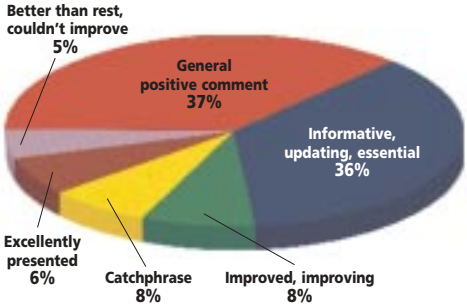


Figure 5: Indicate your opinion of the *Gazette* in a word or phrase

the types of comments within each group. The general positive comments were specific words and phrases such as 'good overall', 'excellent', 'positive', and so on. As is usual with such questions, some respondents take the advertising catch-phrase approach. This category included such opinions of the *Gazette* as 'Millennium-ready', 'a slice of legal life' and 'a forward publication that I look forward to'.

Thank you

Thank you again to all those who took the time to respond to this year's survey. I hope we can count on you to give us the benefit of your opinions in our next one too. For our part, we shall try to address the issues highlighted by the results and will continue working to improve the *Gazette* to make sure that it remains the definitive source of news and information for the legal profession. G

SURVEY PRIZE DRAW RESULTS

The first name out of the hat in the *Gazette* Reader Survey Prize Draw was Fergus Goodbody from Dublin 2, who wins a weekend for two in London. Five runners-up each won a bottle of Jameson's whiskey. They were: PJ Larkin, Booterstown, Co Dublin, John Dunne, Dublin 2, Suzanne Tucker, Dublin 2, Oliver O'Sullivan, Castlepollard, Co Westmeath, and Terence G O'Keeffe, Dublin 2. The winners will be contacted shortly.

Council report

Report on Council meeting held on 22 January 1999

Proposed designation of solicitors pursuant to section 32 of the *Criminal Justice Act, 1994*

John Fish updated the Council on the submission made by the CCBE task force to the European Commission regarding the Commission's proposal to extend the provisions of the *Money-laundering directive* to lawyers. He noted that the Law Society's sub-committee was also examining proposals made to their national governments by the Dutch and Danish bars on self-regulating procedures adopted in relation to money laundering in those jurisdictions.

First annual report of the Independent Adjudicator of the Law Society

The Council noted the first annual report of the Independent Adjudicator of the Law Society, which had been circulated. The President said that, under the *Solicitors (Adjudicator) Regulations 1997*, it was for the Society to furnish the Adjudicator's report to the Minister and to promulgate it to the public and to the solicitors' profession. The Council agreed that this should be done following consultation with the Independent Adjudicator.

(Apprentices' Fees) Regulations 1998

The President reported that the *(Apprentices' Fees) Regulations 1998* had been signed by the President of the High Court and would come into effect on 1 February 1999.

Law Clerks JLC

Gerard Doherty reported that a number of responses had been received to the letter to managing partners on the proposed pension scheme for solicitors' employees and these were currently being collated. Hugh O'Neill confirmed that the Employment Law Committee was also considering the matter.

Solicitors (Amendment) Bill, 1998

The Council approved the appointment of a working group to draft regulations and guidelines in anticipation of the enactment of the *Solicitors (Amendment) Bill, 1998*. The group will be chaired by John D Shaw and the members are David Martin, Niall Farrell, Michael V O'Mahony, Ken Murphy and Mary Keane, with the power to co-opt two additional members. The Director General confirmed that the Department of Justice believed that the Bill would be enacted before Easter.

Courts Service

The President reported that he had had a useful and interesting meeting with PJ Fitzpatrick, Chief Executive Designate of the Courts Service, together with the Director General and Deputy Director General Mary Keane. Mr Fitzpatrick clearly regarded the solicitors' profession as a vital user of the Courts Service, evidenced by his decision to meet the Society on his third day in office. He believed that the Courts Service might be formally established during the Long Vacation and had agreed to circulate a copy of the new *Courts Service newsletter* to the Society's members.

Insurance Bill, 1998

Deputy Director General Mary Keane briefed the Council on a meeting to be held with the Department of Enterprise, Trade and Employment, the Central Bank and the Department of Finance during the following week to discuss how the proposed *Insurance Bill, 1998* might apply to solicitors providing insurance services to their clients.

CCBE

The Society's representative on the CCBE, Geraldine Clarke, briefed the Council on the Paris Forum on Transnational Practice and the Plenary Session in Lyon in November 1998. The Council approved the appointment of John Fish to the Irish delegation to the CCBE.

Education Centre

The President reported that the first meeting of the Education Centre Development Board had been held on the previous day. He confirmed that the proposed façade of the building had been substantially altered and that the architects would be asked to produce a new model of the building for display purposes.

Action plan for the Council for 1999

The Council approved its action plan for 1999, as follows:

- Construction of Education Centre
- Revise *Solicitors Accounts Regulations*
- Launch web site
- Prepare solicitors for introduction of the euro
- Review, promote and enhance members' services
- Promote EU law and educate the profession
- Produce regulations on incorporation of solicitors' practices
- Consider draft discussion document on future of the profession
- Advance further plans for improving the Society's technology
- Improve working environment for executives and staff
- Encourage greater use by the profession of the building
- Consider report of the Council Development Review Group
- Adopt five-year financial plan 1999/2003
- Review Negligence Panel
- Consider structure of membership subscription
- Advance implementation of the *Establishment directive.*

Professional indemnity insurance: pool manager

The Council approved the appointment of William Fields as the Pool Manager under the *Professional Indemnity Insurance Regulations*.

Future of the profession: discussion document

A discussion document on the future of the profession had been circulated. Michael Irvine noted that the Future of the Profession Committee had been established in 1997, arising from a recommendation in the *Review Working Group Report*. He urged that the Council would view the document as a basis for debate, discussion and guidance, rather than agreed proposals requiring implementation. The President thanked Mr Irvine and the members of the committee for production of the discussion document, which would be considered at the March Council meeting.

Report on Council meeting held on 5 March 1999

Northern Ireland nominees

The President welcomed the extraordinary members of the Council from the Law Society of Northern Ireland, who were in attendance.

Motions for consideration at the April meeting

'That this Council approves the draft regulations providing for the establishment of a mandatory in-house complaints procedure in every firm of solicitors.'
Proposed: Francis D Daly
Seconded: John D Shaw

'Having regard to the UN Basic principles on the role of lawyers, *and the non-political concern expressed by the international legal community, that this Council supports the action taken by the International Bar Association in writing on 9 February 1999 to the Right Honourable Tony Blair MP and resolves to play its part by acceding to the request made to the Society by the International Bar Association to write to Mr Blair in like terms to seek to ensure that an independent judicial inquiry is carried out into the circumstances surrounding the murder of our late colleague Patrick Finucane.'*
Proposed: James MacGuill
Seconded: Anne Colley

'That this Council notes the discussion document on the future of the profession prepared pursuant to the Report of the Law Society Review Working Group *(1995) and resolves that it be made available to the profession and discussed with bar associations.'*
Proposed: Michael Irvine
Seconded: Anne Colley

Working Group on Eligibility for Appointment as Judges of the High and Supreme Courts

The Council warmly welcomed the *Report of the working group on eligibility for appointment as judges of the High and Supreme Courts* and, in particular, its recommendation that practising solicitors of not less than 12 years' standing and with ten years' litigation experience before the High and Supreme Courts should be qualified for appointment as judges of those courts.

The President noted that this report by a Government-established independent working group represented a major milestone on the road to eligibility of solicitors for all judicial appointments, something which had been a policy objective of the Society for many decades. He congratulated the Society's representatives on the working group.

Michael Carroll noted that the Society's submission to the working group had made no distinction between in-house solicitors and solicitors in private practice. The working group's recommendations favoured solicitors in private practice, in providing that in-house solicitors and solicitors in the public service would not be eligible for direct appointment to the High and Supreme Court bench, although five years' litigation experience as an in-house solicitor or solicitor in the public service would count towards the ten years required. He expressed disappointment with these recommendations from the point of view of in-house solicitors.

The Director General said that the group's recommendations represented a compromise reached after very lengthy discussion and negotiations. It had not proved possible to convince the group that all solicitors should be eligible for judicial appointment. The final recommendations were, in the view of the Society's representatives on the group, the very best result achievable in the circumstances.

Finance Bill, 1999

John Costello reported that the views of the Taxation Committee on certain provisions of the *Finance Bill, 1999* had been communicated in writing to the Minister for Finance. In particular, the committee had expressed its grave concerns regarding (a) the proposed disclosure of third-party information to authorised officers, with consequent implications for the principle of solicitor/client confidentiality, (b) the lack of adequate notice and appeals provisions, and (c) the lack of provision for compliance costs. The committee had also called for the appointment of an ombudsman. Hugh O'Neill said that the proposed legislation represented further inroads into the fundamental principle of confidentiality. John Harte urged that the Society would state its concerns publicly.

Younger Members Remuneration Survey

The President reported that the Society had engaged statistical consultants to review the conduct and results of the Younger Members Remuneration Survey. A further meeting with the consultants had been scheduled and it was hoped to have their analysis for consideration at the April Council meeting.

Web site launch

On behalf of the Council, the President congratulated all those involved in the launch of the Society's web site on 10 February. He reported that the site had been nominated by Ireland online as one of the top ten sites for March. G

PRACTICE NOTE

Clawback of stamp duty exemption/partial release

The Conveyancing Committee would like to bring the following letter to the attention of practitioners. It is a response to a query in relation to clawback of stamp duty exemption/partial release for new houses under the *Finance (No 2) Act, 1998:*

'Ms Vivienne Bradley
McCann FitzGerald
9 February 1999

Re: *Finance (No 2) Act, 1998 – stamp duty clawback*

Dear Ms Bradley,

I refer to your letter dated 22 January 1999, on behalf of the Law Society Conveyancing Committee, in relation to the stamp duty clawback provisions in the *Finance (No 2) Act, 1998.*

Under the *Finance (No 2) Act, 1998,* the stamp duty exemption/partial relief for new houses was limited to houses which are purchased by, or on behalf of, persons who will occupy them as their only or principal place of residence. The stamp duty will be clawed back if rent is derived from the house during the period of five years from the date of the purchase or until the sale of the house within the said five-year period, whichever event first occurs. The clawback is in the form of a fine, payable by the purchaser who originally obtained the benefit of the exemption/partial relief.

I can confirm that a subsequent purchaser of a house, where a clawback has arisen, has no responsibility in relation to the clawback and is under no obligation to Revenue to make any enquiries as to whether circumstances giving rise to such a clawback have arisen.

Seamus Carey, Assistant Principal, Stamp Duty Technical Unit'

Committee reports

CONVEYANCING

Undertakings: house in the course of construction – a reminder

The Conveyancing Committee would like to remind practitioners of the practice note published by the committee in the November 1990 issue of the *Gazette* and republished last September at page 5.10 of the new *Conveyancing handbook*. Once again, practitioners are reminded that a solicitor who gives a certificate of title undertakes to furnish an engineer's or architect's certificate that the property in question has been erected in accordance with the planning permission granted. In the case of a house in the course of construction, a solicitor cannot undertake this and where the lending institution is paying out the loan by instalments, the solicitor's undertaking to the lending institution should be amended accordingly. If the undertaking to the lending institution is not amended, and if a practitioner pays out a loan cheque or any instalment of a loan to his client before the house is completed, he is at risk if there is a failure by his client to comply with the planning permission granted.

Revenue Commissioners' requirement for bank guarantee for solicitors' cheques for stamp duty

The Conveyancing Committee is trying to find out what proportion of practising solicitors currently pay fees to banks in respect of the above bank guarantee which is required by the Revenue Commissioners in respect of solicitors' cheques for stamp duty. The committee has arranged to circularise the presidents and secretaries of bar associations around the country with this query. Practitioners may therefore send their response to the Law Society, either through their local bar association **or** directly to the secretary of the Conveyancing Committee at the Law Society. Please arrange to forward your response **before the end of April 1999**.

Depending on the response received, the committee may consider approaching the Revenue Commissioners to see if the requirement for the guarantee can be dispensed with or may consider some other recommendation to the practitioners in the matter.

Conveyancing Committee

LEGISLATION UPDATE: 1 JANUARY–15 MARCH

SELECTED STATUTORY INSTRUMENTS

Aliens (Amendment) (No 2) Order 1999
Number: SI 24/199
Contents note: Requires aliens who are in employment or entering into employment to have a work permit. States the grounds on which an immigration officer may refuse leave to land to an alien
Commencement date: 3/2/1999

Aliens (Visas) Order 1999
Number: SI 25/1999
Contents note: Specifies the states whose citizens are required to have transit visas, and the states whose citizens are exempt from Irish visa requirements
Commencement date: 3/2/1999

Companies (Forms) (Amendment) Order 1999
Number: SI 14/1999
Contents note: Gives effect to changes in the way foreign public documents are authenticated/legalised, arising from the ratification by Ireland and coming into force of the *Convention abolishing the legalisation of documents in the Member States of the European Communities*, the *European convention on the abolition of the legalisation of documents executed by diplomatic agents or consular officers*, and the *Hague convention abolishing the requirement of legalisation of foreign public documents*
Commencement date: 9/3/1999

Education Act, 1998 *(Commencement) Order 1999*
Number: SI 29/1999
Contents note: Appoints 5/2/1999 as the commencement date for ss2, 3, 4, 5, 6, 13, 25, 26, 36, 37 and parts VIII and IX of the Act

European Communities (Award of Contracts by Entities operating in the Water, Energy, Transport and Telecommunications Sectors) Regulations 1999
Number: SI 31/1999
Contents note: In awarding supply, works or service contracts, contracting entities shall apply procedures which are adapted to and comply with the provisions and relevant procedures of Council Directive 93/38/EEC (as last amended by European Parliament and Council Directive 98/4/EC)
Commencement date: 16/2/1999

Freedom of Information Act, 1997 *(Section 6(4)(b)) Regulations 1999*
Number: SI 46/1999
Contents note: Provide that requesters, having access to certain records of third parties by virtue of regulations made under section 28(6) of the *Freedom of Information Act, 1997*, may access such records created prior to the commencement of the *Freedom of Information Act*
Commencement date: 12/2/1999

Freedom of Information Act, 1997 *(Section 28(6)) Regulations 1999*
Number: SI 47/1999
Contents note: Prescribe the classes of individual whose records will be made available to parents and guardians, and the classes of requester to whom the records of deceased persons will be made available, having regard to relevant circumstances and to guidelines published by the Minister for Finance
Commencement date: 12/2/1999

Health Insurance Act, 1994 *(Commencement) Order 1999*
Number: SI 28/1999
Contents note: Appoints 4/2/1999 as the commencement date for ss12(1), 12(2), 12(3), 12(6), 12(7), 17, 19 and 34

Intoxicating Liquor Act, 1988 *(Age Card) Regulations 1999*
Number: SI 4/1999
Contents note: Provide for a voluntary, national age card scheme. Cards can be obtained by persons who have attained 18 years of age, in order to confirm that they have attained the legal age for the purchase of intoxicating liquor
Commencement date: 19/4/1999

Landlord and Tenant (Amendment) Act, 1980 *(Section 13(4)) Regulations 1999*
Number: SI 52/1999
Contents note: Extend the period of operation of section 13(3) of the *Landlord and Tenant (Amendment) Act, 1980* (inserted by the *Landlord and Tenant (Amendment) Act, 1989*) by five years

Organisation of Working Time (Public Holidays) Regulations 1999
Number: SI 10/1999
Contents note: Appoint 31/12/1999 to be a special public holiday in celebration of the Millennium

Parental Leave (Disputes and Appeals) Regulations 1999
Number: SI 6/1999
Contents note: Prescribe procedures to be followed in relation to the hearing of disputes and appeals by a rights commissioner or the Employment Appeals Tribunal under part IV of the *Parental Leave Act, 1998*. Also provide for matters incidental to the hearing of such disputes and appeals, including the contents of notices of dispute and appeal, notifications of decisions and determinations, the fixing of hearings and procedures at hearings and the awarding of costs and expenses
Commencement date: 20/1/1999

Parental Leave (Maximum Compensation) Regulations 1999
Number: SI 34/1999
Contents note: Prescribe the method of calculating maximum compensation for the purposes of redress under part IV of the *Parental Leave Act, 1998*
Commencement date: 10/2/1999

Rules of the Superior Courts (No 1) (Proof of Foreign Diplomatic, Consular and Public Documents) 1999
Number: SI 3/1999
Contents note: Insert additional parts VII, VIII and IX to order 39 of the *Rules of the superior courts* pursuant to the ratification of: the *Convention abolishing the legalisation of documents in the Member States of the European Communities*; the *European convention on the abolition of the legalisation of documents executed by diplomatic agents or consular officers*; and the *Hague convention abolishing the requirement of legalisation of foreign public documents*
Commencement date: 9/3/1999

Social Welfare Act, 1998 *(Part IV) (Commencement) Order 1999*
Number: SI 45/1999
Contents note: Appoints 5/2/1999 as the commencement date for part IV of the *Social Welfare Act, 1998*. Part IV of the Act provides for: the introduction of a new personal social service number (PSSN) which will replace the Revenue and Social Insurance (RSI) number and will be used as a unique identifier within the public service; the introduction of a public service card and a payment card; the sharing of information between specified bodies for the purposes of determining entitlement to certain social services and for the control of such services

Taxes Consolidation Act, 1997 *(Section 472B) (Commencement) Order 1999*
Number: SI 48/1999
Contents note: Appoints 17/2/1999 as the commencement date for s472B (inserted by s14(1)(b) of the *Finance Act, 1998*) of the *Taxes Consolidation Act, 1997*. Section 472B provides for a new annual tax allowance for seafarers who meet certain conditions

Western Development Commission Act, 1998 *(Establishment Day) Order 1999*
Number: SI 9/1999
Contents note: Appoints 1/2/1999 as the establishment day for the Western Development Commission

Prepared by the Law Society Library

Solicitors' Benevolent Association

135th Report and Accounts

Year 1 December 1997 to 30 November 1998

The Solicitors' Benevolent Association, founded in 1863, is the profession's voluntary charitable body. It consists of members of the profession throughout Ireland who contribute to our funds, and its aim is to assist members or former members of the profession and their spouses, widows, widowers, families and dependants who are in need. The association also provides advice and financial assistance on a confidential basis and functions independently of both law societies.

The amount paid out during the year in grants was IR£172,223. Currently there are 56 beneficiaries in receipt of regular grants. One third of these are aged 50 years or younger and they have approximately 60 dependant children between them.

The association is only in a position to provide beneficiaries with the bare necessities to live and the vast majority of applicants would be in receipt of social welfare assistance from the State. All cases are kept under regular review.

It has been the policy of the directors in recent years to provide financial assistance in suitable cases by way of loans repayable by the estate of the applicant or out of the proceeds of sale of any assets which he or she may have. Applicants are asked to complete documentation in acknowledgement of such loan and you will see that the repayment of some of these loans is included in this year's accounts for the first time.

The activities of the association are helped not only by individual or special subscriptions, but also by organised groups of the profession including bar associations and the Younger Members' Committee. There are currently 23 directors, three of whom reside in Northern Ireland, and they meet monthly in the Law Society's offices, Blackhall Place. They meet at Law Society House, Belfast, every other year. The work of the directors, who provide their services entirely on a voluntary basis, consists in the main of reviewing applications for grants. The directors also make themselves available to those who may need personal or professional advice.

The directors are grateful to both Law Societies for their support and, in particular, wish to express thanks to Laurence K Shields, Past President of the Law Society of Ireland; Antoinette Curran, Past President of the Law Society of Northern Ireland; Ken Murphy, Director General of the Law Society of Ireland; John Bailie, Chief Executive of the Law Society of Northern Ireland and all the personnel of both societies.

I wish to express particular appreciation to all those who contributed to the association when applying for their practising certificate, to those who made individual contributions and to the following:

Belfast Solicitors' Association, the Dublin Solicitors' Bar Association, the estate of William Brimage deceased, Faculty of Notaries Public, the Law Society, Irish Document Exchange, Kerry Law Society, Limavady Solicitors' Association, Ladies' Solicitors Golf Society, Local Authorities Solicitors' Association, publishers of the *Lawyers' desk diary*, Roscommon Bar Association, the Tipperary and Offaly Bar Association, Waterford Law Society, West Cork Bar Association, Younger Members' Committee.

To cover the ever greater demands on the association, additional subscriptions are more than welcome as, of course, are legacies, and I would urge all members of the association, when making their own wills, to leave a legacy to the association. You will find the appropriate wording of a bequest at page 30 of the *Law directory*.

I would like to thank all the directors and the association's secretary, Geraldine Pearse, for their valued hard work, dedication and assistance during the year.

Thomas A Menton, Chairman

RECEIPTS AND PAYMENTS ACCOUNT 1 DECEMBER 1997 TO 30 NOVEMBER 1998

	1998		1997	
Receipts	**IR£**	**IR£**	**IR£**	**IR£**
Subscriptions	164,503		133,157	
Donations	19,601		40,582	
Investment income	27,677		25,630	
Bank interest	3,414		451	
Tax refund	3,022		—	
Repayment of grants loaned	3,900		—	
		222,117		**199,820**
Payments				
Grants	175,223		188,083	
Bank charges	823		1,547	
Administration expenses	9,599	**185,645**	13,100	**(202,730)**
Surplus/(deficit) for year before Special events proceeds		36,472		(2,910))
Lawyers diaries 1997 and 1998	12,532		—	
Maracycle	1,205		—	
Irish conveyancing precedents publication	5,082		701	
Trial by Jury	5,500		—	
Library book sale	663	**24,982**	—	**701**
Surplus/(deficit) for year before legacies		61,454		(2,209)
Legacies		2,238		38,350
		63,692		**36,141**
Transfer to reserve account		(50,000)		—
Surplus for year		**13,692**		**36,141**

ACCOUNTING POLICIES

a) Accounting convention

The accounts have been prepared under the historical cost convention. The currency used in these accounts is the Irish pound as denoted by the symbol IR£.

b) Receipts and payments

Receipts and payments are recognised in the accounts as they are received and paid.

c) Investments

Investments are stated at cost less provision for any permanent diminution in value.

d) Sterling

Assets and liabilities denominated in sterling are converted to Irish pounds at the rate of exchange prevailing at the balance sheet date. Income and expenditure denominated in sterling are converted to Irish pounds at the average exchange rate prevailing during the year. The rates applicable for the year ended 30 November 1998 were:

	IR£	Stg£
• Year End	1	0.8895
• Average	1	0.8590

ACCOUNTANTS' REPORT

We have prepared the accounts set out above for the period 1 December 1997 to 30 November 1998 from the accounting records and information and explanations supplied to us. In our opinion, the accounts are in accordance therewith.

PricewaterhouseCoopers
Chartered Accountants and
Registered Auditors
Dublin

DIRECTORS AND OTHER INFORMATION

Chairman: Thomas A Menton
Deputy Chairman: John Sexton

Trustees (*ex officio* directors)
Brian K Overend
John M O'Connor
Andrew F Smyth

Directors
Sheena Beale, Dublin
Patrick J Daly, Galway
Desmond Doris, Belfast
Robert M Flynn, Cork
John Brian Garrett, Belfast
Colin Haddick, Newtownards
Gerald Hickey, Dublin
Carmel Jenkins, Ballina
Niall D Kennedy, Tipperary
Frank Lanigan, Carlow
Brendan J Lynch, Carrick-on-Shannon
Noelle Maguire, Dublin
Etta Nagle, Cork
Michael O'Connell, Tralee
John M O'Connor, Dublin
Sylvia O'Connor, Wexford
Brian K Overend, Dublin
Colm Price, Dublin
Tomas D Shaw, Mullingar
Andrew F Smyth, Dublin
Patrick F Treacy, Nenagh

Secretary
Geraldine Pearse

Bankers
AIB plc
37/38 Upper O'Connell Street
Dublin 1

First Trust
31/35 High Street
Belfast BT1 2AL

Stockbrokers
Bloxham Stockbrokers
2 - 3 Exchange Place
IFSC
Dublin 1

Auditors
PricewaterhouseCoopers
Chartered Accountants and
Registered Auditors
George's Quay
Dublin 2

Offices of the Association
Law Society of Ireland
Blackhall Place
Dublin 7

The Law Society of Northern Ireland
Law Society House
90/106 Victoria Street
Belfast BT1 3JZ

Personal injury judgments

Negligence – duty of care – bank customer on bank's premises

Case

John Coffey v Bank of Ireland, High Court, before Mrs Justice McGuinness, judgment of 23 January 1998.

The facts

John Coffey, a 40-year-old man, married with two children, received a loan of £2,000 from the Bank of Ireland. Over the period since the loan was taken out, some £3,000 was paid off. His ill and elderly father, as guarantor, had paid off £2,000. About £1,300 remained owing to the bank. Bank of Ireland had instituted proceedings against John Coffey and he was in danger of being committed to prison arising out of non-payment of the sum of about £1,300.

John Coffey visited the manager of his local branch of Bank of Ireland and asked to be given either his file or a copy of his file. The bank manager stated that he was unable to provide the information sought. On 8 December 1993, Mr Coffey visited the bank for the second time. He alleged that he again asked for a copy of his file and was refused. He became extremely stressed and left the bank, got petrol out of his car, and returned to the bank. He then asked for the file again and was refused again. He asked the bank manager whether this was his last word. The manager allegedly said it was. Mr Coffey then proceeded to pour petrol over himself and to stand with a cigarette lighter in his hand. He suffered burns. It was alleged that there was a certain time-lapse in relation to producing a fire extinguisher. Mr Coffey sued the Bank of Ireland for negligence. The bank denied negligence.

The judgment

McGuinness J considered that she must examine the case from the context of the duty of care the bank owed to a customer on the bank's own premises. She stated that one would expect the bank to have a duty of care, for example, to prevent people from tripping or slipping up on improperly-maintained floors and so on.

The judge referred to the case of *Donoghue v Stephenson* where Lord Atkin stated that the rule that you are to love your neighbour becomes, in law, that you must not injure your neighbour. In answer to the question 'who is my neighbour?', the reply was that a person must take reasonable care to avoid acts or omissions which such a person could reasonably foresee would be likely to injure persons who are so closely and directly affected that a person ought reasonably to have been in contemplation as being so affected.

The judge stated that she had to consider whether what had 'sparked off' Mr Coffey's action was reasonably foreseeable by the bank manager and the bank as a whole. The judge held that there was not a long delay between Mr Coffey pouring the petrol over himself and the action which was taken to deal with the situation. It was clear, according to the judge, that in the circumstances where the customer was about to be committed to prison by the bank, one could expect him to be distressed or even expect him to be angry or abusive. But it was not reasonably foreseeable that the customer would douse himself with petrol and threaten to set himself alight. In spite of the fact that she had considerable sympathy for Mr Coffey, who had suffered terrible and life-long injuries, McGuinness J considered that she must dismiss his case for damages against the bank.

The judge proceeded, *obiter*, to draw attention to the course of the relationship between the bank and John Coffey. She acknowledged that he owed money to the bank and he did not pay it. He had acted very foolishly in hiding his head in the sand, and not going in and talking to the bank and negotiating with them. Someone perhaps 'more privileged, more educated and more monied' would have the sense or knowledge to negotiate with the bank. John Coffey was a person without 'clout' and no background of dealing with banks.

The judge noted that it was common knowledge that banks found themselves from time to time in situations where they had lent large sums, sometimes to people who are not particularly good credit risks and, when there was a failure to repay, the banks sometimes reached a compromise for a much lesser sum than was owed, or indeed wrote sums off as bad debts. The judge noted that it would be rather rare to see one of these large debtors actually committed to prison. Yet, in the Coffey case, involving a comparatively trivial sum of money owed by a man of extremely small means, the bank seemed to have taken a decision to pursue the debt to the utmost. Twice they sought to have Mr Coffey committed to prison. The judge stated that one must be moved to ask whether this pursuit of the sum of £1,300 to the gates of Mountjoy was really necessary.

Counsel for the bank asked for costs. Counsel for Mr Coffey argued that his client's sense of grievance was evident to the court. He drew attention to the fact that from 1993 to the day he dies, Mr Coffey would be left with dreadful scars and a dreadful disability. Counsel referred to the judge's discretion on costs and in the light of the circumstances submitted that the judge should exercise her discretion in Mr Coffey's favour.

McGuinness J stated that, in the vast majority of cases, costs followed the event. In the particular circumstances of the case, she exercised her discretion and stated that she would not make any order as to costs.

Public liability – fall in department store – liability of owners of department store

Case

Catherine Molloy v Arnotts plc, High Court, before Mr Justice Barr, judgment of 2 July 1998.

The facts

One of the enjoyments of Catherine Molloy, a 78-year-old lady living in Kimmage, Dublin, was shopping in Dublin city centre. Her favourite shop was Arnotts Department Store in Henry Street, Dublin. Mrs Molloy had suffered heart trouble in 1981 and in 1984 was fitted with a pace-maker. She was prescribed anti-coagulant medication on a daily basis. She was otherwise in good physical condition for a lady of her age.

On 19 April 1995, Mrs Molloy and her friend Violet Fagan, a lady of similar age and disposition, took the bus to the city centre and, as usual, Arnotts in Henry Street was the focal point of their interest. Both ladies had lunch in the café on the first floor and then decided to visit the footwear section on the ground floor. While walking in the vicinity of the information desk near the scarves section, Mrs Molloy fell and suffered a displaced fracture of her left femur.

In evidence, Mrs Molloy stated that she and her companion were walking normally and at the information desk her foot got caught in the carpet nosing. The toe of her left shoe caught and she tripped. She tried to hold onto her friend but fell and landed on her side. She was wearing a T-bar strap shoe.

In evidence, Violet Fagan stated that she was 77 years of age and had been a friend of Mrs Molloy for nearly 50 years and that she had never known her to collapse. She confirmed that they were regular visitors to Arnotts

and that they went there two or three times a week.

Mrs Fagan stated that after her friend's shoe got caught in the carpet and had fallen, a lady came over and subsequently so did a nurse. The lady was Anne Warren from the nearby scarves section. There was evidence that at the time of the accident there were two floor managers within a few feet of where Mrs Molloy fell and who were aware that she, an elderly customer, had suffered injury but neither approached her. It was left to the first-aid worker to ascertain the identity and address of the injured party.

An ambulance arrived and Mrs Molloy was taken to the Mater Hospital. Mrs Fagan (the plaintiff's friend) was given a voucher for a free lunch in the restaurant. She returned the next day to avail of the lunch and had a discussion with staff in the area of where the accident happened. Mrs Fagan explained to them that her friend Mrs Molloy had caught her foot on the border of the carpet. In evidence, Mrs Fagan stated that she was told that a man had come and nailed down the nosing of the carpet and when she looked at it on the day after the accident it was in fact well nailed down. The raised area had gone.

Mrs Fagan stated that her friend Mrs Molloy was not the same person as she was before the accident. If they go out, they have to take a taxi and do not go shopping now. Mrs Molloy sued Arnotts for negligence.

Three witnesses gave evidence on behalf of Arnotts. Eamonn Galvin, who was a floor manager at the time, stated that the carpet nosing had not been altered to his knowledge since the accident. He confirmed in evidence that it was his function to ensure that the floor in the store was in a safe condition for patrons and others. Mr Galvin stated that the reason why Mrs Molloy fell was that she had collapsed and that there was no other explanation. Mr Galvin saw no defect in the flooring.

Ann Warren, the assistant manager in the scarves department, also gave evidence. She said that she saw Mrs Molloy fall as she was fixing scarves on a nearby stand. She was unable to explain how Mrs Molloy ended up on the carpet. To the best of her knowledge, Mrs Molloy's foot did not get trapped. She did not trip.

John O'Brien, the senior floor manager in Arnotts, also gave evidence. He did not see Mrs Molloy before she was lying on the floor. In evidence, he stated that he personally inspected the nosing of the carpet and there was no lip on it.

The judgment

Having outlined the facts of the case, Barr J stated that Mr Galvin, the floor manager for Arnotts, was endeavouring to establish that there was no relevant defect in the premises for which he would have responsibility. The judge stated that it emerged in evidence that Arnotts carried its own insurance and that both Mr O'Brien and Mr Galvin would have to accept responsibility to Arnotts if it transpired that the accident had been caused by a defect in the premises of which they ought to have been aware. The judge stated that, bearing in mind that the nosing was alleged to have been raised within feet of Mr O'Brien and Mr Galvin's own work station, it was probable that failure to notice such a defect, if it existed, would have been regarded as a serious lapse.

The judge stated that if the evidence given by Mr Galvin and Mr O'Brien was correct – that the carpet nosing was not defective in any way, and that Mrs Molloy had appeared to fall on the passageway of her own volition, that she had collapsed spontaneously – then three inescapable conclusions followed. First, two apparently respectable ladies of a conservative background had conspired to perpetrate a serious fraud on Arnotts. Secondly, that they had conspired and deliberately perjured themselves in evidence. Thirdly, Mrs Fagan (the plaintiff's friend) had aggravated the matter by deliberately lying about what she alleged she was told by members of staff and what she saw when she returned to the store on the following day, and did so with the intention of bolstering the fraud.

Having regard to the demeanour of the two ladies, the nature of their evidence and the manner in which they gave their testimony, Barr J rejected any such conclusion.

Barr J stated that there was no evidence to support the contention that Mrs Molloy had collapsed spontaneously. A concept of a brittle bone being responsible for the fall advanced as a possibility by the surgeon for Arnotts was emphatically rejected by the surgeon for Mrs Molloy. Barr J concluded that he had no doubt that Mrs Molloy and her friend Mrs Fagan had given an honest, truthful account of what had caused the accident. He was also satisfied that that there was no sustainable evidence of contributory negligence on the part of Mrs Molloy. He stated that there had been a defective nosing in the carpet and it would not have been readily apparent to elderly ladies.

Having noted that Mrs Molloy had suffered a major dislocation of her left femur which necessitated the fixation of a long plate, he accepted that she had suffered great pain from the injury. She was detained in the Mater Hospital for two weeks. Her convalescence was slow and the surgeon had stated that it did not unite for five months. She was transferred to the Orthopaedic Hospital at Clontarf where she remained as an in-patient for a further three months. The end result was that she had one-and-a-half inches of shortening of the left leg which necessitated a raise in her shoe. There was a wasting of the muscles, and she has a limp. Barr J held that she had suffered a permanent substantial residual disability and, in the view of the surgeon, her degree of locomotion had been severely compromised. Her confidence had suffered. She now walks with the aid of a stick and has difficulty in getting around. She cannot take a bath without help.

Barr J noted that her pre-accident shopping expeditions in the city were at an end. She was unable to travel by bus and must be conveyed in a motor car. He concluded that she had lost her independence and was deprived of many of the facets of life which gave her existence meaning and enjoyment prior to the accident.

In relation to damages, there were agreed special damages at £500. Barr J awarded £60,000 for pain, suffering and disablement to date and £30,000 for pain, suffering and continuing disablement in the future. This brought the total to £90,500. G

These judgments were summarised by Dr Eamonn Hall, Solicitor, from Doyle court reports of personal injury judgments.

ILT digest

of legislation and superior court decisions

Compiled by David P Boyle

ADMINISTRATIVE

Western Development Commission Act, 1998 (No 42 of 1998)

This Act was signed into law by the President on 25 November 1998.

Appropriations for coming year

The sum of £13,217,471,000 is intended to be appropriated for the purposes expressed in the schedule to the *Appropriation Bill*.

Appropriation Bill, 1998

AGRICULTURE

Plant Varieties (Proprietary Rights) (Amendment) Act, 1998 (No 41 of 1998)

This Act was signed into law by the President on 16 November 1998.

ANIMALS

Dog control measures

A set of regulations and an order:

- Consolidate and amend certain regulations on dog control
- Provide for special controls for certain breeds
- Provide for a system of collar identification to be worn by dogs generally
- Extend the scope of the 'on-the-spot' fine system, and
- Provide that the *Control of Dogs (Amendment) Act, 1992* comes into operation on 1 February 1999.

Control of Dogs Regulations 1998 and Control of Dogs (Amendment) Act, 1992 *(Commencement) Order 1998* (SI Nos 442 and 443 of 1998)

BANKING

Comptroller to investigate non-resident DIRT accounts affair

A Bill has been presented, and passed by Dáil Éireann, which seeks to:

- Allow the Comptroller and Auditor General to examine and investigate the assessment and collection by the Revenue Commissioners of income tax (deposit interest retention tax) which certain financial institutions were legally required to deduct from certain deposits of money held with them, and
- To amend the *Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act, 1997* and the *Comptroller and Auditor-General Act, 1923*.

Comptroller and Auditor General and Committees of the Houses of the Oireachtas (Special Provisions) Bill, 1998

Changes to rules concerning names on building society accounts?

A private member's Bill has been introduced which, if passed, will provide that:

- Where two or more persons jointly hold shares in a building society, they shall share equally those shares except where determined otherwise either by agreement between the parties or by a court
- Where two or more persons borrow jointly from a building society on foot of a mortgage, they shall be deemed joint borrowers except where determined otherwise either by agreement between the parties or by a court, and
- In both the cases of shareholders and borrowers, either of the parties may vote, demand from the building society a copy of annual accounts and they may determine among themselves the order in which they are named in the records of the society.

Building Societies (Amendment) Bill, 1998

CHILDREN

Children Act changes brought into operation

The following sections of the *Children Act, 1997* are brought into effect from 1 January 1999:

- S11, insofar as it inserts ss20-22 and 29 into the *Guardianship of Infants Act, 1964*, and
- Part III in its entirety.

Children Act, 1997 *(Commencement) Order 1998* (SI No 433 of 1998)

COMMERCIAL

Grant of *Mareva* injunction refused

- Where it is unlikely that a defendant will return to a foreign country and there is no evidence to establish such an intention, a *Mareva* injunction will be refused.

The plaintiffs alleged that the first-named defendant misappropriated monies from the first-named plaintiff and defrauded the second-named plaintiff. The plaintiffs sought a *Mareva* injunction restraining the defendants from disposing of their assets. In refusing the application, it was held that:

- The plaintiffs had shown a good arguable case that at least some monies had been misappropriated
- The plaintiffs misled the court on the amount claimed by £95,000
- It was unlikely that the defendants would voluntarily return to Belarus and there was no evidence to establish such an intention
- An undertaking as to damages had been given, but it was clear that the second-named plaintiff was insolvent
- The court must look very carefully at any application to ensure that it is justified on the principles set out in *O'Mahony v Horgan* ([1996] 1 ILRM 161) and the *Third Chandris Shipping Corporation v Unimarine SA* ([1979] QB 655).

Production Association Minsk Tractor Works and Belarus Equipment (Ireland) Ltd v Saenko (McCracken J), 25 February 1998

CRIMINAL

International War Crimes Tribunal Act, 1998 (No 40 of 1998)

This Act was signed into law by the President on 10 November 1998.

Torture convention to be ratified

A Bill has been presented which will allow the State to ratify the *United Nations convention against torture and other cruel, inhuman or degrading treatment or punishment* by ensuring that acts of torture as defined by the convention are offences under the domestic law. The new statutory offence of torture shall carry a maximum sentence of life imprisonment.

Criminal Justice (United Nations Convention Against Torture) Bill, 1998

Representation for complainant in rape cases?

A private member's Bill has been introduced which seeks to permit the complainant in a rape case to be legally represented where the defendant's lawyers wish to introduce material relating to the complainant's sexual history

Criminal Law (Rape) (Sexual Experience of Complainant) Bill, 1998

EDUCATION

Scholarship fund to be established

A Bill has been presented, and passed by Dáil Éireann, which seeks to establish a £2,000,000 scholarship fund in the USA to provide third-level scholarships to citizens of that country. The fund is to be known as the George Mitchell Scholarship Fund.

George Mitchell Scholarship Fund Bill, 1998

EMPLOYMENT

Force majeure leave form prescribed

The form of notice claiming *force majeure* leave under the *Parental Leave Act, 1998* to be given by an employee to his or her employer has been set out.

Parental Leave (Notice of Force Majeure *Leave) Regulations 1998* (SI No 454 of 1998)

ENERGY

Competition regime for electricity proposed

A Bill has been presented which aims to:

- Provide a regulatory framework for the introduction of competition in the generation and supply of electricity, and
- Establish an independent Commission for Electricity Regulation to license and regulate the generation and supply of electricity and to oversee access to transmission and distribution systems.

Electricity Regulation Bill, 1998

ENVIRONMENTAL

New established activities listed

An order specifies dates on or after which certain listed established activities are required to have applied to the EPA for an integrated pollution control licence.

Environmental Protection Agency Act, 1992 *(Established Activities) Order 1998* (SI No 460 of 1998)

FISHERIES

Changes proposed to aquaculture regime

A Bill has been presented which seeks to:

- Remove legal doubt concerning, firstly, the status of approximately 600 applications for aquaculture licences which are awaiting decision and, secondly, the status of approximately 160 licences granted between the enactment of the *Fisheries Act, 1980* and the coming into operation of the new aquaculture licensing provisions last year contained in the *Fisheries (Amendment) Act, 1997*
- Prohibit persons applying for aquaculture licences on or after 10 December 1998 from commencing operations pending the grant of a licence and to invalidate their applications if they breach that provision
- Strengthen ss12-14 of the *Foreshore Act, 1933* to deter unauthorised development and the deposit of unacceptable or harmful matter on the foreshore, and
- Provide greater flexibility for the Minister for the Marine and Natural Resources in the use or disposal of property vested in

him or her by virtue of the *Fishery Harbour Centres Act, 1968*.

Fisheries and Foreshore (Amendment) Bill, 1998

HEALTH AND SAFETY

Increased radiological protection

A Bill has been presented which aims to:

- Strengthen the licensing powers of the Radiological Protection Institute of Ireland relating to the use of x-ray equipment, and
- Elaborate the powers of the Minister for Public Enterprise to fix licence fees in respect of licences issued by the institute.

Radiological Protection (Amendment) Bill, 1998

Activity centre safety measures proposed

A private member's Bill has been introduced which seeks to provide for the regulation of centres and providers of facilities where children under the age of 18 engage in outdoor activities. If passed, the legislation would introduce a licensing system and impose requirements relating to safety.

Activity Centres (Young Persons' Water Safety) Bill, 1998

New night work provisions

New regulations provide, *inter alia*:

- That employers who employ night workers must carry out (for the purposes of the maximum hours of night work permitted under s16(2)(a) and (b) of the *Organisation of Working Time Act, 1997*) an assessment of the health and safety risks attaching to their work with a view to determining whether that work involves special hazards or a heavy mental or physical strain
- That employers whose night workers become ill or exhibit symptoms of ill-health as a result of night work must reassign such workers to day work suited to them wherever possible.

Safety, Health and Welfare at Work (Night Work and Shift Work) Regulations 1998 (SI No 485 of 1998)

Mineral water

New regulations, giving effect to Directive 96/70/EC (of 28 October 1996) update the labelling, treatment and trade requirements for natural mineral waters. New provisions for the treatment, labelling and microbiological requirements and conditions of exploitation of spring waters are also introduced.

European Communities (Natural Mineral Waters) (Amendment) Regulations 1998 (SI No 461 of 1998)

HEALTH SERVICES

Disability authority to be established

A Bill has been presented, and amended in committee, which seeks to establish, on a statutory basis, a National Disability Authority which will have the function of enabling disabled persons to exercise their economic, social, political and civil rights.

National Disability Authority Bill, 1998

HUMAN RIGHTS

Incorporation of measures into domestic law?

A private member's Bill has been introduced which seeks to:

- Make the *European convention on human rights* and its protocols part of the domestic law of the State
- Make a number of UN human rights conventions part of the domestic law
- Require the State to ratify a number of human rights instruments
- Establish a Human Rights Commission, and
- Implement the human rights provisions of the *Good Friday Agreement*.

Human Rights Bill, 1998

INQUESTS

Whether new inquest should be held

- Section 24 of the *Coroner's Act, 1962* empowers the Attorney General to order a new inquest regardless of whether or not the verdict of the first inquest has been quashed.

The respondent appealed an order of the High Court which quashed his decision to hold a second inquest into the defendant's death. The decision was quashed on the ground that s24 of the *Coroners Act, 1962* only empowered the respondent to order an inquest to be held when one had already taken place if the verdict in the first inquest had been quashed by the High Court. In refusing the relief sought, it was held that:

- An inquest was a purely fact-finding exercise and the verdict resulting from one could not impose civil or criminal liability of any sort on any person
- At common law, the High Court, in the exercise of its inherent supervisory jurisdiction over inferior tribunals, could set aside the verdict of an inquest in whole or in part. This jurisdiction to set aside extended to circumstances where there had been no error as to jurisdiction, no fraud on the part of the coroner and no error on the face of the record, but where there might have been some frailty in the course of proceedings, such as an error in law or a want of natural justice or fair procedures
- Where the verdict of an inquest was quashed, it was usual to order a fresh inquest and, accordingly, an order of *mandamus* could issue directing that a new inquest be held
- By implementing the 1962 Act, the Oireachtas had envisaged a major change in Irish law relating to inquests. Before the 1962 Act was enacted, there had been two serious defects in the law in this area. Firstly, there was no statutory machinery for calling for an inquest where none had been held and, second, there was no procedure for ensuring that a further inquest was held where new facts or evidence came to light which raised doubts as to the correctness of the earlier verdict
- It would not have been possible for the High Court to set aside an inquest verdict solely on the ground that new evidence had come to light which rendered a further inquest necessary or desirable. If the respondent was only empowered to order a new inquest when the verdict of the first inquest had been quashed, it would frustrate the clear intention of the Oireachtas to provide a remedy for situations where fresh evidence had come to light
- The High Court could set aside an exercise by the respondent of his powers under s24 of the 1962 Act where he had acted irrationally so as to justify the court intervening. The applicant had to establish that the respondent did not have before him any relevant material which would support his decision
- The court was satisfied that there were no materials before the respondent when he ordered the second inquest which would have justified him in completely reversing his earlier decision to the contrary
- Accordingly, the trial judge had been correct in law in granting the order of *certiorari* sought by the applicant.

Dr Farrell, Dublin City Coroner v Attorney General (Supreme Court), 20 November 1997

INSOLVENCY

Preparation of statement of affairs considered

- While the information provided by the directors could be of considerable value in the realisation and distribution of the assets of the company, it could never be suggested that a liquidator or receiver would rely exclusively upon it.

The plaintiff was the receiver of certain companies whose directors included the defendants. Following his appointment, the plaintiff requested a statement of affairs from the defendants pursuant to ss319 and 320 of the *Companies Act, 1963*. The statement was not submitted within 14 days. The plaintiff sought a mandatory injunction from the High Court compelling the defendants to submit the statement. The High Court granted the injunction and the statements were submitted. The defendants then sought the sum of £31,318.75 as costs incurred in making the statement. The receiver allowed the sum of £10,000. The defendants appealed to the High Court from the plaintiff's decision. The appeal was dismissed and the defendants then appealed to the Supreme Court as against the dismissal. They contended that, in the context of this case, it was not unreasonable for them to obtain independent verification of the statement of affairs. In dismissing the appeal, it was held that:

- The statement of affairs should be such as to enable the receiver to know what value the directors put on the assets and what they considered the liabilities of the companies at that time
- While the defendants were bound to act carefully and prudently in the preparation of the statement, they were not required to have expert opinions by outside experts as to the valuation
- The sections of the 1963 Act had to be construed and applied in the context that the persons to whom the information must be submitted would be experts and have access to any necessary additional expertise
- While the information provided by the directors could be of considerable value in the realisation and distribution of the assets of the company, it could never be suggested that a liquidator or receiver would rely exclusively upon it
- The only duty on those making the statement of affairs was to provide the information within their own knowledge as officers and servants of the company and to provide their estimate as to the realisable value thereof
- As the retention by the defendants of experts to advise them on the value of assets of the companies was unnecessary and unwarranted, the costs and expenses incurred thereby could not be considered reasonable
- The preparation of the statement required essentially clerical or administrative work, and did not involve the preparation of accounts
- The fee allowed by the plaintiff left no room for any additional fee to be allowed to the defendants in respect of any contribution which they might otherwise have made.

Somers v Kennedy (Supreme Court), 20 February 1998

INTELLECTUAL PROPERTY

Injunctive relief refused in passing off case

- Given the disparity in their respective economic 'muscle', if the plaintiff could be afforded a measure of protection pending the trial of the action without putting the defendant in the position of having, *inter alia*, to change its name and to effect other consequential changes, justice did not require that the injunctive sought should be granted.

The plaintiff was a limited liability company incorporated in the UK which traded under the name PC World. The plaintiff retailed, *inter alia*, a large range of computer hardware and software. Its first superstore in this jurisdiction was opened on 7 November 1997. The defendant was a company incorporated in Ireland in January 1997 to, *inter alia*, supply computer hardware and software. The plaintiff instituted proceedings, claiming that it had established a substantial goodwill and reputation in this jurisdiction in the name and mark PC World and that the defendant was passing off its business as that of the plaintiff. The defendant disputed that there was a serious issue to be tried and that the plaintiff had established a goodwill or reputation in the mark or name PC World in this jurisdiction prior to the commencement of trading by the defendant under that name. The defendant contended that by reason of the scale, personal nature and method of marketing of its business, there was no likelihood of confusion with the business of the plaintiff. In the interlocutory relief sought, it was held that:

- There was sufficient evidence before the court of sales to customers resident in this jurisdiction and advertising which was in circulation and capable of being received in this jurisdiction by the plaintiff prior to 1997
- The absence of affidavit evidence from members of the public expressly establishing exclusive association between the name PC World and the plaintiff was not fatal to the plaintiff's claim
- There was a serious issue to be tried that the name PC World was exclusively associated with the plaintiff's business in this jurisdiction prior to January 1997
- In most passing-off actions, damages were an inadequate remedy for a successful plaintiff (see *Mitchelstown Co-operative Agricultural Society Limited v Golden Vale Products Limited*, Costello J, 12 December 1985)
- Given the disparity in their respective economic 'muscle', if the plaintiff could be afforded a measure of protection pending the trial of the action without putting the defendant in the position of having to change its name and to effect other consequential changes, justice did not require that the injunctive relief sought should be granted
- There was no evidence before the court that the defendant had acted other than openly, properly in accordance with good commercial practice and *bona fide* at all times. Given that, and having regard to the nature of the defendant's business operation, the requirements of justice could be met by undertakings from the defendant.

DSG Retail Limited v PC World Limited (Laffoy J), 13 January 1998

INTERNATIONAL AID

Debt relief measures proposed

A Bill has been presented which aims to:

- Enable the Minister for Finance to make payments authorised by the government under the debt relief package announced on 16 September 1998 amounting to £31,500,000 over 12 years
- Provide for the adoption by the State of the *Proposed fourth amendment of the articles of agreement of the International Monetary Fund*, enabling the Central Bank to accept the one-time allocation of special drawings rights agreed by the IMF in 1997, and
- Guarantee the Central Bank against any losses it may incur under the Bank for International Settlements' facility in

favour of *Banco Central do Brazil*.

Bretton Woods Agreements (Amendment) Bill, 1998

LEGAL PROFESSION

Confidentiality considered

- The privilege of confidentiality belongs to the client, not the lawyer. It may be waived by the client, not the lawyer, but such waiver may be implied in certain circumstances as well as being express.

The plaintiff leased certain premises from B, a limited liability estate. In 1982, the plaintiff instituted proceedings against B, seeking injunctions to restrain alleged nuisance to his property, which nuisance was alleged to be permitted by B. The respondents were the solicitors acting for the plaintiff in that action. In July 1985, the plaintiff met C, a senior counsel. At the insistence of the plaintiff, the respondent agreed that C be briefed in the matter. Prior to the trial, negotiations between the parties took place and resulted in the execution of a consent order in settlement of those proceedings. The plaintiff sought damages for the alleged negligence and breach of duty of the respondent in the conduct and settlement of those proceedings. The plaintiff's claim was dismissed in the High Court. In dismissing the appeal, it was held that:

- A lawyer was under a duty not to communicate to any third party information entrusted to him by or on behalf of his lay client
- The privilege of confidentiality belonged to the client, not the lawyer. It could be waived by the client, not the lawyer, but such waiver could be implied in certain circumstances as well as being express
- Where a solicitor alone was sued, the barrister, if called by either party, could be compelled to give evidence as to his advices to the client and as to his advices to the solicitor
- There was no substance in the plaintiff's submission that the respondent should not have briefed C, as the respondent made it clear to the plaintiff that they did not wish to brief C but were overruled by the plaintiff and instructed to brief him
- Even if negligence had been established regarding terms of settlement in not providing that the action could be re-entered and continued if the settlement did not work out to P's satisfaction, no loss had been proved to have flowed from such omission
- In order to prove any loss or damage resulting from failure to provide a clause to re-enter the action if the settlement did not work out, the plaintiff would have to have proved that he would probably have succeeded in the re-entered action and obtained at least a significant portion of the relief claimed in it.

McMullen v Carty (Supreme Court), 27 January 1998

PLANNING AND DEVELOPMENT

Greater protection for 'special interest' buildings

A Bill has been presented which seeks to:

- Oblige planning authorities to compile a list of structures of special architectural, historical, archaeological, artistic, scientific, social or technical interest, which list will form part of the development plan for the area
- Require persons carrying out interior works to such buildings to obtain planning permission where such works would affect the character of the building
- Introduce fines of up to £1,000,000 on indictment for damaging such structures
- Oblige owners to ensure that protected structures are not damaged either through their actions or neglect
- Allow planning authorities to issue notices to owners requiring works to be carried out, including the removal of 'incongruous signs', even where these have been erected lawfully (although in such cases the authority will have to pay for such work), and
- Allow planning authorities to compulsorily purchase listed structures.

Local Government (Planning and Development) Bill, 1998

PRACTICE AND PROCEDURE

Privilege considered in application for further and better discovery

- It was not open to the court to decide on questions of privilege in the absence of having available to it particulars of the documentation in the possession of the defendant relating to the matter and without having particulars with regard to the nature of the privilege claimed in respect of each document.

On 6 December 1986, the deceased, a member of the Defence Forces, received injuries in the course of his duties resulting in death. The plaintiffs, the deceased's wife and children, instituted proceedings against the defendant claiming that the injuries were occasioned by the negligence of the defendant. Having been granted general discovery by the Master, the plaintiff sought further and better discovery in the High Court of, *inter alia*, documents and findings of both the United Nations inquiry and the court of inquiry held in this jurisdiction. The High Court refused the relief sought by the plaintiff and the plaintiff appealed that decision. In allowing the appeal, it was held that:

- It was not open to the court to decide on questions of privilege in the absence of having available to it particulars of the documentation in the possession of the defendant relating to the matter and without having particulars with regard to the nature of the privilege claimed in respect of each document
- It was not sufficient in the circumstances to claim general privilege in respect of bundles of documents or files. The onus was on the defendant to specify in detail each of the documents in their possession relating to the subject matter of the proceedings and to specify in detail the nature of the privilege claimed in respect of each document and the basis for such privilege
- The court was not ruling that these documents should be produced but it was ruling that they should have been enumerated and the basis of the privilege claimed in respect thereof be set forth.

O'Brien v Minister for Defence (Supreme Court), 7 July 1997

Issue of *forum non conveniens* considered

- In entertaining an application for a stay on the grounds of *forum non conveniens*, the defendant must satisfy the court that there is another forum to the jurisdiction of which he is amenable and in which justice can be done between the parties at substantially less inconvenience or expense.

The first-named plaintiff's purpose, *inter alia*, was to purchase steel from NLMK, a steel mill in Russia, and sell it on to the second-named plaintiff. In June 1997, the plaintiffs became concerned as loans owing by NLMK were increasing and NLMK's representative, L, had transferred shares in NLMK to another company controlled by himself and refused to renew the option agreement whereby the plaintiffs had an option to purchase same. The defendant, a private lim-

ited company, was alleged to be under the control of or substantially controlled by L. The plaintiffs alleged, *inter alia*, that the defendant refused to return the shares or renew the option agreement and, further, that the defendant was inducing or procuring breaches of contract between the second-named plaintiff and its customers. The defendant sought a stay on the proceedings on the basis of *forum non conveniens*. It claimed that NLMK's contractual arrangements with the first-named plaintiff were terminated and any dispute should be arbitrated in proceedings in Russia. In refusing a stay and granting an order for interlocutory relief, it was held that:

- S13(2) of the *Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988* provided that the seat of a corporation or association should be treated as its domicile. The defendant, incorporated under the law of Ireland, could be sued in the courts of Ireland
- The defendant had to satisfy the court that there was another forum to the jurisdiction of which it was amenable and in which justice could be done between the parties at substantially less inconvenience or expense
- The stay could not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the court
- Serious questions arose, *inter alia*, as to whether the defendant was liable in damages to the plaintiff
- Damages were not an adequate remedy in the present circumstances and, even if they were, the defendant had not demonstrated anything like a capacity to meet an award
- The balance of convenience was in favour of the plaintiff. In reaching this conclusion, account was taken of the plaintiff's submission that the undertaking as to damages would be given by the group as a whole.

Intermetal Group Limited and Trans-World (Steel) Limited v Worslade Trading Limited (O'Sullivan J), 12 December 1997

Public interest privilege considered in discovery application

- In ascertaining the parameters of public interest privilege, the appropriate test was whether the public interest in the relevant documents invoked outweighed the plaintiff's interest to have access to such documents as were necessary to enable him to prosecute fairly and properly the proceedings in court.

On 3 January 1993, the plaintiff, a detective sergeant, received confidential information from a reliable source. Subsequently, his superiors directed him to disclose the source of his information and he refused on the grounds that the information was strictly confidential. He alleged that as a result of this refusal he was notified of, *inter alia*, a decision to reallocate him. He appealed this decision to the board, which appeal was refused. The plaintiff then instituted proceedings against the defendant alleging breaches of natural and constitutional justice. These proceedings concerned an application by the plaintiff for the production of certain documents. The defendant objected to the production of these documents on the grounds of lack of relevance, public interest privilege and legal professional privilege. In allowing disclosure in respect of certain documents, it was held that:

- On the question of relevance, the appropriate test was whether the documents in issue contained information which either directly or indirectly enabled the party requiring the documents either to advance his own case or to damage the case of his opponent
- In ascertaining the parameters of public interest privilege, the appropriate test was whether the public interest in the relevant documents invoked outweighed the plaintiff's interest to have access to such documents as were necessary to enable him to prosecute fairly and properly the proceedings in court
- The public interest consideration of protecting the integrity and confidentiality of criminal and subversive investigations carried out by the police outweighed the plaintiff's interest to have the particular documents disclosed.

Hughes v Commissioner of An Garda Síochána (Laffoy J), 20 January 1998

REFUGEES

Commissioner to be allowed to delegate?

A private member's Bill has been introduced the purpose of which would be to allow the Refugee Applications Commissioner to delegate the performance of his or her functions to members of his or her staff.

Refugee (Amendment) Bill, 1998

SCIENCE AND TECHNOLOGY

Changes to fund

A Bill has been presented which seeks to:

- Increase payments into the fund established by the *Scientific and Technological Education (Investment) Fund Act, 1997* from £100,000,000 to £130,000,000 for the financial year 1998, and
- Extend the areas of research and development for which payments out of the fund may be made.

Scientific and Technological Education (Investment) Fund (Amendment) Bill, 1998

SUCCESSION

Section 117 application refused

- The maxim 'equality is equity' can have no application under s117 of the *Succession Act, 1965* where the testator has disregarded the special needs of one of the children to such an extent that he could be said to have failed in his moral duty to that child.

The plaintiff instituted proceedings under s117 of the *Succession Act, 1965* claiming that the testatrix had failed in her moral duty to make proper provision for the plaintiff in accordance with her means by her will and sought to claim under the mechanism of s117 to obtain provision for his children. The plaintiff was one of four children of the marriage between the testatrix and the plaintiff's father. The plaintiff had completed a university degree with his father's assistance and now lived in a house which was given to him and his sister by his father. The plaintiff, who was married with three children, developed a severe problem with drink in the mid-1980s which persisted until 1993. He gave evidence that he had not taken any alcohol since the death of the testatrix. After the plaintiff's father's death, the testatrix gave an *inter vivos* gift of shares valuing approximately £275,000 for each child. The plaintiff soon dissipated his sum of £275,000. In her will, the testatrix left the residue of her property to a number of charities. At the date of the death of the testatrix, the plaintiff's three sisters were all comfortably off. The plaintiff claimed that, having regard to his circumstances at the date of the death of the testatrix, she should have made provision for him and his children at the expense of the other beneficiaries, that is, the charities. In dismissing the appeal, it was held that:

- It was not necessarily an answer to an application under s117 that the testator had simply treated all his or her children equally. The maxim 'equality is equity' could have no application where the testator had disregarded the special needs of one of the children to such an extent that he could be said to have failed in his moral

duty to that child
- The test to be applied was whether the decision by the testatrix to make no further provision for the plaintiff in her will constituted a breach of her moral duty to the plaintiff and the date at which the relevant factors must be considered was the date of death of the deceased
- In the circumstances, a reasonable and concerned parent could have decided that, since the provision of significant financial assistance to the plaintiff had not in the past produced the best results, it might not have been in his own interest to provide him with further funds, even through the mechanism of a trust
- The apparent needs of the plaintiff's children were not a factor which would justify the court in the present case in setting aside the findings of the High Court judge
- It was desirable in every case, whether it arose by way of a construction summons or an application under s117 where the interests of charities could be materially affected, that the Attorney General be given notice of the proceedings.

EB v SS and GMcC (Supreme Court), 10 February 1998

TAXATION

Provision made for VAT invoices and the euro

New regulations provide that amounts specified in VAT invoices must be expressed in a denomination of the State's currency and the appropriate symbol must be used to identify which denomination (that is, Irish pounds or euros) is being used. It is also permitted for the amount to be shown in both denominations, provided the appropriate symbols are used.

Value-Added Tax (Electronic Data Exchange and Storage) (Amendment) Regulations 1998 and *Value-Added Tax (Invoices and Other Documents) (Amendment) Regulations 1998* (SI Nos 488 and 489 of 1998)

TELECOMMUNICATIONS

Licensing exemption for CB radios

An order has been made which exempts from the licensing requirements of the *Wireless Telegraphy Act, 1926* citizens' band or CB radio systems which are both type approved and which comply with all other technical specifications laid down in the order.

Wireless Telegraphy Act, 1926 *(Section 3) (Exemption of Citizens' Band (CB) Radios) Order 1998* (SI No 436 of 1998)

TRANSPORT

Carriage of Dangerous Goods by Road Bill, 1998

This Bill has been passed by both Houses of the Oireachtas.

Roadworthiness testing rules introduced

New regulations require roadworthiness tests on certain mechanically propelled vehicles. The regulations:
- Provide that vehicles to which they apply may not be used in a public place without displaying a valid test disc relating to a valid certificate of roadworthiness issued following upon a test duly carried out
- Apply to passenger vehicles with a maximum of eight seats excluding the driver's seat and having a maximum gross design vehicle weight of 3,500 kgs
- Apply to such vehicles having their date of first registration (irrespective of the place of first registration) on or before 31 December 1991 from the anniversary of such registration which occurs in 2000
- Apply to such vehicles having their date of first registration (irrespective of the place of first registration) between 1 January 1992 and 31 December 1996 from the anniversary of such registration which occurs in 2001
- Apply to such vehicles having their date of first registration (irrespective of the place of first registration) after 1 January 1997 from the anniversary of such registration which occurs in 2002 or the fourth anniversary of such registration, whichever is the latter
- Provide that any vehicle to which the regulations apply must be re-tested on the next biennial of first registration occurring after the date of first issue of a certificate of roadworthiness
- Specify that the fee for a test shall be £35 and for a re-test shall be £19.80, and
- Provide that tests shall be carried out by the National Car Testing Service Limited.

Road Traffic (Car Testing) Regulations 1998 (SI No 481 of 1998) G

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News from the EU and International Affairs Committee

Edited by TP Kennedy, Legal Education Co-ordinator, Law Society of Ireland

Expulsion for life from a Member State contrary to EC law

Donatella Calfa (Case 348/96), judgment of 19 January 1999. Donatella Calfa is an Italian national. While staying as a tourist in Crete, she was charged with possession of prohibited drugs. She was convicted of an offence under Greek law and sentenced to three months' imprisonment. She was also expelled for life from Greece.

The Greek law on drugs provides that when a foreign national is convicted of a breach of the law, the court must order his expulsion from Greece for life unless there are compelling reasons, in particular family reasons, for not doing so. The expulsion order can only be revoked by a decision of the Minister for Justice after a minimum period of three years. In contrast, Greek nationals cannot be subject to an expulsion order. At most, in the event of a serious crime (one with a penalty of at least five years' imprisonment), they can be forbidden from residing in certain parts of Greece for a period not exceeding five years.

Ms Calfa appealed to the Greek Supreme Court which made a preliminary reference under article 177 to the ECJ. The court held that Ms Calfa was the recipient of a service. It pointed out that tourists are free to travel to another Member State in order to receive services there, without restrictions. Though criminal legislation is primarily a matter for Member States, it must not restrict the fundamental freedoms guaranteed by EU law.

The ECJ held that expulsion for life was an obstacle to the free movement of services, one of the fundamental freedoms. The court then moved on to consider whether the penalty could be justified on grounds of public policy. In previous decisions, this had been interpreted to refer to 'a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society'. On this basis, a Member State could consider drugs a danger for society justifying special measures against foreign nationals. However, the court emphasised that the public policy exception, as with any derogation from a fundamental rule of the treaty, must be interpreted restrictively. Public policy measures require an assessment of the personal conduct of the individual (Directive 64/221). The fact of a criminal conviction is insufficient. In Greece, expulsion for life is imposed automatically following a criminal conviction.

The court concluded that the legislation was an obstacle to the free movement of persons and could not be justified on grounds of public policy. G

Indirect discrimination

The Queen v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez (Case 167/97), judgment of 9 February 1999. Ms Seymour-Smith and Ms Perez worked in the United Kingdom from February 1990 to May 1991, when they were dismissed. They complained to the Industrial Tribunal that they had been unfairly dismissed and sought compensation. The tribunal refused to consider their claims as the UK *Employment Consolidation Act 1978* affords protection against unfair dismissal only after a qualifying period of two years' continuous employment.

They challenged the legality of the qualifying period on the grounds that it was incompatible with EU law. They argued that these rules discriminated against women. Statistics were produced showing that the proportion of women with two years' employment is lower than the proportion of men satisfying the requirement. On appeal, the House of Lords stayed the proceedings and referred several questions to the ECJ for a preliminary ruling under article 177.

The ECJ held that a judicial award of compensation for unfair dismissal can be considered 'pay' under EU law. Thus, it is governed by the EU law principle of equal pay for men and women. The court then moved to consider whether the UK legislation did indirectly discriminate between men and women. It held that the best approach was to compare the proportions of men and women able to satisfy the two-year requirement with those unable to do so and to compare those figures with the number of women in the workforce. The court said that it is for the national court hearing the case to assess the relevance and validity of the statistics, the degree of disparity and the length of time the disparity has existed.

It is also for the national court to consider whether a rule with a more detrimental impact on women than men is justified by objective reasons unrelated to any discrimination based on sex. The court dismissed a submission that the disputed rule was designed to encourage recruitment by limiting the risk that employers will be exposed to proceedings for unfair dismissal brought by employees who have only recently been engaged. The court said that this argument was a mere generalisation and was not objective justification for measures that may be regarded as discriminatory. G

Designations of origin

Consorzio per la tutela del Formaggio Gorgonzola v Käserei Champignon Hofmeister GmbH & Co v KG, Eduard Bracharz GmbH (Case 87/97), judgment of 4 March 1999. The designation 'Gorgonzola' has been protected in Austria since 1951, most recently under EC regulations concerning the registration of geographical indications and designations of origin. Since 1983, a soft cheese manufactured in Germany has been sold in Austria under the trade mark 'Cambozola'.

The applicants applied to the Austrian courts for an order prohibiting the marketing of the cheese in Austria under that name. The Commercial Court in Vienna referred the matter to the ECJ.

The ECJ held that the regulations guarantee that designations of origin will be protected against all 'evocations'. This covers the situation where a term used to indicate a product reproduces part of a protected designation and has the same number of syllables, and where a consumer is likely to associate the term with the product whose designation is protected. On this basis, 'Cambozola', used for a cheese, may be regarded as an evocation of the designation 'Gorgonzola'. However, it is for the national court to determine whether the requisite conditions are satisfied for allowing use of the trade mark 'Cambozola' to continue, despite the fact that it is an evocation and in principle prohibited.

The trade mark was registered before the entry into force of the EU protection of the designation 'Gorgonzola'. To allow its use to continue, its initial registration must have been made in good faith and its use must not be liable to deceive the public.

The court held that the application of those criteria fell outside its jurisdiction. It did point out that the fact of an evocation did not necessarily mean that the public was likely to be confused. G

RECENT DEVELOPMENTS IN EUROPEAN LAW

CONSUMER LAW

Package holidays directive

AFS Intercultural Programs Finland ry v Kuluttajavirasto (Case 237/970, judgment of 11 February 1999. AFS is a non-profit-making Finnish association which co-ordinates international student exchanges. Twice a year it sends students abroad for a period of six to 11 months. The students attend school in the host state and lodge with families who accommodate them free of charge. In late 1995, the Finnish Consumer Protection Office informed AFS that it considered the exchange programmes to be comparable with a package travel business. It asked AFS to register in the register of package travel businesses within one month. AFS failed to do so. It claimed that it was not a package travel organiser within the meaning of Directive 90/314/EEC on package holidays. The Finnish court referred the matter to the ECJ asking whether the directive applied to student exchanges of six months' or one year's duration with an educational purpose and free accommodation. The ECJ looked to article 2(1) of the directive which defines a package as comprising a pre-arranged combination of not fewer than two of the following elements: transport, accommodation and other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package. AFS organises travel on scheduled flights and thus met the transport element. The court held that a period spent with a host family being treated as a member of that family could not be described as 'accommodation' within the directive. It also concluded that there were no other tourist services. Selection of educational establishments or host families did not qualify. Thus, AFS did not come within the terms of the directive.

DIRECT EFFECT

Regulations

Consorzio del Prosciutto di Parma v Asda Stores Ltd, 4 December 1998, Court of Appeal (England). A food-processing company obtained supplies of ham produced in Italy. It sliced and packaged the ham and resold it to Asda. The plaintiff is an organisation of Italian ham producers with responsibility under Italian law for enforcing the rules relating to the marketing of Parma ham. They took action on regulations 1107/96 and 2081/92. These regulations impose restrictions on the misleading use of statements of the geographic and other origins of agricultural products intended for human consumption. 'Protected designations of origin' can be obtained by a registration process whereby a specification is provided to obtain registration. The regulations included a discretionary procedure for verification. This had not been followed in this case. The English Court of Appeal held that the regulation was not directly effective. It was insufficiently clear and precise. The court held that a structure where verification was not mandatory and where there was no register for specifications could not be regarded as conferring directly-enforceable monopoly rights. The court also noted that the designation of origin was one of about 300 submitted by Member States. As there was no central register, there was no source from which Asda could quickly and cheaply have learnt of any prohibition on slicing and packaging. This opaqueness further prevented the regulations from having direct effect.

EMPLOYMENT

Transfer of undertakings

Francisco Hernández Vidal SA v Prudencia Gómez Pérez and Others (Cases 127/96, 229/96 to 74/97), judgment of 10 December 1998. The ECJ held that the *Transfer of undertakings directive* (77/187/EEC) applied to a situation where cleaning was formerly carried out on contract but the contractor terminates the contract and decides to carry out the cleaning itself in the future. However, the transfer of the cleaning operation must also be accompanied by the transfer of an economic entity between the cleaning service and the contractor. The term 'economic entity' refers to an organised grouping of persons and assets enabling an economic activity which pursues a particular objective to be exercised. The fact that the maintenance work first carried out by the cleaning firm and then by the undertaking owning the premises does not justify the conclusion that such a transfer of an entity has taken place.

FREE MOVEMENT OF GOODS

Export of livestock

R v Chief Constable of Sussex, ex parte International Trader's Ferry [1999] 1 All ER 129. ITF is a trade association for exporters of livestock. It had an agreement with the port of Shoreham for the use of a berth and subsequently chartered a vessel. There were significant demonstrations by animal rights activists. For two weeks, 1,125 police officers were present at each sailing. Following a fall in the number of protestors, the police numbers were progressively reduced. In April 1995, the chief constable informed ITF that the only policing provided would take place on two consecutive days a week, excluding Fridays, weekends and bank holidays. This made it difficult for sailings to take place, and by June 1996 ITF had ceased trading. ITF sought to quash the decision of the chief constable and also claimed damages for loss of business. One of the arguments advanced was that the decision of the chief constable was a measure on the part of the state equivalent

to a ban on exports, prohibited by article 34. The majority of the House of Lords resolved the matter on an analysis of article 36, which allows for derogations from article 34 on grounds of public policy. Lord Slynn (with Lords Nolan and Cooke concurring) held that article 36 was applicable. They held that the chief constable could establish that his decision was suitable, necessary and not disproportionate to the restrictions which it involved, taking into account the resources available to him. He had acted proportionately and had taken steps to deal with violent demonstrators. Limiting protection afterwards was not disproportionate, given the other demands on police resources. They distinguished the ECJ decision in *Commission v France* as in that case the French authorities had been guilty of manifest and persistent failure to prevent French farmers from preventing imports. Lord Hoffman found against ITF on the ground that article 5 was not directly effective. This is the article which requires Member States to take positive steps to ensure compliance with their treaty obligations. Thus, a Member State was not under any directly effective obligation to take steps under article 34 to assist an exporter.

Restrictions on imports

Österreichische Unilever GmbH v Smithkline Beecham Markenartikel GmbH (Case 77/97), 28 January 1999. Smithkline manufactures toothpaste in Germany and exports it to Austria. Austrian law prohibited the marketing of foodstuffs which made misleading claims to prevent or cure illness. OU, a competitor, sought an injunction against the marketing of the toothpaste in Austria. Smithkline in its advertising stated that its toothpaste (Odol-Med 3) helped to prevent plaque and to remove tartar. Smithkline argued that it was entitled to make these claims in its marketing under article 30 and that the exceptions in article 36 for public health and public policy did not apply to the Austrian legislature. The ECJ held it was open to Austria to rely on article 36. However, the Austrian law was disproportionate as it went further than necessary to protect public health. A disproportionate public health measure cannot be justified under article 36.

INTELLECTUAL PROPERTY

Patents

The European Commission has recently issued a policy communication outlining a series of measures which it will be adopting to improve patent protection in the EU (IP/99/15). The first of these is a proposed regulation to create an EU patent, which would be valid throughout the EU based on a single application. This system would coexist with patents issued by national offices and the European Patent Office. The second proposal is for a directive to harmonise the conditions for the patentability of inventions related to computer programs. The third is for a Commission communication clarifying how patent agents can benefit from EU rules on freedom of establishment and freedom to provide services.

LITIGATION

Preliminary references to the ECJ

Victoria Film A/S (Case 134/97), judgment of 12 November 1998. The court held that a Swedish tax body, the Skatterättsnämnden, was not a court or tribunal within the meaning of article 177 of the treaty. There were some factors which pointed to the Swedish body performing a judicial function. It was independent and it had the power to deliver binding decisions in applying rules of law. However, there were other factors leading to the conclusion that it performed an administrative function. The body could be called upon by a taxable person to give a preliminary decision on matters of taxation. Such an application could be made even when the taxpayer's situation had not been the subject of any decision by the tax authorities. Its function was not, therefore, to review the legality of the decisions of the tax authorities but rather to adopt a view, for the first time, on how a specific transaction was to be addressed by tax. In the giving of such preliminary rulings, it performed a non-judicial function. It was only where the taxpayer brought an action challenging a preliminary decision that the court or tribunal before which the matter was brought could for the purpose of article 177 be regarded as performing a judicial function.

Conferences and seminars

Academy of European Law
Contact: (Tel: 0049 651 937370)

Topic: *Judicial remedies at the crossroads between Community and national law*
Date: 16 April
Venue: Brussels, Belgium

Topic: *The increasing role of the European Parliament in the field of environmental law after the* Treaty of Amsterdam
Date: 19-20 April
Venue: Copenhagen, Denmark

Topic: *Interaction between double-taxation conventions and the rulings of the ECJ on fundamental freedoms*
Date: 26-27 April
Venue: Trier, Germany

Topic: *Current developments in Community law*
Date: 3-4 May
Venue: Trier, Germany

Topic: *The future of professional associations in the single market*
Date: 17-18 May
Venue: Trier, Germany

Topic: *Consumer protection in the field of banking law*
Date: 27-28 May
Venue: Trier, Germany

AIJA (International Association of Young Lawyers)
Contact: Gerard Coll
(tel: 01 667 5111)

Topic: *Outsourcing: legal and transactional aspects*
Date: 6-9 May
Venue: Estoril, Portugal

Topic: *Tourism law*
Date: 24-27 June
Venue: Capri, Italy

Topic: *Annual congress*
Date: 22-27 August
Venue: Brussels, Belgium

Topic: *Private-public partnership*
Date: 20-21 November
Venue: Warsaw, Poland

European Lawyers' Union
Contact: Antonio Debiasi or Laura Agopyan (tel: 0039 2 783341)

Topic: *Antitrust between the EC law and national law*
Date: 13-14 May
Venue: Treviso, Italy

Contact: Klaus-Ullrich Link
(tel: 0049 711 4897923)

Topic: *Setting up companies in the European Union*
Date: 17-18 June
Venue: Dresden, Germany

Contact: Gérard Abitbol
(tel: 0033 0491 338195)

Topic: *European social law*
Date: 15 October
Venue: Marseilles, France

IBC
Contact: Scott Forbes
(tel: 0044 171 4535495)

Topic: *European air transport services and airports*
Date: 10-11 June
Venue: Brussels, Belgium

IIR
Contact: Scott Forbes
(tel: 0044 171 4535495)

Topic: *International patent law in the pharmaceutical industry*
Date: 21 June
Venue: London, England

Law Society of Scotland
Contact: (Tel: 0044 141 5531930)
Topic: *50th anniversary conference*
Date: 8-10 July

Solicitors' European Group
Contact: (Tel: 0044 1905 724734)

Topic: *The new* Merger rules *one year on and other recent developments*
Date: 18 May
Venue: London, England

Topic: *Annual conference*
Date: 20-22 May
Venue: Lille, France

Topic: *Public procurement policy in the Community*
Date: 16 June
Venue: London, England

Topic: *Broadcasting, pay-per-view and sports competition law*
Date: 6 July
Venue: London, England

OBITUARY

Noel C Ryan, Director General of the Law Society of Ireland (1990-1994)

Noel gently passed away on Monday 15 March 1999, the evening before the Cheltenham Festival, with the funeral mass taking place on Cheltenham Gold Cup day. How ironic – and yet how appropriate – for the chief executive of the Irish Horseracing Authority (IHA) that he should take his leave of us during that week of all weeks for those who enjoy racing, as Noel surely did.

When Noel decided at the end of 1994 that he would move from the maelstrom of the Law Society to the equal maelstrom of the IHA – in effect, to turn his pastime into his occupation – it was perceived to be the Society's loss and the IHA's gain. However, in hindsight, both institutions were winners. The Society had the dynamic services of a consummate and enthusiastic administrator for a critical four-year period of transition in its financial and administrative structures, as well as in its legal framework as wrought by the *Solicitors (Amendment) Act, 1994*. The IHA also, as it turned out, had Noel at the helm for a similar four-year period as the legal and administrative structure of Irish racing was being transformed.

Noel's *curriculum vitae* might be encapsulated as 30 years in the public service followed by eight years shared between the Society and the IHA. When his public service career is reviewed more closely, however, Noel is seen as constantly on the move, ever upwards, from one area of achievement to another, never willing to rest on his laurels but always seeking the next challenge – from the Departments of Defence to Finance to Public Service to Justice and finally to Foreign Affairs, under whose aegis he served just five years with the Secretariat at Maryfield (Belfast), established under the Anglo-Irish agreement of November 1985. In the midst of that public service career he found time to obtain a first class honours BCL degree (UCD, 1978) and to become a barrister-at-law (1979). He is on record as saying more than once that five years was the optimum time one should spend doing the same job because after that one risked becoming stale or bored. During his period with the Society, Noel could certainly never have been accused of being either stale or boring. Whatever this man of considerable intellect undertook he carried out with determination and single-minded commitment. A debate with Noel on any issue was indeed a challenge, as he presented the 'pros' and 'cons' but at the same time strongly expressed his personal point of view. However, once the issue was debated fully and a decision made, he could brilliantly present, orally or in writing, the rationale for the decision with lucidity and conviction, whether or not it reflected his own view.

Two years into his term with the Society, Adrian Bourke (President 1991/92) aptly described Noel in the Society's November 1992 annual report thus:

'Since he came to the Society he has been a remarkable energy force, giving unstintingly of his ideas, his contacts and his time on behalf of the Society. As was intended, he is a leader from the front. He argues his point. He always accepts the outcome of a discussion, in whatever forum, no matter how tough the going! My belief is that the Society is lucky to have Noel as Director General and this is clearly borne out by his record to date'.

At his funeral mass, the celebrant and Noel's friend of many years, Bishop Ray Field, in a very personal and forthright yet loving homily, alluded to Noel's strongly-held views on many matters, not least organised religion. It would appeal to Noel's wry sense of humour that present were not one but two bishops (Bishop Field and Bishop Eamonn Walsh, another long-standing friend) and a Maynooth professor (Mngr Pat Hannon) as well as many other priests. All those lucky to be present, who came as representatives of the many facets of Noel's working and social life, were both sad and glad to have Bishop Ray jog their individual memories of a character behind whose sometimes gruff and argumentative exterior they identified a man of substance and sensitivity. All who came in contact with Noel in any sphere will have favourite anecdotes by which to recall his memory with joy and so to sublimate that feeling of loss when such a unique person dies at 56 when still in his prime.

To his wife, Una, and to his children Colm, Fiona, Aoife, Patrick, Eoin and Katie, we extend our sincere sympathy on the loss of a dear husband and father. We also extend our sympathy to his mother, May, who was so proud of her son's achievements, and to his many brothers and sisters.

Noel Christopher – what else would you have been called when born, as you were, on Christmas morning 1942? – we will not easily forget you.

Michael V O'Mahony

Council of the Law Society 1998/99

(Front row, l-r): Michael Carroll, Past President Patrick A Glynn, Past President Frank Daly, Director General Ken Murphy, Junior Vice-President Gerard Griffin, President Patrick O'Connor, Senior Vice-President Anthony Ensor, President of the Law Society of Northern Ireland Catherine Dixon, Past President Laurence K Shields, Past President Moya Quinlan, Ward McEllin, John Meehan; *(middle row)*: Anne Colley, John Harte, Michael Irvine, Philip Joyce, Sean Durcan, Niall Farrell, Hugh O'Neill, Gerard Doherty, Elma Lynch, John Dillon-Leetch, John P Shaw, Alastair Rankin, Chief Executive of the Law Society of Northern Ireland John Bailie, Peter Allen, Orla Coyne; *(back row)*: Owen Binchy, Eamon O'Brien, Walter Beatty, James McCourt, James MacGuill, Donald Binchy, Michael Peart, Simon Murphy, David Bergin, James Sweeney, Kevin O'Higgins, George Palmer, John Costello, Keenan Johnson

OBITUARY

Colum Gavan Duffy, 1913–1999

Colum Gavan Duffy, solicitor, former librarian of the Law Society and editor of the *Gazette*, known to generations of apprentices and solicitors as 'the Gav', died on 15 March 1999. He was aged 85 and suffered a stroke some months previously.

Colum was the son of a famous father who was himself the son of an illustrious Irishman. This was both a benefit and, sometimes, a burden for Colum. Colum's father, George, a solicitor, defended Sir Roger Casement for his life, was one of the signatories of the *Anglo-Irish Treaty* of 1921, was Minister for Foreign Affairs, a barrister, and subsequently President of the High Court. Colum's grandfather, Sir Charles Gavan Duffy, founded in 1842 the *Nation*, a weekly paper, was a member of parliament, emigrated to Australia to practise law, became Prime Minister of Victoria in 1871 and was knighted in 1873 for services to the colony.

The name Gavan Duffy opened doors for Colum and he became fiercely proud of his ancestors. GM Golding, a solicitor and academic at University College Dublin, wrote a biography of Colum's father in 1982. In one chapter dealing with religious matters, he examined Gavan Duffy J's decision in *Schlegel v Corcoran and Gross* ([1942] IR 19), a landlord and tenant case, involving a Catholic and a Jew, and the issue of whether or not anti-semitism was reasonable in the circumstances. Golding concluded that Gavan Duffy was, on occasions, anti-semitic. Colum became very upset and did his utmost to ensure that there would not be a second edition.

Colum was born in Dublin on 19 April 1913, educated at Mount Saint Benedict (Gorey), Anjou (France), Ecole Abbatiale, Maredsous (Belgium) and with a missionary uncle near Madras in India. He graduated with an honours BA degree in French, German and Modern History in 1935, achieved second place in the LLB in 1935 and was awarded first-class honours for his MA thesis *The Senate in the Irish Constitution* in 1947.

Apprenticed in Arthur Cox, he was admitted as a solicitor in 1938 and practised on his own account between 1939 and 1943. He subsequently studied librarianship, became assistant librarian in the College of Science, Dublin, between 1947 and 1950 and was appointed librarian of the Law Society in 1952. He was editor of the *Gazette* between 1969 and 1978.

Colum wrote extensively. He published *A chapter of accidents*, an epitome of Irish decisions on road traffic accidents from 1900 to 1941, wrote numerous leading articles, book reviews and summaries of judgments in the *Gazette* as well as occasional book reviews in the *Irish Independent*. Colum was also an assistant lecturer in constitutional law in University College Galway for almost a decade from 1972.

Colum was a fearless champion of human rights. He was liberal, generous with his time and talents. His death marks the end of the Gavan Duffy male line in Ireland. Maureen, his wife, died two months ago; they had no children. His memory will be cherished by those who had the privilege of knowing him.

Dr Eamonn Hall

The Law Society recently hosted a dinner for the Minister for Social, Family and Community Affairs, Dermot Ahern, who is a solicitor by profession. Pictured at the dinner were *(l-r)* Law Society Deputy Director General Mary Keane, Director General Ken Murphy, Minister Ahern, President Patrick O'Connor, Senior Vice-President Anthony Ensor and Junior Vice-President Gerard Griffin

Former Law Society President Frank Daly (right) presents a decorative panel featuring the Law Society's crest to President Patrick O'Connor

Gathering at Blackhall Place

Law Society President Patrick O'Connor recently hosted a function at Blackhall Place for Council members and past presidents of the Society.
Left: Council members James McCourt and Anne Colley, Law Society President Patrick O'Connor, and Council members Orla Coyne and James MacGuill
Right: Patrick O'Connor with Rosario Boyle BL, Council member Philip Joyce, Law Society Finance Director Cillian MacDomhnaill and Past-President Michael V O'Mahony (1993/94)

Calcutta run update

Preparations are well underway for the Calcutta Run on 15 May. This 10K fun-run, which was featured in the January/February issue of the *Gazette* (page 46), is being organised by a group of solicitors with help from the Law Society. So far, approximately 350 people have signed up and sponsorship cards and training programmes are being sent out to those who have registered. Most of the participants are from legal firms in Dublin, but the run is by no means confined to solicitors' firms. A big turn-out is also expected from the Bar and a number of other non-law companies are sending runners and teams.

Law Society President Patrick O'Connor and Director General Ken Murphy get into gear for the Calcutta Run. Also pictured is GOAL's Lisa O'Shea

The Calcutta Run will start and finish in Blackhall Place from 2.30 on Saturday 15 May. There will be an evening party and barbecue afterwards. All the proceeds will go to GOAL's projects for street children in Calcutta and Fr Peter McVerry's project for homeless young people in Dublin.

The organisers are looking for as many firms and individuals to take part as possible in what promises to be an excellent day out. If you cannot take part in the run, you may be able to help with stewarding or make a donation.

If you wish to register for the run, you can do so by e-mail to *run@algoodbody.ie* or by post to the Calcutta Run, 1 Earlsfort Centre, Hatch Street, Dublin 2. You can also contact Eoin MacNeill or Aine Maguire by telephone on 01 6613311.

At the Education Forum

Above: Judge John F Buckley, Ronan Molony, Law Society President Patrick O'Connor and Don Thornhill
Below: Elaine Hanly, Mr Justice Ronan Keane, Law Society Education Co-ordinator TP Kennedy and Director of Education Albert Power

Roscommon Bar Association AGM

The Roscommon Bar Association recently held its annual general meeting. Pictured at the AGM were *(back row, l-r)*: Gerard Gannon, Terry O'Keeffe, Declan O'Callaghan, Dermot MacDermott, John Sweeney and John Murphy; *(middle row, l-r)*: Padraig Kelly, Eithne Sheridan, Joan Devine, Con Harlow, Gerry Kelly, Rebecca Finnerty, Michelle Dolan and Brian Neilan; *(front row, l-r):* Brian O'Connor, Law Society Director General Ken Murphy, Law Society President Patrick O'Connor, Joseph Caulfield, Marie Connellan and Harry Wynne

Southern Law Association AGM

At the AGM of the Southern Law Association last November were *(back row, l-r)*: Jerome O'Sullivan, Sean Durcan, Frank Daly, Martin Harvey, Sinead Behan, Richard Neville, Pat Casey, Simon Murphy, Patrick Dorgan, Michael Powell and Jerry Cronin; *(front row, l-r):* then Law Society President Laurence K Shields, Rachel O'Toole, SLA President Fionnuala Breen-Walsh, Fiona Twomey and Law Society Director General Ken Murphy

Sligo and County Solicitors' Association

Law Society President Patrick O'Connor and Director General Ken Murphy recently visited the Sligo and County Solicitors' Association. *(Front row, l-r)*: Michele O'Boyle, Honorary Secretary, Ken Murphy, Patrick O'Connor and Hugh Sheridan, Bar Association President; *(back row, l-r)*: Raymond Monahan, Patrick McEnroe, Michael Quigley, Niamh Callan, Aine Kilfeather, Dervilla O'Boyle, Michael Mullaney, Claire O'Sullivan, Damien Martyn, Anne Hickey, Noel Kelly, Fiona McGuire, John Creed, Mark Mullaney, Michael Monahan, Thomas Tighe and Keenan Johnston

Apprentices emerge victorious in moot court

The Law Society's apprentice debating team will represent Ireland in the prestigious Phillip C Jessup International Moot Court Competition world finals, following a victory over Trinity College Dublin. The competition is the largest and most prestigious of its kind. It is organised annually by the American Association for International Law and the International Law Students Association. The world finals are held in Washington DC where teams from over 50 nations gather to argue the finer points of international law.

This year's case focuses on commercial aspects of international law such as the *General Agreement on Tariffs and Trade* and the *World Trade Organisation Agreement* of 1994, as well as the protection of intellectual property rights in the international sphere.

This year the Irish final was contested by the Law Society Apprentices Team and Trinity College Dublin. After a lively and challenging moot, the Law Society team emerged victorious against the Trinity side, which was coached by Dr Clive Symons. In addition to winning the moot outright, the Law Society team won awards for best and second best individual speakers, as well as best written arguments. The team is Marsha Coughlan, Alan Roberts and Peppe Santoro of A&L Goodbody, John Meade of McCann Fitzgerald, and Geoff Moore of Arthur Cox. This team will now represent Ireland in the world finals and hopes to emulate previous Law Society teams that in the past have defeated eminent universities such as Harvard, Cambridge and the Sorbonne.

The team members would like to express their appreciation to their respective firms for the support and encouragement given during preparation for the Irish final. Sincere thanks is also extended to our coach TP Kennedy, Education Co-ordinator of the Law Society, who has been immensely generous with both his time and his knowledge of the subject matter at hand.

Geoff Moore, Arthur Cox

Kildare Bar Association Biennial Ball

Pictured at the Kildare Bar Association Biennial Ball late last year were Damien Maguire, Treasurer, Kildare Bar Association, Brian Price, Tony Osborne, Mrs Osborne, Thomas Quinn, President, Kildare Bar Association, and Grainne White, Secretary, Kildare Bar Association

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 2 April 1999)

Regd owner: Mary Scanlon (now Mary O'Halloran), Claremont, Clarecastle, Co Clare; Folio: 21281; Lands: Townland of Barntick and Barony of Islands; Area: 3a 1r 35p; **Co Clare**

Regd owner: Daniel O'Regan; Folio: 10663; Lands: Part of the lands of Butlerstown, situate in the electoral division of Butlerstown and Barony of Ibane and Barryroe; **Co Cork**

Regd owner: Jack and Josephine Magnier, 4 Montgomery Terrace, Moville, Co Donegal; Folio: 1380F; Lands: Drumaweer; Area: 0a 1r 14p; **Co Donegal**

Regd owner: Thomas Alexander Gamble, Glentown, St Johnston, Co Donegal; Folio: 3519; Lands: Glentown; Area: 85a 3r 10p; **Co Donegal**

Regd owner: John Creighton and Gloria Creighton; Folio: 28360F; Lands: Townland of Templeogue and Barony of Uppercross, property known as 480 Orwell Park, Templeogue; **Co Dublin**

Regd owner: Roseanna Cullen; Folio: 12632; Lands: A plot of ground situate on the south side of the Grand Canal in the parish of Drimnagh, District of Drimnagh and City of Dublin; **Co Dublin**

Regd owner: Catherine Harvey; Folio: 50368F; Lands: Part of the Townland of Loughlinstown and Barony of Rathdown; **Co Dublin**

Regd owner: James and Bridget O'Gorman, both of 20 Mount Shannon Road, Dublin 8; Folio: 74433L; Lands: Property known as 20 Mountshannon Road, Kilmainham, situate in the Parish of Saint Jude and District of Kilmainham; **Co Dublin**

Regd owner: Deirdre Walsh of 10 Wellington Cottages, Templeogue, Dublin 6W; Folio: 9686; Lands: Property situate in the Townland of Templeogue and Barony of Uppercross; **Co Dublin** `

Regd owner: Margaret Digby; Folio: 881F; Lands: Talbotsinch and Barony of Crannagh; **Co Kilkenny**

Regd owner: Martin Nolan; Folio: 838; Lands: Ballyvalden and Barony of Gowran; **Co Kilkenny**

Regd owner: Runtalrad Limited; Folio: 3678; Lands: Cloghabrody and Barony of Gowran; **Co Kilkenny**

Regd owner: Patrick Kinsella and Marion Kinsella; Folio: 1663F; Lands: Springhill and Barony of Slievemangy; **Co Laois**

Regd owner: John Joseph Reynolds, Drumgownagh, Annaghmore, Carrick-on-Shannon; Folio: 18003; Land: Prop 1 – Drumconny, Prop 2 – Drumconny, and Prop 3 – Drumgownagh; Area: Prop 1 – 11a 1r 30p, Prop 2 – 1a 3r 20p, and Prop 3 – 0a 3r 22p; **Co Leitrim**

Regd owner: Laurence Ryan; Folio: 5622F; Lands: Townland of Moigh and Ballyadam and Barony of Clanwilliam; Area: 16.842 hectares and 2.258 hectares; **Co Limerick**

Regd owner: Thomas Murnane; Folio: 8095F; Lands: Townland of Templeglantan East and Barony of Glenquin; **Co Limerick**

Regd owner: Rose McCormack, 9 Kennedy Drive, Longford; Folio: 11846; Lands: Glack; Area: 0a 0r 4p; **Co Longford**

Regd owner: John Joseph Mulkeen (deceased), Coogue Middle, Aghamore, Ballyhaunis, Co Mayo; Folio: 3234; Lands: Townland of Coogue Middle and Barony of Costello; Area: 30a 1r 10p; **Co Mayo**

Regd owner: Brigid Gallagher, Derrypatrick, Drumree, County Meath, also 12 Beech Grove, Mullingar, Co Westmeath; Folio: 659; Lands: Ballynamona; Area: 34 acres; **Co Meath**

Regd owner: Patrick Vincent Duffy (otherwise Vincent Duffy), Crosshugh, Braddox, Co Monaghan, and Grosvenor, 62 Church Road, Ryton on Dunsmore, Coventry, West Midlands, England; Folio: 16758; Lands: Crosshugh; Area: 8a 1r 0p; **Co Monaghan**

Regd owner: Richard Alexander; Folio: 18342; Lands: Eglish and Barony of Eglish; **Co Offaly**

Regd owner: Alistair McGrath and Geraldine McGrath; Folio: 2180F; Lands: Endrim and Barony of Garrycastle; **Co Offaly**

Regd owner: Peter E O'Gara, Grallagh, Fairymount, Castlerea, Co Roscommon; Folio: 9606; Lands: Prop 1 – Townland of Grallagh and Barony of Frenchpark, Prop 2 – Townland of Lisduff and Barony of Frenchpark; Area: Prop 1 – 14a 1r 10p, Prop 2 – 6a 0r 24p; **Co Roscommon**

Regd owner: Michael Willis, Tiratick, Ballintogher, Co Sligo; Folio: 15418; Lands: Townland of Carrickcoola and Barony of Tirerrill; Area: 13a 2r 20p; **Co Sligo**

Regd owner: Michael Barry and William Barry; Folio: 9644; Lands: Ayle and Barony of Clanwilliam; **Co Tipperary**

Regd owner: Patrick Kavanagh; Folio: 1766; Land: Carriganagh and Barony of Clanwilliam; **Co Tipperary**

Regd owner: Margaret Quigley; Folio: 36141; Lands: Clooncleagh and Barony of Eliogarty; **Co Tipperary**

Regd owner: William Patrick Kavanagh (deceased); Folio: 10086; Lands: Rathmacknee Great and Barony of Forth; **Co Wexford**

Regd owner: John Murphy; Folio: 5834; Lands: Oldtown and Barony of Bargy; **Co Wexford**

Regd owner: Annie Carr; Folio: 2444; Lands: Ballyguile More Wicklow Rural and Barony of Arklow, County Wicklow; **Co Wicklow**

Regd owner: Linde Hall; Folio: 3288F; Lands: Ballydonarea and Barony of North Salt; **Co Wicklow**

WILLS

Maxwell, Annie, deceased, late of Manna South, Templemore, Co Tipperary. Would any person having knowledge of a will of the above named deceased who died on 28 February 1999, please contact James J Kelly & Son, Solicitors, Templemore, Co Tipperary, tel: 0504 31278, fax: 0504 31983, e-mail: jjkellylaw@tinet.ie

Murphy, Una Margaret, deceased, late of 2 Whitebeam Road, Clonskeagh, Dublin 14. Would any person having knowledge of a will of the above named deceased, who died on 24 January 1999 (widow of the late Patrick Joseph Murphy, Finance Solicitor to the Government, who died on 22 January 1964), please contact John Rochford & Company, Solicitors, 16/17 Upper Ormond Quay, Dublin 7, tel: 01 8721499, fax: 01 8721654, FCDX 1015

McCormack, Bernard, deceased, late of 1 Goatstown Avenue, Goatstown, Co Dublin. Would any person having knowledge of a will of the above named deceased, who died on 11 October 1998, please contact M Roche & Company, Solicitors, Essex House, Essex Gate, Dublin 8, tel: 01 6792355, fax: 01 6792357

O'Malley, Michael, deceased, late of 25 St Patrick's Cottages, Tralee, Co Cork. Would any person having knowledge of a will of the above named deceased who died on 7 November 1998, please contact Elizabeth Casey, Solicitor, Martin A Harvey & Company, Parliament House, 9 Georges Quay, Cork, tel: 021 963400, fax: 021 270940

EMPLOYMENT

Locum solicitor required for four months from mid-April for south Donegal practice. **Reply to Box No 30**

Solicitor available to do part-time work in North Dublin/South Meath area, tel: 01 8257559

Solicitor with excellent PQE available for part-time work Dundalk/Dublin area, tel: 080 1232 492303

Solicitor required for South Tipperary practice. Experience required in defence work, both High Court and Circuit Court, also knowledge of District Court matters and proficiency in conveyancing and probate, tel: O'Brien & Binchy Solicitors, 052 21411

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, County Down, tel: 080 1693 68144, fax: 080 1693 60966

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

Personal injury claims, family law, criminal law and property law in England and Wales. We have specialist departments in each of these areas, and offices in London (Wood Green and Camden) and Birmingham. One of our staff is in Ireland for one week in every month. Legal aid available to clients that qualify. Contact David Levene & Company, Ashley House, 235-239 High Road, Wood Green, London N22 4HF, England, tel: 0044 181 881 7777, fax: 0044 181 889 6395, and The McAllen Building, 35 Dale End, Birmingham B4 7LN, tel: 0044 121 212 0000, fax: 0044 121 233 1878

London solicitors will advise on UK matters and undertake agency work. All areas. Corporate/private clients. Ellis & Fairbairn, 26 Old Brompton Road, South Kensington, London SW7 3DL, tel: 0044 171 589 0141, fax: 0044 171 225 3935

Agents – England and Wales. We are willing to act as agents for Irish solicitors in civil and criminal litigation. Contact: Olliers, Solicitors, Alderman Downward House, 2/3 The Birtles, Civic Centre, Wythenshawe, Manchester M22 5RF, tel: 0044 161 437 0527, fax: 0044 161 437 3225

Northern Ireland solicitors. Will advise and undertake NI-related matters. All areas corporate/private. Agency or full referral of cases as preferred. Consultations in Dublin or elsewhere if required. Fee sharing envisaged. Donnelly Neary & Donnelly, 1 Downshire Road, Newry, Co Down, tel: 080 1693 64611, fax: 080 1693 67000. Contact K J Neary

Family mediation —
Experienced private practitioner
Trained by Michael Williams
Immediate appointments
Adele Gannon: 01 8328730

For sale: Large Chippendale dining/boardroom table, old mahogany, 13 ft long, pristine condition, £3,500, matching chairs also for sale, tel: 01 2698131

Seven-day ordinary clean licence required. Contact Houlihan McMahon, Solicitors, reference JS, tel: 065 28706

Marian Kenny (Principal), Kenny & Associates, Taxation Consultants, 30 Lower Leeson Street, Dublin 2. Services include dealing in all taxation matters, specialising in personal and capital taxes, tel: 01 6769993, fax: 01 6611567

Solicitors' practice required, Dublin area. Three-man Dublin solicitors' firm wish to acquire the practice of a sole practitioner or retiring solicitor. Consultancy or other flexible arrangements. **Reply to Box No 31**