Gazette LawSociety

Regulars

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Cover Story

Editor: Conal O'Boyle MA. **Assistant Editor:** Maria Behan. **Designer:** Nuala Redmond. **Editorial Secretaries:** Catherine Kearney, Louise Rose. **Advertising:** Seán Ó hOisín, 10 Arran Road, Dublin 9, tel/fax: 837 5018, mobile: 086 8117116, e-mail: seanos@iol.ie. **Printing:** Turners Printing Company Ltd, Longford. **Editorial Board:** Pat Igoe (Chairman), Conal O'Boyle (Secretary), Eamonn Hall, Mary Keane, Ken Murphy, Michael V O'Mahony, Michael Peart, Keith Walsh

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

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SIS UNDER NEW MANAGEMENT
The management of the Solicitors Investment Services scheme has been taken over by Bank of Ireland Private Banking Limited, following a review of the scheme by the Law Society. The bank's relationship manager Monica Walsh will be the liaison officer between Bank of Ireland Private Banking and the SIS/Law Society. If your practice is interested in subscribing to the service, and hasn't already done so, contact Monica Walsh on 01 631 1400 for details.

LAW SOCIETY OF IRELAND RETIREMENT TRUST SCHEME
Unit prices: 1 June 2001
Managed fund: 386.8p
All-equity fund: 112.978p
Cash fund: 185.856p
Pension protector fund –

CLASP SUMMER PARTY
CLASP (Concerned Lawyers for the Alleviation of Social Problems) will be holding a 'summer soirée' in the Law Society's Blackhall Place headquarters on Friday 20 July from 6.30pm to 10pm. For further information, contact CLASP chairperson Josepha Madigan on 01 492 1111.

LawSociety Gazette

summer publication

As usual, the *Gazette* will be taking a well-earned break over the summer so there will be no issue in August. Normal publication will resume with a joint August/September issue, due out on 7 September.

Consultation shows broad support for new regulations

There has been wide consultation with bar associations around the country in relation to the proposed new *Solicitors' accounts regulations* from the Law Society, *writes Gerry Doherty, chairman of the society's Compensation Fund Committee*.

The regulations were last updated 17 years ago and the Law Society Council felt it was time to bring the regulations into line with developments in law and practice. In 1994, the *Solicitors (Amendment) Act* made extensive changes to the section governing the regulations. The new regulations are at last giving effect to those provisions and are also reflecting developments in legislative drafting over the past two decades. They also provide an opportunity to take account of technological and operational changes in the world of legal practice over recent years.

Of course, the primary purpose of the regulations is to set out the rules governing the treatment of clients' monies by solicitors and to provide for verification of compliance. Solicitors are in a unique position of trust in society, in that they are entitled by law to handle, hold and transfer clients' funds. This right is essential to ensure the smooth conduct of transactions and serves the commercial needs of the business and financial worlds. However, rights attract responsibilities and these are reflected in the accounting and procedural safeguards contained in the regulations. As a self-regulating profession, solicitors have effectively entered into a contract with the public that they will be honest and fair in their dealings with clients and will respect the trust invested in them in their treatment of clients' monies. Both solicitors and their clients look to the Law Society to ensure that this contract is upheld, and the regulations are the means of doing so.

Doherty: solicitors have entered into a contract with the public

Conscious of the practical effects of the regulations on the day-to-day workings of a solicitor's practice, the Council of the Law Society agreed that the Compensation Fund Committee should engage in a consultation process with the members and with the principal accountancy bodies. This has proved to be a valuable exercise and a number of useful suggestions have been made that will undoubtedly improve the effectiveness of the regulations. It has been very gratifying for the society that, while there have been several suggestions for improvements in the detail of the regulations, there has been widespread support for their overall content and a keen appreciation of the benefits of responsible regulation to the profession as a whole.

As with the 1984 regulations, the new regulations will require a lead-in time, coupled with an education process, in order that both solicitors and their accountants can be fully comfortable with the new rules. It is intended that a series of explanatory seminars will be held around the country in Autumn/Winter 2001 and Spring 2002 and that practical guidelines will be developed to address any operational issues and to ensure consistency of application and interpretation.

WHAT THE NEW REGULATIONS PROPOSE

In practical terms, there are few significant changes to the manner in which solicitors will be required to deal with clients' funds. The regulations introduce a prohibition on the intermingling of a solicitor's own money with clients' money (a change designed to prevent the masking of deficits on the client account), a requirement to balance the client items reflected in the office account and a regular reconciliation of both client and office accounts. Most other changes in the regulations reflect the law contained in the 1994 act, including changes to definitions.

New CCBE guidelines on e-mail, EU law

The Council of the Bars and Law Societies of the European Union (CCBE) has issued new guidelines on electronic communication and the Internet for European lawyers. The CCBE adopted the guidelines at its plenary session last November and hopes that they will help national law societies, bars and firms to produce their own policies. The guidelines can be viewed on the CCBE's website at *http://www.ccbe.org*, while summary guidance is contained in the umbrella organisation's new bulletin, the *CCBE gazette*.

The CCBE has also published a practical guide explaining the implementation of Community law. It is free of charge and can be obtained from the CCBE secretariat, but it is currently only available in French (translations are apparently under consideration).

Law Society slams 'shoddy and unbalanced' magazine article

Law Society President Ward McEllin has branded a recent article in the *Phoenix* magazine as 'unbalanced, shoddy and just plain wrong'. He said the story was based on 'one-sided leaks and disinformation' from people who for some reason are opposed to more effective *Solicitors' accounts regulations*.

He also condemned the *Phoenix*'s failure to make contact with the society so that the numerous factual errors and distortions in the article could have been corrected. The *Phoenix* approached the society only to request a photograph of the president. It did not seek to ensure accuracy in its article or invite balancing comment. 'Obviously the *Phoenix* saw this as a story too good to check', quipped McEllin.

In an extraordinarily personalised attack on the president of the Law Society, the 'satirical' magazine tried to link the recent Supreme Court judgment in the *Kennedy* case (see *Gazette*, May issue, page 3) with the imminent introduction of updated *Solicitors' accounts regulations* for the profession. According to the *Phoenix*, the new regulations 'can only be seen as giving two fingers to the Supreme Court judgment'. The magazine said that the *Kennedy* case 'was the first time the society's powers had been tested and the result left plenty of egg on the face of McEllin *et al*'. It added that the judgment 'opened the way for a massive damages claim from Kennedy (apart from the £1.5 million costs) as a result of loss of fee income'.

Ward McEllin: the *Phoenix* felt it had 'a story too good to check'

Responding to the article, an angry McEllin said: 'This "story" is based on one-sided leaks and disinformation. The magazine didn't even bother to contact the Law Society to see if there was any substance to the stories that they were being fed.

'The main thrust of this totally unbalanced story is that the Law Society shouldn't try to update its *Solicitors' accounts regulations*. Well, why not? They haven't been updated since 1984. We have 17 years' experience of their operation, together with the requirements of the *Solicitors (Amendment) Act, 1994*. Times have changed, and, as the regulatory authority for the solicitors' profession, we have to change with them. No solicitor who runs his or her practice in a professional and business-like way has anything to fear from this. The society is not going to walk away from its duty to regulate the profession. The interests of both the profession and the public will be better protected by the new regulations'.

LINK TO SUPREME COURT CASE 'JUST PLAIN WRONG'

Commenting on the allegation that the proposed *Solicitors' accounts regulations* were a deliberate insult to the Supreme Court, Law Society President Ward McEllin said: 'The new regulations have nothing to do with the *Kennedy* judgment in the Supreme Court. The Law Society began working on them many years ago and to try to link the two things is just plain wrong. That kind of remark is degrading to both the Law Society and the Supreme Court. It should not have been published, particularly as the balance of the Supreme Court case has yet to be heard. It is now scheduled to resume on 23 October'.

Solicitors urged to help Mexican human rights drive

Irish solicitors have been urged to lend their voices to international campaigns to stop terror and torture in Mexico by one of that country's leading human rights lawyers.

Speaking at a meeting in Blackhall Place organised by Amnesty International, Arturo Requesens Galnares said: 'There is still a big problem with paramilitary groups. In the state of Chiapas alone, there are more than 12 such groups and there is evidence that the state government used to support them with money and also with training, while the army protected them. There were never any prosecutions'. Things had improved somewhat since the recent change of government in Mexico, he added, but there was still the very real risk that gross human rights violations could happen again.

Arturo Requesens Galnares

Irish lawyers, he said, should study some of the specific cases highlighted in a recent Amnesty International report on Mexico and write to the Mexican authorities, asking how the investigations into those cases are proceeding.

• Amnesty International's Lawyers' Group meets at 7.30pm on the first Tuesday of every month at the organisation's headquarters in Dublin's Fleet St and all are welcome to attend.

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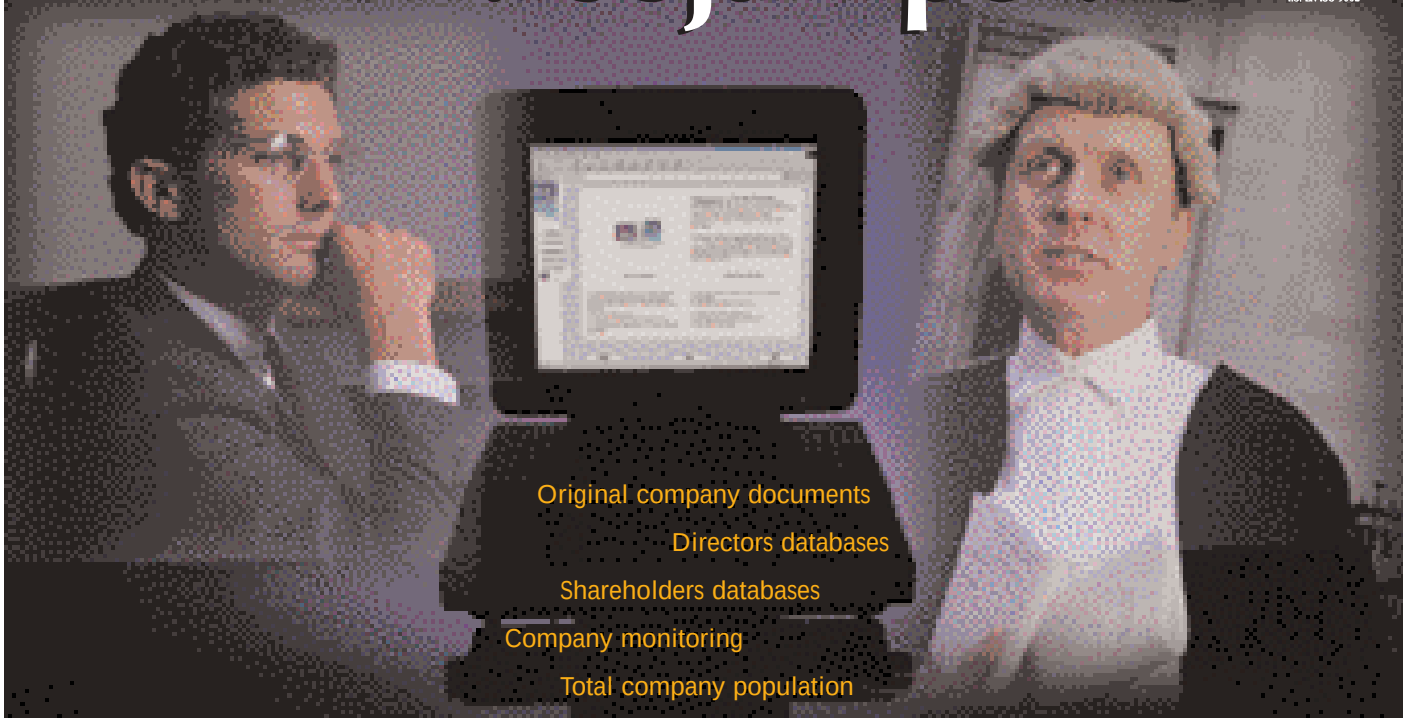

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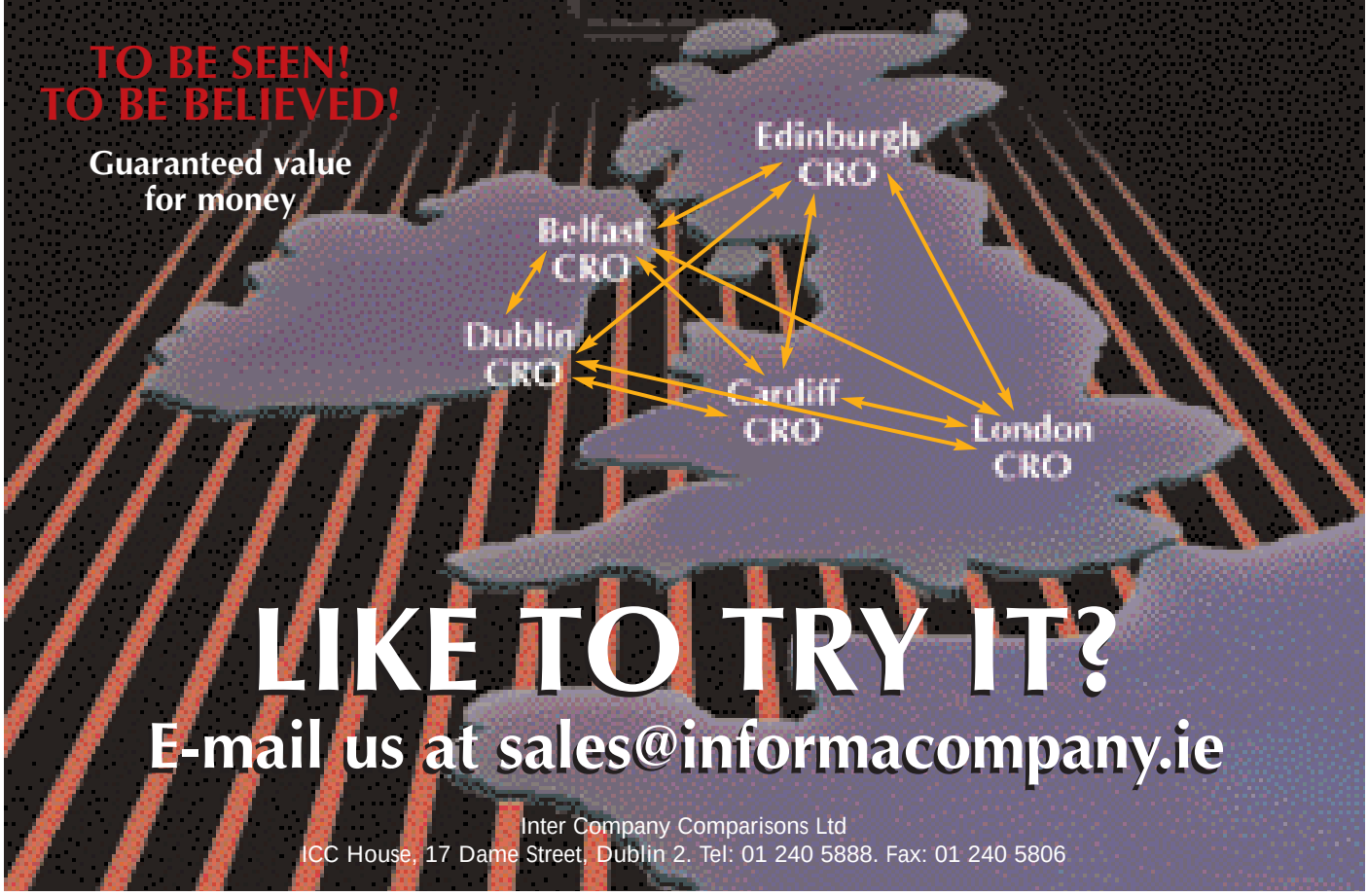

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Letters

Pondering probate problems

From: Owen Binchy, James Binchy & Son, Charleville, Co Cork

I refer to the practice note which appeared in the *Gazette* of May 2001.

The practice note, and in particular the heading, gives the impression that it is reasonable to give undertakings in probate matters. This is not the case.

Once the grant of probate issues to a named executor, it is that executor who is in control and not the solicitor. Without reference to the solicitor, the executor is entitled to obtain an official copy of the grant and note it himself and collect in the assets. If an executor dies, someone else can obtain a grant without reference to the original solicitor who has acted.

Therefore, a solicitor does not have sufficient control in a probate matter to give an undertaking in relation to estate funds which he has not got into his client account. It is not appropriate for a solicitor to give a conditional undertaking in circumstances where he does not have control. Unless the problems are clearly identified in the letter of undertaking, the solicitor giving the undertaking may well find himself bound to the recipient.

The practice note has correctly identified some of the problems which can arise when a solicitor is getting the assets of an estate, but does not, I feel, identify the dangers which may arise.

Setting the standard for snails?

From: Patrick Fitzgibbon, Pierse & Fitzgibbon, Listowel, Co Kerry

On 2 June last, I received notification of completion of an application from the Land Registry. The papers were lodged in the Land Registry on 8 March 1910. Is this a record?

I suspect not.

DUMB AND DUMBER

Seeing as how we received no *Dumb and dumber* entries from the profession this month, we decided to reproduce some of the oddities that can be found on the web. We realise that they have nothing to do with the law, but that's your own fault. We will award ourselves a bottle of champagne and drink your health. As always, we welcome your examples of the wacky, weird and wonderful in the legal world. Send your best stories to the Editor, *Law Society Gazette*, Blackhall Place, Dublin 7 or you can fax us on 01 672 4877 or e-mail us at c.oboyle@lawsociety.ie.

Good luck America – quotes from George W Bush Jnr

- *'The vast majority of our imports come from outside the country'*
- *'If we don't succeed, we run the risk of failure'*
- *'Republicans understand the importance of bondage between a mother and child'*
- *'Welcome to Mrs Bush, and my fellow astronauts'*
- *'The Holocaust was an obscene period in our nation's history. I mean in this century's history. But we all lived in this century. I didn't live in this century'*
- *'I believe we are on an irreversible trend towards more freedom and democracy – but that could change'*
- *'One word sums up probably the responsibility of any governor, and that one word is "to be prepared"'*
- *'Verbosity leads to unclear, inarticulate things'*
- *'I have made good judgements in the past. I have made good judgements in the future'*
- *'The future will be better tomorrow'*
- *'We're going to have the best educated American people in the world'*
- *'People that are really very weird can get into sensitive positions and have a tremendous impact on history'*
- *'I stand by all the misstatements that I've made'*
- *'A low voter turnout is an indication of fewer people going to the polls'*
- *'When I have been asked who caused the riots and the killing in LA, my answer has been direct and simple: Who is to blame for the riots? The rioters are to blame. Who is to blame for the killings? The killers are to blame'*
- *'Illegitimacy is something we should talk about in terms of not having it'*
- *'We are ready for any unforeseen event that may or may not occur'*
- *'For NASA, space is still a high priority'*
- *'Quite frankly, teachers are the only profession that teach our children'*
- *'We're all capable of mistakes, but I do not care to enlighten you on the mistakes we may or may not have made'*
- *'It isn't pollution that's harming the environment. It's the impurities in our air and water that are doing it'*
- *'[It's] time for the human race to enter the solar system'*

That sporting life

- *'I've never had major knee surgery on any other part of my body'* – Winston Bennett (rugby)
- *'The lead car is absolutely unique, except for the one behind it which is identical'* – Murray Walker (Formula One)
- *'I owe a lot to my parents, especially my mother and father'* – Greg Norman (golf)
- *'Sure there have been injuries and deaths in boxing, but none of them serious'* – Alan Minter (boxing)
- *'The racecourse is as level as a billiard ball'* – John Francombe
- *'If history repeats itself, I should think we can expect the same thing again'* – Terry Venables (football)
- *'I would not say he (David Ginola) is the best left winger in the Premiership, but there are none better'* – Ron Atkinson (football)
- *'He dribbles a lot and the opposition don't like it, you can see it all over their faces'* – Ron Atkinson (again)
- *'Ah, isn't that nice, the wife of the Cambridge president is kissing the cox of the Oxford crew'* – Harry Carpenter, BBC TV boat race 1977
- *'Julian Dicks is everywhere. It's like they've got eleven Dicks on the field'* – Metro Radio (football)
- *'Well, either side could win it, or it could be a draw'* – Ron Atkinson
- *'Strangely, in slow-motion replay, the ball seems to hang in the air for even longer'* – David Acfield
- *'There goes Juantorena down the back straight, opening his legs and showing his class'* – David Coleman at the Montreal Olympics
- *'One of the reasons Arnie (Arnold Palmer) is playing so well is that, before each tee-shot, his wife takes out his balls and kisses them … Oh my God, what have I just said'* – US TV commentator

A case of '*Déjà vu* all over aga

Yet again, the solicitors' profession is being put under the microscope in an attempt to find 'anti-competitive' practices. The profession has nothing to fear from an objective study, but why is this being repeated now? asks Ken Murphy

'It's *déjà vu* all over again', an American baseball coach once famously remarked. Irish solicitors know the feeling.

March 1990 saw the publication of the Fair Trade Commission report 'into restrictive practices in the legal profession'. Comprising 334 pages of very detailed research, analysis and recommendations, it was by any standards a major work which in all took no less than six years to complete. Its 18 chapters examined dozens of topics relevant to competition and the regulation of solicitors and barristers in Ireland.

As has frequently been acknowledged by one of the two members of the Fair Trade Commission who produced the report, Dr Patrick Lyons (subsequently the first chairman of the Competition Authority), most of the key recommendations of the report in relation to the solicitors' profession were subsequently implemented, some through the enactment of the *Solicitors (Amendment) Act, 1994*.

Ken Murphy: the basis for this study is questionable

However, it is now announced that the Competition Authority is about to embark on a major 'study' – the statutory term – on certain professions which, according to its draft terms of reference, will:

- Identify any restrictions on, and impediments to, competition and the supply of professional medical, legal and construction services that are imposed, provided for or facilitated by the state, either directly by law or indirectly via a statutory authority, council or other intermediate regulatory body or otherwise.

This study by the Competition Authority was announced by the taoiseach on 24 April at the official launch of the OECD report on *Regulatory reform in Ireland*. In the May issue of the *Gazette* (page 4), I wrote about this report and criticised the unargued and completely unjustified recommendation of the OECD that the Law Society's should cede control of the education and entry to the solicitors' profession. Although it is worth adding that the authors of the recent UK Office of Fair Trading report specifically declined to make such a recommendation in relation to the similar controls of the Law Society of England & Wales, I will not repeat my earlier arguments here.

Others, however, are not so sensitive to the tedium of repetition. Who are these 'others'? It cannot be believed that the Competition Authority entirely of its own initiative would have identified a study of these professions, representing as they do a tiny portion of the national economy, as the most important project in which to expend the authority's all-too-limited resources. No, it is clear that the primary decision-maker in relation to this was the government or, perhaps more accurately, some members of the government. It is not

Nice treaty is no threat to Irish

What lies ahead for the *Nice treaty* in the wake of the recent No campaign triumph? Conor Quigley argues that the sovereignty issues are just red herrings and that Ireland must vote Yes in a second referendum if it wants to stay in the European mainstream

Three weeks before the referendum on the *Nice treaty*, an opinion poll showed that of those expressing an opinion a clear majority was in favour of ratification. 52% were inclined to vote Yes, 28% registered as Don't Knows, while 21% were against. On the day of the referendum, the Yes vote failed to materialise, while a mere 18% voted No, thereby securing a majority of the 33% of those who turned up at the polling stations.

On these figures, the No campaign cannot be justified in arguing that it represents mainstream opinion in Ireland and that the *Nice treaty* should be abandoned. While there is little excuse for the utter incompetence of the government in wasting millions of pounds of state money in organising a referendum without ensuring that the public understood the fundamental importance of the issues (and even less excuse for the fact that nobody seems to be prepared to accept political responsibility and resign), it is surely right that a second referendum takes place after a period of deep and considered reflection.

We can be sure that most of those who were against ratification will largely remain so and may even gain further support, but a second rejection of the *Nice treaty* would be the most important decision that the people of Ireland could take and would, in my view, consign Ireland to international and European political and economic sidelines for decades to come. The concern of those seeking a Yes vote must, accordingly, be to muster the support which was previously there and to ensure that it is properly harnessed.

Sovereignty has been raised by John Rogers SC as a central

ain'

difficult to see the appeal for politicians of giving the impression that they are 'taking on vested interests in the legal profession', however spurious this may be in reality, with a view to engaging in some form of 'deregulation' with which to impress voters at election time. Best to avoid examining the state's role in the far more economically significant electricity and gas sectors, also criticised by the OECD. No. On reflection, I am sure I am being far too cynical. No Irish politician would ever think in such terms.

Strangely, it is not only lawyers who are raising some questions about the value of the exercise to which the Competition Authority has now been committed. At an excellent conference organised by *Competition Press* in Dublin on 26 June, the UCD economist Moore McDowell questioned why, a decade after pro-competition changes were introduced in the legal profession, it should once again be the case that 'political pressure has led to the Competition Authority being induced or at least encouraged into undertaking further investigation into the profession'.

McDowell was speaking with the benefit of the insights which he and another economist, Dr Peter Bacon, acquired through a report which they made for Forfás last year on, among other things, legal services for Irish business. At the conference they announced their broad conclusions that 'the regulatory framework for the legal profession did not cause a problem', there was 'little or no evidence of anti-competitive practices' and there was, as they put it, 'no crock of gold' to be found whereby significant savings to consumers of legal services could be produced. The true problem, McDowell argued, lay not in the legal profession but in the law and, at a much deeper level, in the general public policy environment, for example, in the state's failure to provide adequate courts services.

Speaking at the same conference, competition lawyer Vincent Power challenged the Competition Authority to 'be brave' and to take an original and more economically-efficient approach by studying professions or occupations which had not been examined before. It seems that the authority feels compelled to re-examine the legal profession, although arguably it is not the proper role of the authority to evaluate the wide public policy issues involved in government regulation, as distinct from dealing with anti-competitive practices between undertakings.

The solicitors' profession has nothing to fear from an objective study. We have seen it before, and it looks as if, unnecessarily, we are about to see it again. G

Ken Murphy is director general of the Law Society of Ireland.

'FURTHER REFORMS' OF LEGAL PROFESSION RECOMMENDED IN THE OECD REPORT

- Opening up the service of conveyancing to, for example, banks and financial institutions
- Continued freedom of advertising for solicitors
- Making solicitors responsible for paying barristers their fees and enabling clients to instruct barristers directly
- Allowing solicitors and barristers to practise in other business forms (such as partnerships with other professions)
- Any publication of such things as surveys of costs should be suppressed
- The control of education and entry of legal professionals should be moved from the self-governing bodies, but close ties as regards quality of entrants and content of education should be maintained.

sovereignty

issue, it being argued that *Nice* represents a further decline in Irish sovereignty which should be resisted. This is, apparently, reflected in the fact that 'more than 30 significant areas' were to become subject to qualified-majority voting in place of unanimity, that the number of European commissioners will eventually be less than one each per member state, and that weighting in the council is to be altered in favour of large member states. I do not accept that these concerns stand up to examination. Nothing in the *Nice treaty* impinges on sovereignty, whatever that may be in a modern, open economic state such as Ireland.

Many of the proposed amendments to the *EC treaty* which involve a switch to qualified-majority voting are relatively unimportant, and few can be regarded as 'significant'. For example, article 110 EC is to be amended to allow for the council to agree by majority vote to grant financial assistance to a member state which finds itself in severe economic difficulties. Other amendments relate to such diverse issues as the operation of the euro, the conditions governing members of the European parliament and of political parties at a European level, and the appointment of the secretary-general of the council. Surely none of these could be regarded as impinging on national sovereignty.

Conor Quigley: A second rejection of *Nice* would condemn Ireland to the political sidelines

A switch to majority voting is necessary, however, in the context of an enlarged European Union, in order to prevent member states from being tempted to block agreement for spurious political advantage. Thus, the Spanish have refused to agree to certain EC legislation governing air transport because that might recognise the status of Gibraltar airport. Whatever the merits of such territorial disputes, they should not be allowed to block

progress elsewhere. The fear is that, in an enlarged council, opportunities for stalling necessary and desirable developments for ulterior motives would be a temptation that many member states would find hard to resist.

Admittedly, some important areas, such as measures concerning discrimination on grounds of race, religion or disability, will cease to be decided by unanimous vote. However, by far the most important areas of community law are already governed by majority vote. I am not aware that there have been many instances where Ireland has found itself in a situation where legislation which it opposes has been foisted on it against its will. Rather, where a member state has any problems with a particular measure concerning, for example, the internal market, environmental policy, consumer protection or international trade (which are generally adopted by majority vote), it seems to be quite common for a derogation to be included in the legislation.

The result is that the relevant rules are harmonised throughout the community to the most desirable extent, but not at the expense of justified exceptions. Of course, there are occasions when member states oppose legislation. In those circumstances, skilled diplomacy is called for, which, in most cases, should result in the problems being identified and resolved.

Most observers agree that the European Commission cannot operate as an effective executive if it has more then 20 or so members. While all member states are currently entitled to propose a commissioner of their choice, in a European Union of 27 member states this will not be possible. Accordingly, it was agreed at Nice that when the number of member states reaches 27 (which is not likely to be for at least seven or eight years) the size of the commission would be reduced, although it has not yet been decided by how much.

We are told by all and sundry that this will be a disaster for Ireland. Frankly, I cannot understand why. Commissioners are meant to perform their tasks wholly independently and are not to take instructions from any governments. Of course, considerable lobbying is carried out at present by member states to ensure that 'their' commissioner understands national concerns and that these concerns are, in turn, conveyed to the commission as a whole. In a reduced commission, such lobbying

How solicitors can get the bes

Experts can make or break a case, but Paul Jacobs maintains that making the most of them requires solicitors to display a bit of expertise themselves

It is well recognised that experts can make a valuable contribution to the solicitor's case team, and for this reason it is not uncommon in commercial cases to involve experts on the sides of both the plaintiff and the defendant. Those instances where a plaintiff or defendant obtains an advantage simply because the solicitor has instructed an expert where the other side has none are becoming less common.

Furthermore, the courts have been putting the basis of experts' testimony under greater scrutiny in recent years. For these reasons (and others), it is now even more critical that experts are managed and supported properly by their instructing solicitors and that experts are given opportunities to offer advice at the appropriate stages.

In my view, there are two main areas that solicitors should consider:

- Obtaining the advice of their experts at a much earlier stage in the litigation process, or even prior to the commencement of proceedings
- Adopting a more hands-on management style during the course of the assignment, with a clear focus on identifying the responsibilities of each professional.

Paul Jacobs: teamwork between experts and solicitors helps achieve success

As a chartered accountant practising in the provision of expert accounting services, I have often found myself considering whether we could have made a greater contribution to the development and, ultimately, the result of a case. From my observations, the actions of the instructing solicitor and/or counsel can have quite a significant impact on an expert's effectiveness in a case.

Obviously, the timing of instructing experts is crucial and involves a trade-off between the costs and perceived benefits of involving the expert at that stage. However, the expert often feels that he or she was not instructed early enough, leaving insufficient time for a full investigation of the issues and forcing them to prepare their report under unnecessary time constraints. Restricting experts in this way has a potentially negative impact on their ability to handle rigorous cross-examination. In one extreme case, I know of an expert who declined an instruction because he believed that there was insufficient time for him to conduct the investigation and prepare his evidence to the required standard.

Although an expert accountant's testimony is typically heard in the latter stages of a case, an important role is to identify issues that should be addressed by other experts and/or factual witnesses. A particularly late instruction to the expert accountant can often mean that insufficient time is available for the instruction of other experts (such as handwriting or computer analysts) or obtaining necessary factual evidence by way of affidavit.

A missed opportunity to settle arose in one case that I was involved in, when a defendant company turned down a plaintiff's offer to settle for an amount less than £1 million, and found that the court eventually awarded damages of many millions. I wonder if the defendant would have accepted the offer if he had had the benefit of accounting advice as to likely *quantum* of loss at the time the plaintiff made his offer.

would no doubt continue, but checks and balances would need to be put in place to ensure that it would be more broadly based and transparent and that it did not operate on nationality lines.

But the danger (or the advantage) of lobbying should not in any event be exaggerated. It is already the case that a commissioner who insists on putting a partisan national argument which is not properly and objectively justified incurs the contempt of his colleagues.

Small country tyranny

Re-weighting of the council is also a matter on which I have difficulty understanding the objections based on sovereignty, given that the whole point of qualified-majority voting is that each member state has only a small proportion of the overall votes. The necessity for re-weighting is obvious in that of ten applicant countries all but one are classified as small countries. Thus, the European Union will have a total of 21 small countries and six large ones. It would have been quite impossible (and wholly undemocratic) for the large countries to have found themselves in a position of being dictated to by the small countries. The proposed re-weighting formula seeks to balance in a fair and democratic manner the interests of all the member states. The smaller member states, including Ireland, still have many more votes than their population would warrant on a strictly proportionate basis.

We should be under no illusion as to the consequences of rejecting the *Nice treaty* a second time. Sure, it would mean the abandonment of that particular treaty, since ratification by all member states is a necessity. Enlargement would go ahead in some guise, since technically the only changes needed are to the numbers and votes in the EU institutions, which can be secured in each respective accession treaty. But, just as many in Ireland say they voted against the *Nice treaty* for reasons which relate to the general direction of the European Union rather than to any particular detail of the treaty itself, so across Europe the feeling is that the Irish rejection was based on selfish, parochial and immature considerations.

No amount of harping on about sovereignty, neutrality and the democratic deficit (which in any case is self-inflicted) will alter that view. G

Conor Quigley is a barrister specialising in EU law, practising in Brussels, London and Dublin.

st from their experts

Another reason that lawyers may want to involve experts sooner rather than later relates to the identification of documents and computer records that the expert will need to rely on in his report. In too many cases, I have had to painstakingly reconstruct (at the solicitor's client's expense) accounting records because the client had discarded the primary evidence, or let important faxes fade with the passage of time, or had not backed-up computer records from disks onto more durable storage media.

Insufficient hands-on management

I have also found that the cases that run particularly smoothly are those where the solicitor has a hands-on management style, with a clear focus on identifying the responsibilities of each professional involved. Too often, experts are left to their own devices without appropriate supervision by the instructing solicitor, including deciding the scope of their investigation and identifying the evidence (factual and other expert) that it will be necessary to rely on. Where more than one expert is appointed for the plaintiff or the defendant, this raises its own issues, particularly when one expert is going to rely on the opinion of another. For example, where the same solicitor appoints more than one expert, it is often left to the experts of different disciplines to identify how the evidence will fit together. A good expert will identify for the solicitor the factual or other expert evidence that is required for him to express a convincing opinion. Without hands-on management, solicitors run the risk of not getting the best from their expert.

A key question for the instructing solicitor is whether to involve the expert as part of the case team or to consult only when a particular issue requires. The answer to this question obviously depends on a balance between the issues of the case, the extent to which experts are required and costs. In some cases, I have been brought into the core case team to give accounting-related advice which impacted on strategic issues, for example, whether the client's solicitor should make an offer to settle the action. But in other cases, I have not had this close involvement. I recommend that an expert be called in only when absolutely justified.

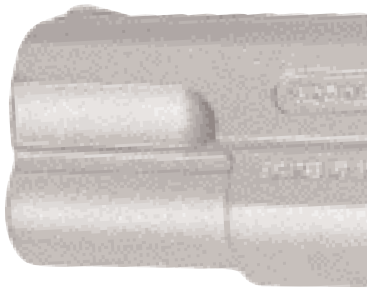
The role of the expert needs to be managed skilfully by the instructing solicitor. First, experts are not always involved sufficiently early in the litigation process, which could mean that clients miss out on advice on key evidential and *quantum* issues. Second, solicitors should consider adopting a more active management style to ensure that all evidential matters that each expert will need to rely on are identified at an early stage in the litigation process and are in fact obtained.

Failure by the instructing solicitor to adequately consider these two main factors can lead to a less-than-optimum performance by the expert in the witness box, a prolonged litigation process, increased costs, an unfavourable award of damages and, ultimately, a very unhappy client. G

Paul Jacobs is a senior manager in the litigation and forensic accountancy services group at Ernst & Young.

One of the most fundamental concepts in Irish law is the right of the individual to trial by jury. But this right is increasingly being curtailed through the use of the Special Criminal Court for ordinary crime. Julie-Anne Sweeney argues that the continuing misuse of the court could eventually corrupt our justice system

Why do we still have a *Special Criminal Court*



Article 38 (3) of the Irish constitution provides for the establishment of Special Criminal Courts for the trial of offences in cases 'where it may be determined in accordance with such laws that the ordinary courts are inadequate to secure the effective administration of justice and preservation of public peace and order'.

Part V of the *Offences Against the State Act, 1939* reiterates this constitutional provision word for word and so provides the legislative basis for the Special Criminal Court.

In order for part V of the act to come into effect, the government must issue a proclamation stating that the ordinary courts are inadequate to secure the effective administration of justice and preservation of public peace and order. Such a proclamation was issued in 1939 and the court remained in operation until 1946. The present Special Criminal Court was established by a 1972 proclamation and has been in operation without serious governmental review to the present day. The problem of Northern Ireland and the ensuing paramilitary activities has been the primary reason given by the government on numerous occasions for the establishment of the Special Criminal Court.

Sections 46 and 47 of the act give the director of public prosecutions (DPP) the authority to issue certificates in relation to any particular offence, deeming the ordinary courts as inadequate to secure justice. Upon certification by the DPP, these cases must be sent for trial in the Special Criminal Court. There is no limit on the type of offence that may be certified by the DPP and his decisions are not subject to judicial review (see *Kavanagh v The Government of Ireland, the DPP and The Special Criminal Court*, [1996] IR 321). There now exists a commonly-held and not unsubstantiated fear among human rights organisations that jury trial is slowly being abolished by 'the backdoor'.

Today, Ireland is not experiencing any emergency status, as the government acknowledged in 1995 – yet the Special Criminal Court continues to operate and is now increasingly being used to try non-subversive offences. In the past two years, approximately one-third of the cases dealt with by the court have related to offences with no paramilitary connections.

The continued operation of the Special Criminal Court is dependent on the government's belief that the ordinary courts are 'inadequate to secure the effective administration of justice and preservation of public peace and order' (section 35(2) of the 1939 act). The reasons why the courts are inadequate to secure effective justice in relation to ordinary crime have never been outlined.

MAIN POINTS

- Historical background to *Offences Against the State Act, 1939*
- The role of the DPP
- Extension of the SCC into ordinary crime

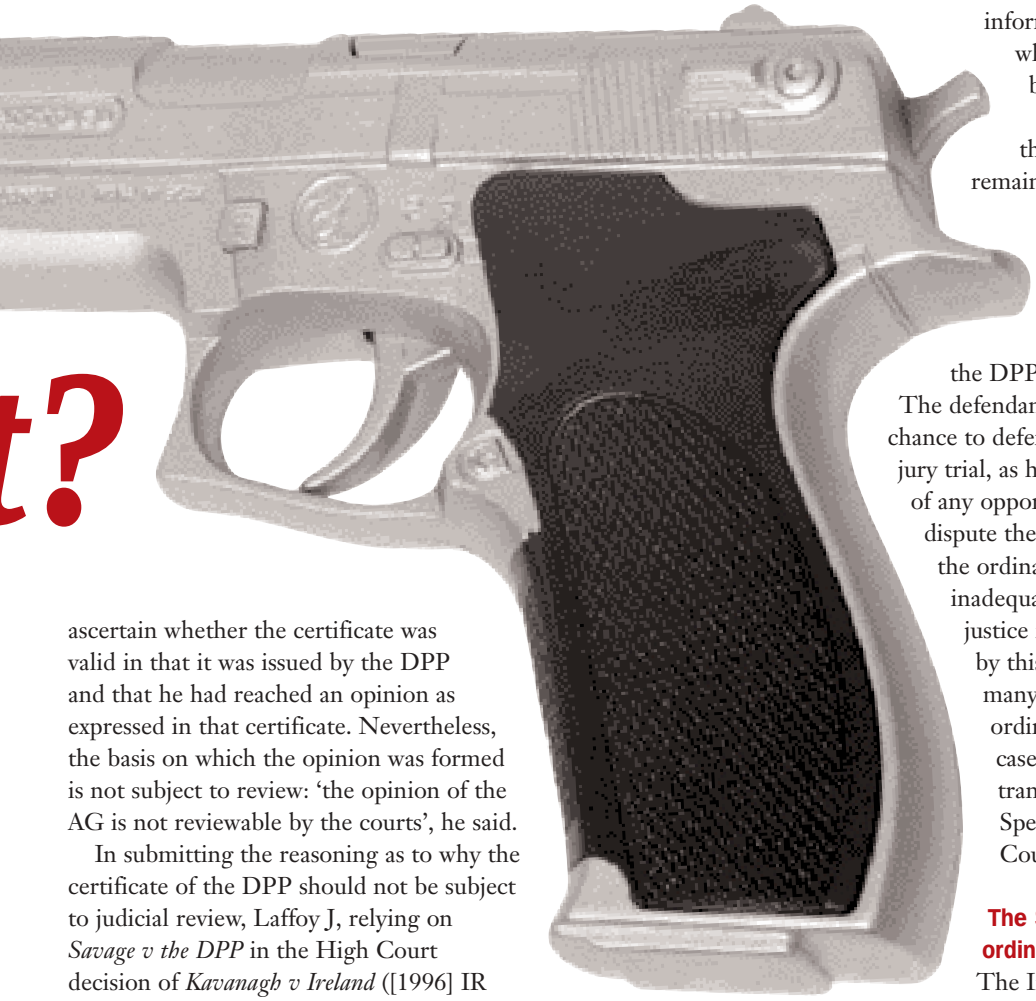
As mentioned earlier, the DPP may transfer non-scheduled offences to the court if he believes that in a certain case the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. No other reason need be given. The certificate is not subject to judicial review unless there is evidence of *mala fides*. This creates a catch-22 situation for the accused, as it is virtually impossible to provide evidence of *mala fides* when the reason for the transfer does not have to be disclosed.

The subject of judicial review of the DPP's certificate was primarily addressed in *Savage v the DPP* ([1982]) ILRM 385). Relying on *In re McCurtain* ([1941] IR 83), the judge held that the only function of the judiciary in this area was to ascertain whether the certificate was valid in that it was issued by the DPP and that he had reached an opinion as expressed in that certificate. Nevertheless, the basis on which the opinion was formed is not subject to review: 'the opinion of the AG is not reviewable by the courts', he said.

In submitting the reasoning as to why the certificate of the DPP should not be subject to judicial review, Laffoy J, relying on *Savage v the DPP* in the High Court decision of *Kavanagh v Ireland* ([1996] IR 321), stated that: 'the revealing of such information in open court ... would be a security impossibility'. But, as commentators have argued, this concern could be met by following the ruling in *Murphy v Dublin Corporation* ([1972] IR 215) under which court proceedings which include sensitive material from a security point of view may be held in camera. However, in the case of *O'Reilly & Judge v DPP* ([1984] ILRM 229), it was held that 'based on the terms of article 38(3)(1) of the constitution and the authorities to date, the opinion of the DPP is not reviewable by the courts, whether in open court or as private investigation'.

Moreover, the certificate is not reviewable even in cases that have no subversive elements or security hazards. In *Byrne v Dempsey* (unreported, Supreme Court, March 1999), the plaintiffs argued that the DPP's decision should be subject to review by the courts as 'the upholders and protectors of the constitutional rights of the citizens'. Once again, it was held that the power of the DPP to transfer cases derived from the legislature, which vested this power solely in the executive. The court held that in the absence of *mala fides* the DPP cannot be called upon to explain his decision or give reasons for it nor the sources of information on which it was based.

So the law in this area has remained stagnant, with little leeway given to the judiciary to interfere in the DPP's decisions. The defendant is given no chance to defend his right to jury trial, as he cannot avail of any opportunity to dispute the allegation that the ordinary courts are inadequate to secure justice in his case. It is by this route that many of the ordinary criminal cases are transferred to the Special Criminal Court.



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The SCC and ordinary crime

The Irish Council for Civil Liberties has documented the wide range of ordinary crime that has been charged before the court via the DPP's certificate. Charges such as arson, the unlawful taking of a motor car, receiving a stolen caravan and its contents, and the theft of cigarettes and £150 from a small shop have all been heard before the Special Criminal Court. The contention that the act

BACKGROUND TO THE ESTABLISHMENT OF THE SPECIAL CRIMINAL COURT

The Oireachtas debates of 1939 illustrate not only the circumstances and events surrounding the introduction of the *Offences Against the State Act, 1939* but also provide an insight into the initial intention of the Oireachtas in passing the act.

The *Offences Against the State Bill, 1939* was introduced when the Irish state was in its infancy, the country had recently emerged from a bitter civil war and dissident political views regarding partition were rife. In trying to combat threats made by the IRA, the government decided to introduce an act conferring on itself special powers.

Introducing the bill, the Minister for Justice, Mr Rutteledge, outlined its sole objective as being 'to prevent the display, the use or the advocacy of force as a method to achieve *political or social* aims'. By including the phrase 'social aims', the parameters of the bill were rendered sufficiently broad so as to encompass crimes not related to subversive activity.

However, the Dáil debates indicate that the initial intention was to use these measures to combat politically-motivated violence. The bill – and, in particular, part V relating to Special Criminal Courts – was defined as an 'emergency provision'. The emergency to which the minister referred was the proclamation made by the IRA purporting to be the true government of the state with the right to declare war. Thus, the primary grounds given for the bill was that the security of the state was under threat.

The speeches made by Dáil deputies during the debates emphasise the intentions of the legislature regarding the bill. For example, Professor O'Sullivan (deputy for North Kerry) said: 'It is a bill which is clear from its context is designed to deal with what I might call dangerous political disorder'. But even in the initial stages of the bill's passage, some deputies voiced their fears about its potential for abuse by the government. Professor O'Sullivan highlighted the dangers of certain sections of the bill 'to the ordinary citizen who may be guilty of an offence but not guilty of anything that could be interpreted as upsetting the state or leading to the upsetting of the state'.

This danger has already been realised through the use of the Special Criminal Court for trying non-subversive crimes, such as manslaughter and drug trafficking.

could be extended into ordinary crime was dealt with extensively in *The People v Quilligan & O'Reilly* ([1986] IR 495).

This case concerned an appeal made by the DPP against the ruling of the trial judge pertaining to the arrest of Mr Quilligan under the *Offences Against the State Act*. Quilligan was charged with murder. Barr J in the Central Criminal Court divided criminals into two broad categories for the purposes of determining the intention of the act, and subsequently coined the phrases 'ordinary crimes' and 'subversive crimes'. He held that as the offence with which the defendant had been charged contained no subversive element, an arrest under the *Offence Against the State Act* was unlawful and so any statements made while in police custody were inadmissible. In coming to this conclusion, the judge held that '[the act's] general purpose is to deal with political or quasi-political crimes against the state, its organs or personnel'. Furthermore, he held that 'the adequacy or otherwise of the ordinary courts to conduct and dispose of criminal business arises only in connection with subversive crime'. On appeal to the Supreme Court, it was held that Barr J had erred in his interpretation of the act by limiting its application to subversive offences.

In the Supreme Court, Walsh J outlined the jurisdiction of the Special Criminal Court as being 'restricted to the offences in relation to which the government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and preservation of public peace and order which have been "scheduled" by the government in the prescribed manner and to any offences in respect of which there is a certificate by the attorney general or now also the DPP that the ordinary courts are in his opinion inadequate to secure the effective administration of justice and the preservation of public peace and order in respect of the trial of the offence in question' (*The People (at the suit of the DPP) v Christopher Quilligan & Patrick O'Reilly* [1986] IR495 at p 506). Considering that the certificate of the DPP is in reality unreviewable by the courts and neither his nor the government's reasoning as to the adequacy of the courts is disclosed, it effectively means that there is little or no restriction on the jurisdiction of the court.

The justification of jury intimidation

In holding that the act could be extended to deal with ordinary crime, Walsh J referred to actions which contained no paramilitary element yet could be economically injurious to the state, and used the black-market cases which were heard by the Special Criminal Court to illustrate this. However, these cases were heard during the late war years when Ireland was in a state of emergency. As the 1939 Dáil debates show, the act was set up to deal with issues affecting the functioning of the state during the Emergency.

Walsh J then continued his analysis for allowing the act to encapsulate ordinary crime by citing the reasoning of the legislature in 1939 for the Special Criminal Court, which envisaged the possibility of jury intimidation. He argued that 'ordinary gangsterism or well-organised drug dealing' could just as equally pose as great a threat to juries as subversives. This argument carries weight, but ignores the fact that the act was intended in the debates to deal with crime affecting the security of the state in a time of emergency. Unfortunately, large-scale drug trafficking is quite common in many countries and would not constitute 'an extraordinary circumstance' in modern society. Furthermore, the abolition of the requirement of unanimous verdicts for juries was introduced in 1984, arguably making jury intimidation more difficult to achieve.

The *Criminal Justice Act, 1999* also underwent a number of amendments with a view to generally strengthening the law in relation to the intimidation of witnesses and jurors. It has been argued that if a jury is at risk of tampering, there are more effective ways of dealing with the problem than simply dispensing with them completely (see, for example, the submission from the Law Society's Criminal

Law Committee to the Hedermann Committee to Review the *Offences Against the State Acts, 1939 to 1998* and Related Matters). Other jurisdictions (such as the United States) deal quite effectively with high-profile drug- and gang-related cases where juries may be at risk without doing away with them altogether.

Moreover, the case of *Littlejohn v Governor of Mountjoy Prison* (unreported, Supreme Court, 18 March 1976) highlights a weakness in the justification of jury intimidation for the use of the Special Criminal Court in ordinary crime. Here, the accused had already pleaded guilty in the District Court, so a jury trial was not required. Henchy J stated *obiter* that he was unable to accept that the threat of jury intimidation 'is the sole basis on which the attorney general might validly certify that the ordinary courts are in his opinion inadequate to secure the effective administration of justice and preservation of public peace and order'.

Jury intimidation is not the only reason for the Special Criminal Court. Yet due to the drastic nature of this measure (in that it curtails the basic right to jury trial), the government should outline the other valid reasons for the use of the Special Criminal Court in ordinary criminal cases.

Instances where the courts will interfere

The courts concede that the maintenance of the Special Criminal Court is primarily a political question. As was stated in the1996 case *Joseph Kavanagh (Applicant) v The Government of Ireland, the DPP, the Attorney General and The Special Criminal Court*: 'It is natural that such a political decision should be primarily subject to political control' (IR321 at p355). However, in *Kavanagh v Ireland*, Keane J acknowledged that the government's decision on the adequacy of the ordinary courts 'cannot be regarded as forever beyond judicial control'.

He also recognised that, as per *Crotty v An Taoiseach* ([1987] IR 713), judicial review of the decision by the government is dependent on the actual infringement or threatened infringement of the rights of individual citizens. Such an infringement may be indicated by 'a clear disregard by the government of the powers and duties conferred upon them by the constitution'.

In *Byrne v Ire*land (unreported, Supreme Court, 11 March 1999), the appellants relied on unfair discrimination in violation of article 40.1 of the constitution in contending the validity of the DPP's certificate transferring them to the Special Criminal Court while nine of their co-accused were sent for trial in the ordinary courts.

The appellants relied upon this statement made by Henchy J in The Stardust Victims Tribunal: 'I would accept that article 40.1 of the constitution requires that people who appear before the courts in essentially the same circumstances should be dealt with in essentially the same manner'. The appellants and their nine co-accused were charged with the same offences arising out of the same set of circumstances. Hamilton CJ justified the situation in which the appellants found themselves by stating that 'what distinguishes the appellants from their co-accused is that, in respect of them only, the DPP has certified that the ordinary courts are inadequate to secure the effective administration of justice and preservation of public peace and order'. And he contended that the DPP is directly authorised by statute 'to issue a certificate and thereby make the distinction between citizens'. In other words, an individual's right to jury trial is up to the opinion of the DPP, without question.

'If emergency measures are used and normalised within this jurisdiction, we may witness the degeneration of the criminal justice system into one of double standards'

By contrast, Keane J in *Kavanagh v Ireland* stated that 'save in exceptional circumstances of war and national emergency envisaged by article 28, section 3, the courts at all times retain their jurisdiction to interfere so as to ensure that the exercise of these drastic powers to abridge citizens' rights is not abused by the arm of the government to which they have been entrusted' (IR 321 at p366).

Was this distinction by the DPP between 11 people charged with identical crimes arising out of an identical set of circumstances not exactly the sort of infringement of citizens' rights that the courts claim authority to protect, as outlined by *Crotty v An Taoiseach*?

The evolution of the Special Criminal Court has been something of a snowball effect: it began as a means to combat political crime and is now being applied to any sort of offence, regardless of classification, which the DPP feels the ordinary courts cannot adequately supervise. The adequacy or otherwise of the courts is determined by two subjective sources: the government, which has an interest in ensuring that crimes are prosecuted, and the DPP, who will be prosecuting the case.

This fact, coupled with the continued evasion by the judiciary of a supervisory role in relation to the DPP's certificate, highlights the need for well-defined conditions under which the Special Criminal Court should be used.

The most obvious and persistent criticism of the Special Criminal Court is that it was not intended that ordinary criminal cases should fall within the ambit of the act. These cases are being tried under an emergency procedure which is contravening the initial intention of the Oireachtas. To use part V of the act in ordinary crime without adequate justification or supervision is not only incorrect but also disconcerting.

If emergency measures are used and normalised within this jurisdiction, we may witness the degeneration of the criminal justice system into one of double standards where, for unexplained reasons, certain individuals are granted their right to jury trial while others are denied it. G

Julie-Anne Sweeney is a law student at the University of Limerick. This article is an edited version of her winning entry in the Law Society's Law Reform Student Essay Prize competition.

Introduced in a hurry to save a beef baron's bacon, examinership was designed to keep troubled companies with a potential future from winding up. But flaws soon emerged in the legislation, forcing reforms last year. The courts have recently begun testing the overhauled regime, as Barry O'Halloran reports

Examining the exami

MAIN POINTS

- Original examinership regime impinged seriously on creditors' rights
- Tougher approach taken in 1999 legislation
- Courts are now applying these reforms

Software developer and Internet publisher Nua Ltd is one of the better-known casualties of this year's high-tech fallout. When the door to a last-ditch rescue bid was finally closed in March, its directors looked at one more option: examinership. This would involve petitioning the High Court to have the company placed in its protection for a period of up to 100 days while a court-appointed examiner puts together a rescue plan or 'scheme of arrangement' designed to ensure its survival.

On the face of it, Nua might have been a good candidate. According to its chief executive, Gerry McGovern, it was close to winning a number of contracts for its recently-developed web management software, Nua Publish. That, and a number of other developments, might have ensured viability. Instead, at the request of its directors, Nua's biggest creditor, Eircom, placed it in the hands of receiver David Hughes of Ernst & Young.

McGovern says examinership had been ruled out almost as soon as the company looked at the possibility. 'Our advice was that while it was once relatively easy, the law has been changed and we would have needed an independent accountant's report to show that we could have remained viable. We just did not have time to do that', he says.

That is a far cry from the days when the courts first started to apply the *Companies (Amendment) Act, 1990*. It became clear through a number of controversial judgments that almost any company unable to pay its debts, but with a remote chance of survival, could get court protection, often to the detriment of its creditors.

The act is partly the legacy of Saddam Hussein, because the Iraqi dictator's September 1990 invasion of Kuwait threatened, among other things, the Irish beef industry. This depended heavily on export earnings from the Middle East. Its biggest player was the Goodman group, controlled by Larry Goodman.

With the threat of war hanging over what was then one of our largest industries, an emergency sitting of the Oireachtas passed the legislation. One way or the

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other, it would have ended up on the statute books by the end of that year. The government had proposed introducing examinership as part of a package of company law reforms. The rest were passed in December 1990 as the *Companies (Amendment) (No 2) Act, 1990*.

The 1990 act states that the court 'may, in particular' appoint an examiner if this facilitates the company's survival. Originally, it was thought that this implied that judges had discretion, but a different story emerged when the courts began applying the act.

In *Re Atlantic Magnetics Ltd* ([1993] 2 IR 561), the Supreme Court decided that the level of judicial discretion was not that wide. Justice Finlay ruled that the act's wording imposed a 'strongly persuasive' obligation on the court to appoint an examiner where it would facilitate a company's survival.

And, while the High Court declared that where a case was unclear, an examiner should be appointed if there was 'some reasonable prospect of survival', Finlay changed this to 'some prospect of survival'. Dropping the word 'reasonable' effectively meant that even troubled companies with only the slimmest prospects of making it would get court protection.

Atlantic Magnetics laid down the criteria for appointing examiners that would apply until the *Companies (Amendment) (No 2) Act, 1999* came into force last year. According to solicitor Catherine Duffy, an insolvency practitioner with law firm A&L Goodbody, the ease with which companies could get this kind of protection had long-term consequences. 'Banks, and particularly foreign banks, became very wary of lending money to Irish companies', she says.

That was serious from the point of view of individual businesses. In the early nineties, the Irish economy was still struggling and venture capitalists willing to invest in a company in return for a stake were few and far between. In general, Irish companies were under-capitalised and borrowing was the quickest – and in most cases, the only – route to capital.

But the banks did not tighten up only because it was easy to get protection; there were also the

WHAT IS EXAMINERSHIP?

Examinership is basically a statutory corporate-rescue mechanism. The law covers any company incorporated or registered in this country. To qualify, it must be unable to pay its debts. An examiner cannot be appointed if a resolution or order has been made for its winding up, or if a receiver is in place for more than three days.

The following may petition the High Court to have an examiner appointed: the company itself, directors, creditors (including employees) or shareholders holding one-tenth or more of the paid-up capital.

consequences. Under section 5 of the 1990 act, once an examiner is appointed, a company cannot be wound up. Creditors cannot take action against it to recover their debts; secured creditors cannot realise their security; nor can the suppliers of goods subject to hire purchase or retention of title agreements recover their property. In fact, no proceedings of any kind can be taken against the company without the court's consent and, even then, the examiner can challenge it.

The full consequences were realised in 1994, when the Supreme Court handed down judgment in *Re Holdair Ltd* ([1993] 1 IR 416). Holdair Ltd was one of the Kentz group of companies. When this ran into trouble, one of the creditor banks, which held a debenture over some of the company's assets, appointed a receiver. Under section 6 of the 1990 act, a receiver can be ordered to stand down if an examiner is appointed within two days. There was a question in the case over whether the bank's security was a fixed or floating charge. The Supreme Court ruled it was a floating charge. However, once a receiver is appointed, a floating charge crystallises into a fixed charge. If the charge is fixed, the company cannot use the assets without the security holder's permission.

It was argued that this would have prevented the examiner from getting access to the assets which he needed. In the Supreme Court, Justice Blayney ruled that maintaining this as a fixed charge would breach section 5, which prohibits any action being taken to realise a secured debt.

In a judgment that must have frozen the average banker's blood, Blayney J stated that once the receiver stood down, the fixed charge de-crystallised and became once again a floating charge. At the time, critics of this ruling pointed out that there was no basis in Irish law for this theory and, in fact, the judge did not cite any.

But his colleague Justice Finlay concurred, and declared that section 5 prevented security holders enforcing their rights in the first place. What they were doing was simply enforcing the act's provisions, which baldly stated that where any claim against a company is secured by a charge 'no action may be taken to realise the whole or any part of such security' unless the examiner consents.

This was bad news for creditors. Before the law was reformed, examiners could be appointed quickly. And even though creditors had the right to challenge this, no examiner was ever removed after being appointed. For creditors, the consequences of seeing a debtor go into protection meant that the company continued trading, and that whatever was left in the kitty dwindled away while the examiner worked out a rescue scheme.

But it's worth remembering that judgments such as *Atlantic Magnetics* and *Holdair* were made in very different days. Creating and saving jobs were the main political issues in the early nineties. By 1995, unemployment hit a record 300,000-plus. Examinership was the only system of corporate rescue we had, and its main aim was protecting jobs. In a 1991 case, *Re Selukwe Ltd* (unreported, 20 December 1991), Justice Costello allowed the fact that there were 30 jobs at stake to outweigh all other issues.

Nonetheless, as the courts applied the legislation, the cracks began to show, and by 1994 a government-appointed company-law review group recommended reform. Its proposals were enacted in the *Companies (Amendment) (No 2) Act, 1999*, and became law last year.

Catherine Duffy says that the changes are largely procedural, but do represent a major improvement. 'One of the most significant points is that you have to produce an independent report in order to get an examiner appointed', she explains. 'This has to set out what is required if the company is to survive as a going concern. And you have to satisfy the court that the company has a reasonable prospect of survival. Under the previous legislation, that was not the case'.

Independent accountants prepare the reports, which have to include the following:

- A statement of the company's assets, debts and liabilities
- A statement by the accountant that the company has a reasonable prospect of survival
- Details of the funding needed to keep trading during the examinership period, and the sources of that money, and
- A recommendation detailing what debts incurred before the court hearing should be paid during the examinership period.

Both the petitioner and the independent accountant have to disclose all relevant information and exercise the utmost good faith. If they do not fulfil either of these obligations, protection will not be given. This was introduced because critics felt the ease with which an examiner could be appointed under the 1990 legislation left the system open to abuse.

In a further tightening of the regime, creditors have the right to be heard before the court decides to appoint an examiner. As the legislation allows for the payment of pre-petition debts, it is likely that key suppliers of goods and services will be paid.

Duffy believes that the new system is fairer because it gives creditors a role in the rescue process. 'What is happening is that you are talking

to your creditors', she says. 'The accountant would not be able to come to any conclusion without going to them first. Obviously, if there is a chance that the company will survive, they will co-operate, because it means that they are likely to recover far more of what they are owed than if the company goes into liquidation or receivership. It means that you can come to an arrangement that is in the best interests of everybody'.

The scheme of arrangement – basically, the examiner's proposals for saving the company – has also thrown up some controversy. The schemes are put to the court when the examiner makes his second report at the end of the protection period. (He is required to make a first report after 35 days.) Section 18 of the 1990 act obliges him to formulate a scheme if he believes that this will facilitate the survival of all or part of the company.

Originally, shareholders were required to approve the schemes by a simple majority. The 1999 act jettisoned this provision, but gives shareholders the right to be heard if they believe the scheme unfairly prejudices their interests. The changes also allow the court to approve the scheme if just one class of creditors, whose interests or claims would be affected by the proposals, votes to accept them.

In *Coombe Importers Ltd* (unreported, Hamilton P, 5 December 1990), 36 unsecured creditors who were owed a total of £470,000 accepted an offer of 15p/£1. The Revenue Commissioners rejected an offer of 80p/£1 and two secured creditors rejected an offer of 22p/£1. The court approved because one class – the unsecured creditors – accepted the deal. The court can throw out a scheme if it's unfairly prejudicial to any interested party's interests.

While the law in this area has not been changed radically, Duffy points out that there have been other very welcome reforms. A key one relates to the repudiation of contracts. The 1990 act allowed an examiner to reject contracts or agreements entered into before his appointment if he believed they were detrimental to the company's interests. He is no longer entitled to do this.

Similarly, the reforms safeguard the rights of parties who have leased land or any other property to the company.

Effectively, the 1999 amendment prevents the examiner from including any provisions in the scheme of arrangement that allow for reducing or eliminating the payment of rent, or if they in any way prevent lessors from exercising their rights to recover property.

These and other reforms took effect in early 1999 and the courts have begun enforcing them. In May, the High Court appointed an examiner to Castleholding Investment Ltd, the holding company for the Tipperary-based medical devices group Antigen Ltd.

The company was unable to pay its debts after it went into shutdown in order to upgrade its manufacturing technology in preparation for a trade sale. Unfortunately, the downtime lasted for five months longer than the company was originally told would be necessary.

Underlying this was the fact that Antigen is a healthy business. Employing 350 people, it is a major supplier to the British National Health Service. Antigen Ltd's 1999 annual returns show that it had net assets of £19.5 million. Sales for the year to 31 March 1999 were £21.78 million, while profits after tax were £3.35 million. One Dublin-based stockbroking analyst – who did not want to be named – valued Antigen at £20m on the basis of these figures. The petition, from directors George Fasenfeld and Padraig Marrinan, showed that the company had been profitable since its foundation in 1946. Surpluses for the four years between 1996 and 2000 totalled over £12 million. There were strong grounds for believing that the company could return rapidly to profitability once it attracted investment for further remedial works and was allowed the chance to restructure its debts. Antigen was more a victim of bad luck than anything else.

These days, fewer companies are coming before the courts seeking protection. One reason for this is the fact that the regime is a good deal tougher, but practitioners such as Catherine Duffy also believe it's fairer. G

Barry O'Halloran is a staff reporter with Business & Finance *magazine.*

COMPANIES (AMENDMENT) (NO 2) ACT, 1999

SUMMARY OF EXAMINERSHIP REFORMS

- Criteria for appointment was changed to a 'reasonable' prospect of survival, not just 'some' prospect
- The petition must include an independent report prepared by an accountant that includes a statement of the company's affairs and an assessment of its survival prospects
- Creditors have a right to be heard by the court before an examiner is appointed
- Court protection has been reduced from three months to 70 days, which can be extended by up to 30 days
- The examiner must make his first report in 35 days or within a longer period if the court allows
- If the accountant's report recommends that certain pre-petition debts be paid during the protection period, the examiner is entitled to do this
- The court can call for a special hearing to consider any evidence of irregularities found by either the accountant or examiner. Creditors are entitled to attend and be heard at this
- Shareholders/members are no longer required to approve a scheme of arrangement, but if its provisions unfairly prejudice their rights, they may raise this with the court
- No compromise or scheme of arrangement can contain provisions reducing or eliminating the payment of rent in respect of leased land or preventing the lessor from enforcing his rights
- No compromise or scheme of arrangement can contain provisions reducing or eliminating the payment of rent due under leasing or hiring agreements relating to any other property
- Costs and liabilities certified by the examiner during the period of his examination no longer have priority over claims secured by a fixed charge.

Information technology, e-mail and the Internet have become the lifeblood of most workplaces. But, as Terence McCrann explains, employers must be vigilant to ensure that these technologies don't wind up doing more harm than good

MAIN POINTS

- Need for a communications policy in the electronic workplace
- Balancing the rights of employee and employer
- 'Cyber-smearing' and the risk of defamation

The e-workplace has revolutionised the way we all do business and has greatly facilitated organisations in their ability to communicate and sell their services. It also brings with it challenges in terms of control, abuse and potential liability which need to be addressed by all organisations. The main issues arising from the electronic workplace are discussed in the **panel opposite**.

Communications policy for the workplace

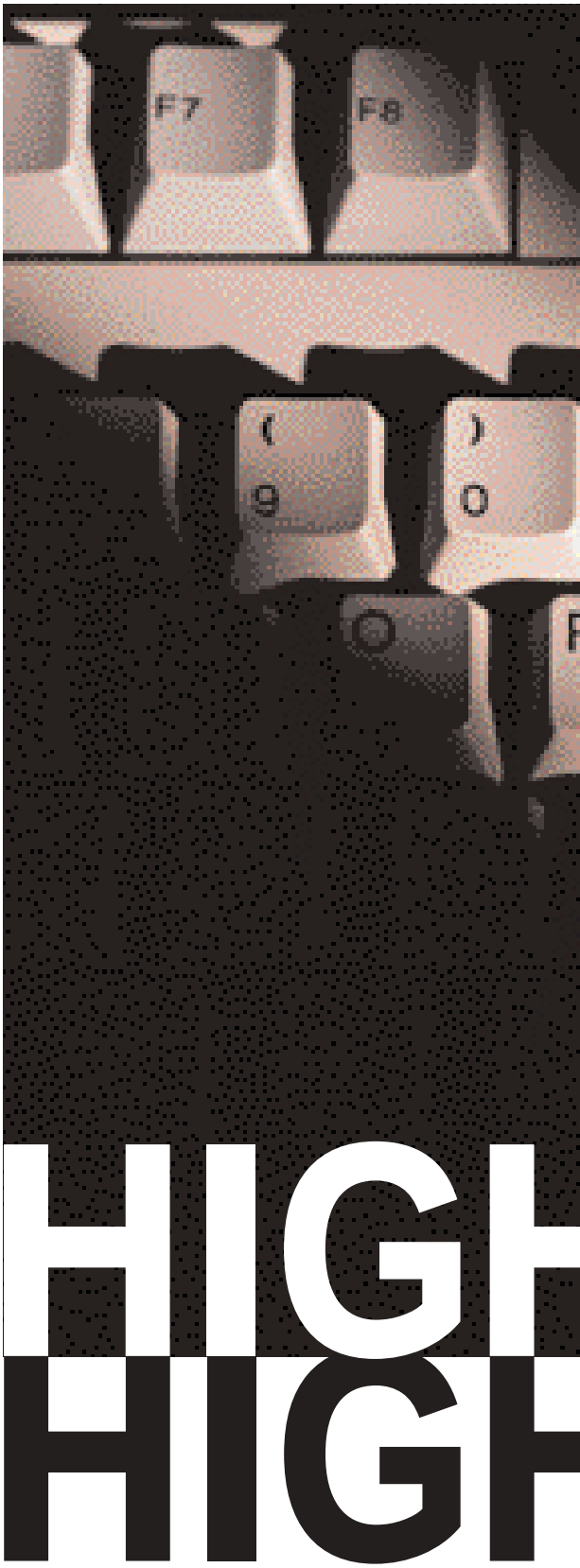
Most organisations now have a comprehensive communications policy for the electronic workplace. The government has issued a code of practice for e-working in Ireland, which is the combined work of the government and social partners. It sets out the principles which apply to e-working, taking into account professional considerations. The code covers people working at home full time or part time, telecommuters working part time at home and part time in the office, and mobile workers (defined as people on the move) and sets out the very special considerations which would apply to an e-mail or Internet policy for such a mobile workforce.

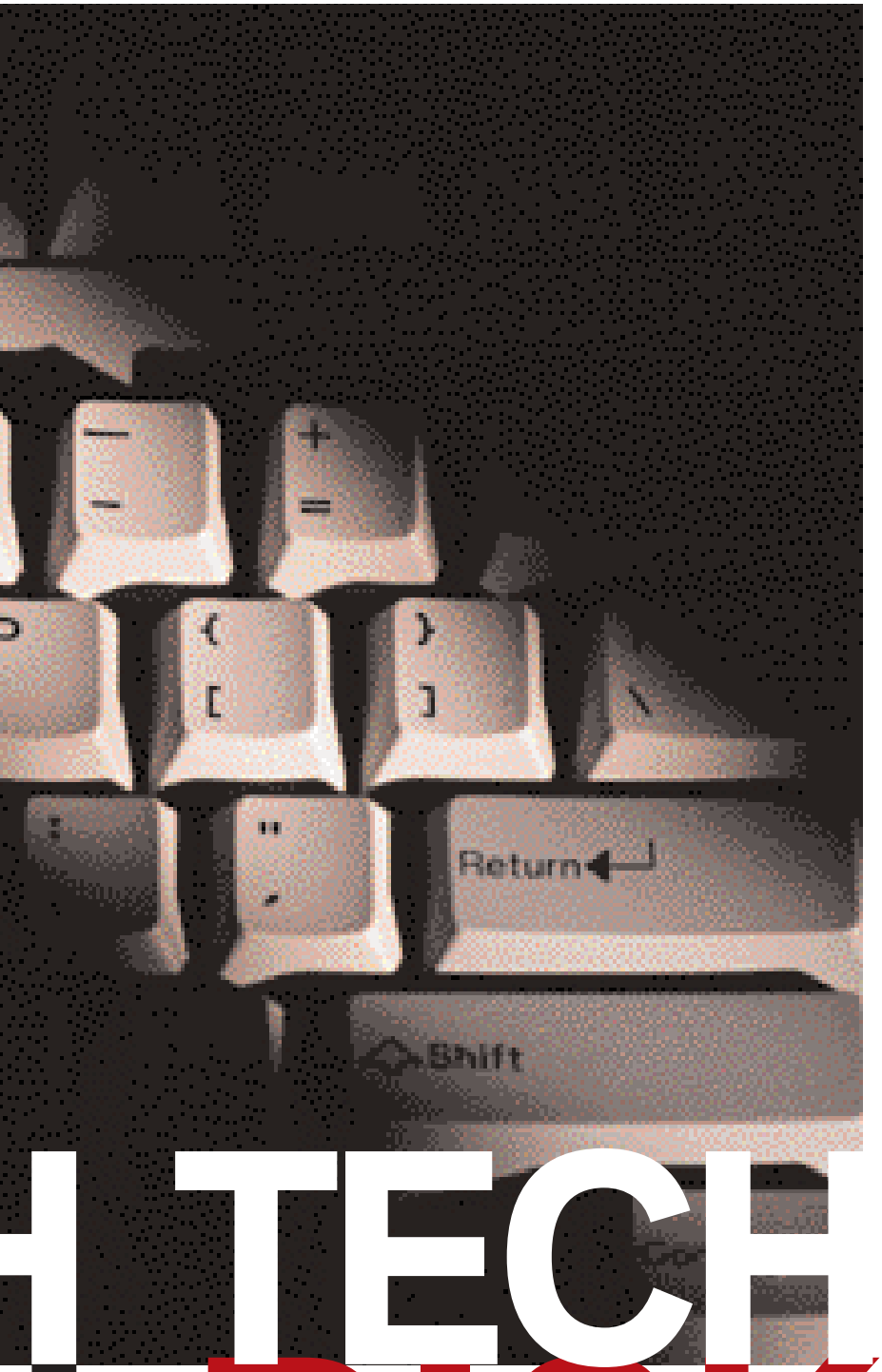
Sending messages by e-mail has been compared to sending a post card: you do not have any expectation of privacy. Yet many people seem to make the illogical assumption that they can send the most personal messages to an individual by e-mail on the basis that it could not be seen by anyone else. The spectacularly-publicised suspensions and sacking of people for making that fundamental error are well known, with lawyers being no exception!

In order to ensure observation of an organisation's communications policy, a range of monitoring techniques have been adopted by employers. The monitoring rights of employers may conflict with individual rights of privacy and this topic is the subject of much current debate. In his 11th annual report, the data protection commissioner referred to the 'surreptitious monitoring of personal e-mails by employers', which he considered difficult to justify. His role under the *Data Protection Act, 1988* is to ensure that organisations maintaining electronic records do not abuse the data they obtain.

Monitoring techniques used by organisations include:

- Closed circuit TV, private investigators, audio-bugging and taping of phone calls
- Location tracking, which involves checking geographic movements through electronic mechanisms on trucks and 'active badges', which





H TECH
H RISK

THE MAIN ISSUES IN THE ELECTRONIC WORKPLACE

- **IT investment.** The massive investment in IT products by organisations is designed to improve the delivery of the services and products they provide. Organisations must maximise their investment to ensure that it is used to its full potential and is in no way damaged or wasted. Spending hours on the Internet for personal use may be entertaining, but it is hardly a productive use of company time
- **Systems damage.** A virus is a piece of software designed to deliberately cause malicious damage. Corruption of the system through unauthorised use, such as opening potentially virus-infected messages, may result in losses and costs for the system
- **Confidentiality and 'know-how' protection.** A company will want to ensure that its confidential information processes, inventions, copyrights, trade secrets and research and development are properly protected and that no employee in any way breaches any form of that confidentiality by copying it in an unauthorised fashion or sending it elsewhere in breach of confidentiality principles
- **Quality standards.** An organisation will have an interest in ensuring that the service provided by employees through electronic correspondence is of sufficient quality to comply with company standards and applicable regulations
- **Legal and contractual commitments.** Employees can enter into binding contractual commitments by ordering materials or requesting services purportedly on behalf of the employer. This can occur very easily and, sometimes, unintentionally
- **Defamation.** An employer has an interest in ensuring that it is not found liable as a result of publication of a statement, either internal or external, purporting to be on its behalf which may be defamatory and therefore damaging to a third party
- **Harassment.** Employers should ensure a safe and harassment-free environment for employees and ensure that they do not e-mail offensive or harassing material to fellow employees
- **Pornographic and other offensive material.** Breaches of child pornography and obscenity laws should be prevented by prohibiting such use on the company system. There have been many cases of suspensions and terminations of employment over this issue.

monitor the movement of an individual around a particular building
- Information and communications monitoring, including keyboard monitoring and e-mail and Internet monitoring. This type of monitoring includes searching for keywords in e-mails for the purposes of monitoring private use or malicious traffic and searching in context as to whether messages appear to be legitimate company business.

Telephone monitoring has become common in the services sector in order to comply with regulatory requirements such as prohibitions on insider dealing, and in call centres to monitor productivity and quality of service. Again, clear guidelines must be published in relation to the monitoring of telephone calls, with clear rules in relation to personal telephone use, the nature of it, the timing of it, the paying for it and the sanctions for breaches of the policy.

Given the very powerful and intrusive nature of many monitoring activities, it is understandable that individuals regard the wholesale use of these measures as being disproportionate, intrusive and a breach of privacy rights. The law therefore has to achieve a balance between, on the one hand, the legitimate privacy rights of individuals and, on the other hand, the legitimate rights of employers to monitor and survey the activities of its employees in the electronic workplace for the reasons outlined above. However, people would be forgiven for thinking that Big Brother has arrived.

Defamation by employers and employees

Great care has to be taken by employers in the way they write about personnel matters and keep personnel files. They also have a duty to take care about the way they record the details of disciplinary hearings and any performance reviews or decisions made as a consequence of such disciplinary hearings which might in any way be defamatory.

'Cyber-smearing' has led to employers seeking to sue anonymous posters of libellous statements. There have been actions by employers against Internet service providers, seeking court orders to identify anonymous posters who defame their organisations and other third parties. Very often these activities are carried out by disgruntled existing or former employees.

It is important that employers who could ultimately be sued over material put on the Internet or their own e-mail systems by their employees are aware of this risk and alert their employees to the danger that their messages could give rise to legal action.

And because there is a huge degree of informality in the nature of e-mail communication and a widespread use of bulletin boards and chat rooms, employers must ensure that employees do not send messages during the course of their employment which would in any way be deemed to be within the ostensible authority of the employer and, therefore, a potential liability.

Problems also arise for an employer where its copyright in certain works may be infringed either deliberately or negligently by an employee, or when the employee infringes someone else's copyright for which the employer may be held vicariously liable. Employers clearly need to educate employees who will be using the Internet as to the works in which copyright, database rights or moral rights subsist. They should be clearly informed of the potential losses that an organisation may suffer due to an infringement of any of these rights.

The coming of the railways and motorways caused the law to take account of the legal consequences of such revolutionary changes. The information superhighway is the current revolution, and new legal ground has been broken. Interesting times lie ahead. G

Terence McCrann is a member of the Law Society's Employment and Equality Committee.

People are your 'most valuable resource', right? So how come attracting and retaining the right staff is a major headache for every business in the country? And law firms are no exception. Deiric McCann explains why people leave their jobs and offers sound advice on what you can do to keep them from straying to pastures new

6 simple steps to keep your staff happy

MAIN POINTS

- The main reasons that people change employment
- Money versus career development
- How to become an 'employer of choice'

Even as we complain about the difficulty of attracting and retaining the sort of people essential to our organisation's success, there are some employers who seem able to do it easily. What's the secret of these 'employers of choice'? It's not really a secret as such; they simply know what's important to prospective and current employees and they work hard to ensure that they provide it.

Before you can look at the whole area of attracting and retaining people in a realistic manner, you must first look at the dark side – at what drives people away. One Irish company recently completed a survey on why people change jobs. The results were fascinating. The following were the six main reasons cited by respondents:

- Bored with the job
- Inadequate salary and benefits
- Limited opportunities for advancement
- No recognition
- Unhappy with management
- Other reasons.

Before we reveal the relative importance of each reason, give yourself a test. Consider which ones you'd expect would get the highest percentage of responses. In other words, if you wanted to retain your people, which factors would you address first? When you've thought about it, turn to the panel **on page 25** and see how you fared before you carry on reading the rest of this article.

Welcome back. Were you surprised? Most employers are. The message is simple: if you want to attract and retain staff, these are the key items for consideration.

If you follow these six steps, you could become an employer of choice, too.

Step 1 Look at your managers

The numbers don't lie. People leave people, not jobs. Look at the results: 30% of people didn't leave their jobs, they left their managers. Poor managers can completely cancel out the positive effects of your heavy investment in recruitment advertising, PR, killer remuneration packages, outstanding share option schemes and all of the other good things you do to attract and retain the right people. Your human resource people sweat blood to bring in a sufficient number of these right people and, in 30% of cases, poor managers shred them and send them back out of the company before you've even recovered the cost of hiring them. Crazy.

So what do you do? First, start measuring your staff turnover *by manager*. Find out where the real problems are. It will frighten but enlighten you. Unless you know which managers are haemorrhaging people, you can't do anything about it. To help these managers improve their game, you first have to identify them.

Second, review all of your managers in terms of their leadership and management skills – that way

you'll find out what exactly is driving your people away. Use 360-degree feedback to give each manager, his boss, those who report to him, and his fellow managers an opportunity to provide feedback on what they are doing well – and what they could do better. Then act upon what you discover. Provide training, coaching and support to those managers who struggle to manage their people in a way that encourages productivity and retention. Good management is the key to good retention.

Step 2 Create a recognition culture

25% of all people leaving their jobs do so because they don't get sufficient recognition for the contribution they make. Fix this or learn to live with the attrition. Give your managers responsibility for seeking out the many ways in which their people perform above and beyond the call of duty. Have them consciously seek out opportunities for positive recognition. Institute award schemes for exemplary performance and give everyone an opportunity to bask in the glow of positive recognition for a job well done. But be aware that a recognition culture cannot be created from nothing. It requires a healthy working environment to thrive.

Step 3 Create a healthy working environment

To encourage development of a genuine recognition culture, you'll need to create a healthy working environment. Not healthy in the sense of lots of fresh air and few toxic chemicals knocking around (although that's always a good start), but a healthy *psychological* working environment: one where providing recognition for exemplary performance seems normal.

There are a number of key elements in achieving this. First, open up communications. There are too many old-economy attitudes abroad in our businesses. In the old economy, scarcity was the driving force: information was power, and those that had information hoarded it, and kept it scarce. That way, they amassed great power, privilege and wealth. Look around: the world has changed dramatically. Our modern economy is based on abundance: those who prosper are those who share information with everyone and anyone who can make use of it effectively. This is the information age, and any environment where the workforce is not tapped in to all that's going on in their organisations is toxic. Suspicion, mistrust and resentment grow … and key people go.

Let all of your people know where the organisation is going, how it plans to get there, how their jobs play a part in the grand scheme of things, and why they are key to your success. Their contribution is just as valuable as the chief executive's – and they know it. Let them know that you know it too. Spread information liberally throughout your organisation; give your people an 'I'm-on-the-inside' feeling. It's hard to leave a place that has you on the inside.

Next, develop an attitude of co-operation. Give and take is the order of the day. Be prepared to consider anything that makes it easier and more practical to work for you than anyone else. Look at flexible hours, compassionate leave, sabbaticals, teleworking, crèche facilities: anything you can afford to do that shows that you are prepared to meet your people half-way (or more) in balancing their work and personal-life commitments.

Finally, develop an atmosphere of trust. If you want people to trust you (with their jobs, their careers, their development), then you have to trust them. Create an atmosphere where managers automatically expect the best of their teams. They'll respond. If you give people a good reputation to live up to, they won't let you down. This is one of the key sources of recognition. No-one is more flattered than when they are trusted implicitly.

Step 4 Create an atmosphere of continual self-improvement

20% of people leave their jobs because they feel that they're not getting sufficient advancement. Not surprising, really. Our new flat-structured organisations don't have the dizzying promotional heights that previous generations of workers could aspire to. So there's really nothing we can do about this point unless we still have an old-fashioned multi-layer hierarchical organisation, right?

No! That thinking is about as wrong as you can get. Modern job-seekers want the opportunity to develop themselves to be all that they possibly can be: to continually polish their skills, abilities and experience so that their potential market value continually rises. If they can do this without the uncertainty of job-hopping, then so much the better. You don't necessarily have to have multiple promotional opportunities to meet this demand. What you need is a clear on-going development

path, a way that each and every one of your people can advance their skills and value so that they become all that they can be. This means heavy investment in training and development.

Create an atmosphere of continual self-development by giving everyone access to any training that will enhance their skills, their value and their self-esteem. Don't be boxed in to limiting the training available to those skills specific to an individual's current job. Remember that you are not simply training for job effectiveness, but also offering your people the development opportunities that make them feel good enough about the pace of their *personal* advancement that they don't feel the need to seek out greener grass elsewhere. Invest heavily in training and development and then actively encourage your people to take advantage of your programmes. Provide them with the means for success: train them on company time, give them study leave, have senior managers coach and support them. Engage them in their own on-going, longer-term development. Show them how they can get all of this development from within your organisation; focus their minds on genuine development goals that extend far beyond the availability of the next recruitment supplement. This creates truly compelling and self-serving reasons to stay.

If you implement these first four steps, well done! You've already eliminated 75% of the reasons that people leave their jobs, and we haven't even mentioned money yet!

Step 5 **Put your best foot forward**

What about the 15% who leave for more money? Will more recognition, better management and opportunities for continual self-development retain them? In many cases, yes (at least for a time). Sadly, however, you still have to pay the market rate or better to stay in the game. But when and how you pay this level is key.

If you're reading this article, chances are that you're sitting down. Good. Because the next suggestion can topple some old-style thinkers. When it comes to remuneration, put your best foot forward immediately. Pay your people as much salary, give them as many benefits as you can afford – and do it from day one.

Abandon the 'what can I get her for?' thinking in favour of 'how much is this position worth to me, and what can I afford to pay?' Then pay it.

Think about it sensibly. If you pare back the package at offer time by the 10% or 15% you can get away with, will this 10% or 15% be enough to retain these people in the face of an offer from another employer? Probably not, and it will be too little, too late. So put your best foot forward, and let your people know. Let everyone know that you are paying absolutely as much as you can and that, to continue to do so, everyone will have to pull together as a team to generate the productivity necessary for the organisation's success. We all respond to fair treatment.

Now, don't misunderstand the advice: pay as much as you can, not more than you can. Pay more than you can afford and you'll just become employer road-kill. Know what each job is worth, and pay it early.

Step 6 **Match people to jobs**

Following 360,000 people through their careers over a 20-year period, a major study by the *Harvard Business Review* demonstrated that a key ingredient in retaining people is ensuring that they are matched to their jobs in terms of their abilities, interests and personalities. The study found that staff turnover fell dramatically and productivity soared when you put people in jobs where the demands matched their own abilities, where the stimulation offered by the job matched their particular interests, and where the demands of the position matched their personalities.

Use psychometric tools to determine the requirements of each of your positions in terms of abilities, interests and personality, and then use this information to match your jobs to people who will excel in them. Gut feeling cannot do this assessment for you. It needs to be undertaken using properly-validated tools designed for this purpose. Once you know what each job requires, then you can more effectively match people to their jobs, providing any training, support or coaching necessary for them to be successful. Put the right person in the right job and you eliminate a large amount of the 5% that leave simply because they 'are bored with the job'.

Sadly, there is no quick, easy and inexpensive 'silver bullet' that will help you to win the war for quality people. But apply these six sensible steps and you eliminate over 95% of the reasons people defect. That will put you well on track to be one of that envied class: the employer of choice. G

HOW DID YOU DO?

The study found that of the job-leavers surveyed:

- 30% were unhappy with management
- 25% felt that they got no recognition for good work
- 20% complained of limited opportunities for advancement
- 15% cited inadequate salary and benefits (low, isn't it?)
- 5% were bored with the job, and
- 5% cited other reasons (retirement, career change, sabbatical, travel).

So, if you want to attract and retain the people essential to your success, these are the key factors you have to consider. The priorities are abundantly clear. Money, for example, is important, but not nearly as important as most employers seem to believe.

Return to where you were in the article to see what you can do to make practical use of this insight.

Deiric McCann is managing director of Profiles Ireland, which provides businesses with self-assessment tools to help them recruit and retain star performers.

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Book review

The old Munster circuit: a book of memoirs and traditions

Maurice Healy. Wildy & Sons Ltd (2001), Lincoln's Inn Archway, Carey Street, London WC2A 2JD, England. ISBN: 0-85490-098-5. Price: stg£19.95.

Death will most certainly envelop us all in her clasping grasp; it may be a small consolation for some of us that there may be some memorial afterwards in print, albeit a humble piece, ever so briefly recording our passage in this life and our passing to the next one. It would indeed be fortunate were we to have an obituarist of the calibre of Charles Lysaght, who has written a biographical introduction for the latest edition of Maurice Healy's celebrated tome. Lysaght won a gold medal for oratory as a member of the Literary and Historical Society at University College Dublin, where he read history and economics and then studied law at Cambridge University, where he was president of the union. The north Tipperary man went on to become Winston Churchill's close friend and wartime minister of information, and the author of the celebrated biography of Brendan Bracken. His addition to *The old Munster circuit* does not disappoint.

The book's author, Maurice Healy, was the son of a solicitor and a member of parliament. He was also a nephew of Tim Healy, king's counsel of England and Ireland and the first governor-general of the Irish Free State. Maurice Healy studied history and economics at University College Dublin and was called to the bar in 1910. Having served with the army during the First World War, he was awarded the military cross and retired in 1919 with the rank of captain. He became a king's counsel in 1931, recorder of Coventry in 1941 and died in 1943.

The old Munster circuit was first published in 1939. The book is composed of stories mainly about the old days in Cork when Healy used to travel the Munster circuit. *The Spectator* noted on its publication that the book was 'entirely delightful to read'. In fact, *The Spectator* enthused: 'No book dealing with any phase of Irish life that has been published in recent years contains so many entertaining anecdotes and sketches'.

The old Munster circuit is recognised as one of the crown jewels in Irish legal literature, appreciated by lawyers and non-lawyers alike – in fact, by anyone interested in a good story. Healy's accounts are riveting and fulfilling and splendidly readable. In an inimitable style, he looks at life and the law with a critical yet totally affectionate eye and, in the process, the reader benefits from fascinating insights into lawyers – solicitors, barristers, judges – and, most important of all, the nature of the human psyche. G

Dr Eamonn Hall is company solicitor of Eircom plc.

Tech trends

By Maria Behan

Cross your Palm with silver?

The latest Palm is an arctic mist (that's silver to you and me) beauty that manages to combine increased processing power and a high-contrast colour LCD screen with improved battery life (the company claims that it can run for four straight weeks of 40-minute-a-day use). It includes a USB port for easy connection to digital cameras, MP3 players and the other gadgets in your arsenal. And if you hook into a modem or data-enabled mobile phone, you can access the web and check e-mail. Other enhancements include increased security features, the ability to set silent and vibrating alarms, and software that lets you edit Excel spreadsheets and Word documents, read e-books, view photos and video clips and browse web content off-line. *Available for about £500 from electronics outlets.*

An evil empire no more?

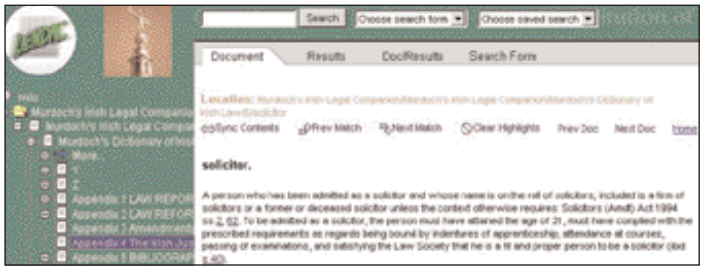
The 'XP' in Microsoft's new suite of office programs, Office XP, is meant to stand for experience – pretty cheeky, since users' experience with the company's software often involves obscurely ominous error messages, cruelly-timed crashes and cheerily impenetrable 'help' menus. But judging by its latest offering, the company that built its empire through market hegemony has finally opened its eyes to the experience of the millions using its products. Indeed, the word-processing, spreadsheet, calendar and other programs that make up the Office XP package boast several nifty capabilities. A feature called Smart Tags offers useful options at crucial intervals: for instance, when you're using the word-processor and type in a name, a Smart Tag pops up asking if you want to add it to your contact list. And if it's already in your contact list, you can add the name and address with just a mouse click. Other features make it easy to take advantage of the web and to access several e-mail accounts from Microsoft's Outlook e-mail portal. And Office XP's new document-recovery facility means that you won't lose your work if the power cuts out or your PC crashes. Microsoft may still be doing its utmost to lure users into its clutches and keep them there, but at least it's using more carrot and less stick. *Available at computer outlets; pricing varies based on the package selected and whether it's a new or upgraded installation. For example, Office XP Standard costs about £250 for an upgrade or £535 for new users, while the Professional Special Edition, which offers additional collaboration tools and website creation, costs roughly £400.*

Fit to print

The Hewlett Packard LaserJet 4100 contributes to the paper glut in style. It uses a 250 MHz RISC processor (many PCs would be jealous) to perform impressive feats such as receiving printer input via the Internet and sending e-mails to alert relevant workers of empty paper trays and low toner. It also produces 24 pages a minute, offers 110 different TrueType fonts and the resolution is top notch at 1,200 dpi. If your firm needs a state-of-the-art printer that can keep up with multiple jobs, you may want to look into this one. *Available for about £1,600 from office suppliers and computer outlets.*

Dusty tome goes digital

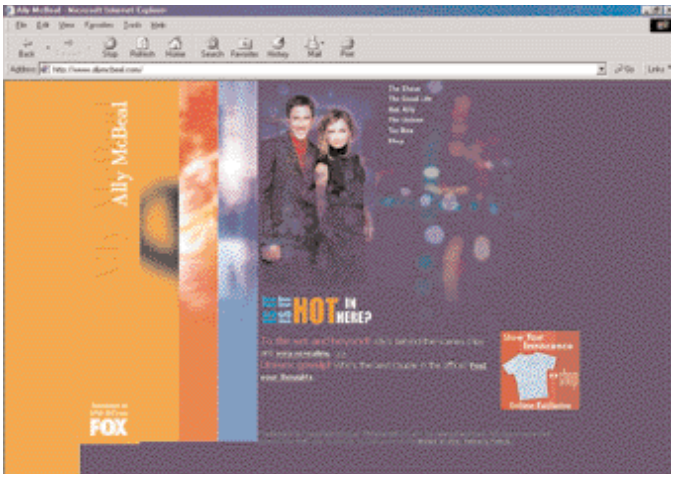
The venerable *Murdoch's dictionary of Irish law* has moved into the computer age. Renamed *Murdoch's Irish legal companion*, all the material from the book you know and love, plus the full text of statutory instruments, acts and bills, are now available either on CD-ROM or via the Internet. One big advantage over the bound book is that once you've found the definition you're looking for, you can link to related terms, websites or pertinent statutory material. You can also cut-and-paste information directly into your word-processor or personalise and annotate sections for later use, which might come in handy for research or training. *Prices start at £80 for a student edition to £450 for a large enterprise edition, available from Lendac Data Systems, 01 677 6133. Visit* http://milc.lendac.ie *for a preview.*



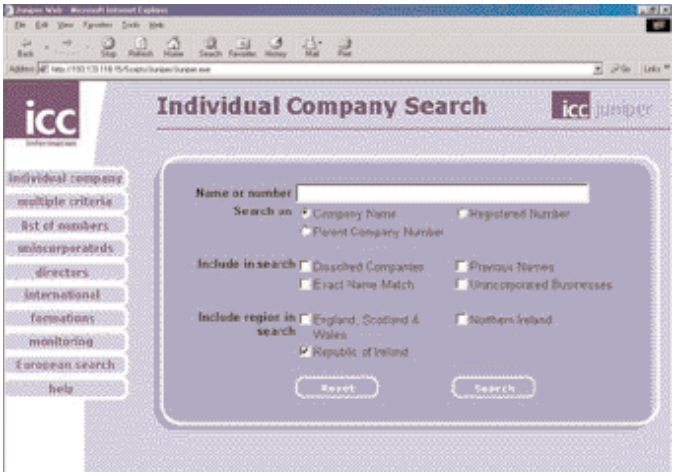
ExZYting news?

Want to turn the mounds of paper littering your office into a storehouse of knowledge? According to the folks at ZyLAB, their ZyIMAGE imaging system will do just that. You can scan paper documents into the system, or, if they're already stored in electronic format via programs such as Word, WordPerfect, Excel or PowerPoint, you can just drag and drop the files onto the software's index builder to digitally store your documents in a way that's searchable (by name or text keywords) and easy to organise – and re-organise. It also features snazzy capabilities that let you make information accessible on the Internet for clients or travelling staff members and something called ZyALERT, which allows you to define search criteria and have hits from paper and electronic data automatically routed your way. *Pricing varies based on configuration, but a system including scanner, software, installation, training and maintenance starts at £6,000. Available by contacting the sole Irish distributor, Digiscan, on 01 834 1220 or e-mail* sales@digiscan-ace.com.

Sites to see

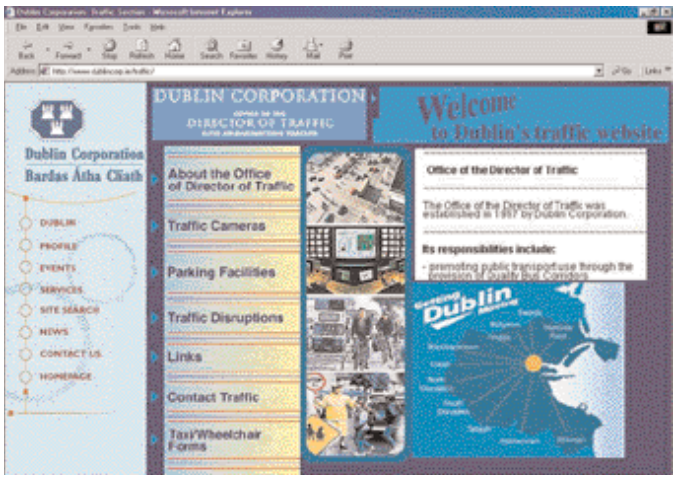


Ally McBeal (*www.allymcbeal.com*). The site for real lawyers hooked on the doings of their hopelessly slim and neurotic counterparts across the pond. It offers discussion groups on the TV show, star interviews and episode previews complete with video clips and cartoons. There's even an 'e-mail a voodoo doll' service, complete with a cunning figure that screams when you stick pins in it.



Juniper (*www.iccjuniper.ie*). An on-line company report service from Intercompany Comparisons, this fee-based site is the motherlode of information and analysis on all limited companies registered in the Republic, Northern Ireland and the UK. Boasting ISO 9002 quality accreditation for both its analysis and data capture, the site offers much that might be of interest to solicitors and their clients, including the low-down on company directors and shareholders, cash flow, profitability and risk assessment. A tracking feature can even alert you to news on companies that you specify as being of particular interest.

VHI Health-e (*http://www.vhihealthe.com*). The focus of this health insurers' site is on education, from a Health A-Z covering common concerns to sections laden with tips on fitness, nutrition and travel health. It also features an 'Ask the experts' section.



Dublin Corporation Traffic (*www.dublincorp.ie/traffic*). Wondering if it's safe to start out for home? Check out this site, which lets you click on city maps to access footage from strategically-placed traffic cameras, so you'll know if the coast is clear or whether you should plan on working late.

Davy
STOCKBROKERS

Short-term resul

In this month's *Stockwatch*, Jack O'Keeffe describes some alternative investment strategies which experienced investors may find of interest

Jack O'Keeffe: Alternative investment strategies are not for the faint-hearted

In my previous articles, I explained how an ordinary investor with limited knowledge of the stock market is generally best served by selecting companies carefully on the basis of their fundamentals and holding them for the long term. However, if you count yourself among the more experienced investors, you may want to consider other financial instruments which can maximise the returns on your portfolio.

Some of these are outlined below. But first, a word of warning. The strategies outlined this month are *only* appropriate for knowledgeable investors who are willing to accept a high degree of risk – including the possibility of losing some or all of their investment – in return for the possibility of substantial gains.

Trading stocks

Unlike the traditional approach to building a portfolio, which involves careful selection of companies and holding the shares for the long term, aggressive trading strategies involve taking a *short-term* view on equities in response to specific events or general market trends. Essentially, you accept that share prices are going to fluctuate and you build a position to reflect this view.

For example: Company A is due to announce its interim or annual results which you believe (because you've researched the stock or because of economic or market trends) will disappoint analysts' expectations. You decide to 'short' the stock (that is, sell more than you actually own) in the hope of buying it back at a cheaper price and making a profit on the difference. Alternatively, you may think Company A's results will surpass analysts' expectations and you go 'long' on the stock (that is, purchase more than you can pay for) in the hope of selling it at a profit if the price subsequently rises.

Trading indices

Investing in the mainstream indices such as Standard & Poor's (S&P) 500, the FTSE 100 or the Dow Jones Industrial Average is generally regarded as a fairly safe investment strategy. The same does not hold true, however, for some of the specialist indices, such as the technology indices. These are far riskier investment choices, although they do hold the prospect of substantial returns. Let's suppose the US Federal Reserve's Open Market Committee (FOMC) is due to meet and you believe the Fed will cut interest rates. You might decide to take a long position in one of the technology indices such as the XLK Technology Select SPDR Fund or the Nasdaq 100 Index Tracking Stock in the hope of a market rally.

Delayed settlement

If you have an established relationship with a stockbroker, you may be able to incorporate a delayed settlement facility into your trading strategy. This would allow you to settle trades on a delayed payment basis that could be anything up

lts – long-term gains?

to 30 days after the trade was executed. You may have to pay a small premium on top of the share price for this facility, depending on the volumes and the equity in question. In effect, you receive an interest-free loan for the period. Usually, you can close out the position before settling the trade if the trade is showing a profit.

Margin trading

Some foreign brokers allow clients to trade on funds which the clients effectively borrow from the broker. The broker charges interest on the funds while the client uses leverage to try to increase his return. Before the broker will extend funds for margin trading, he will require collateral, usually in the form of share holdings, which must be maintained at an agreed ratio to the borrowings. If the market falls and the value of the equities held as collateral drops below the minimum ratio required, the broker may liquidate the position and cut the losses.

Alternatively, the client may provide additional collateral or funds to hold his position in the hope of a recovery.

Options and futures

Experienced financial investors often use options and futures to protect their investments in a volatile market. Say you hold an equity position with a higher level of risk than you would normally accept. You might try and reduce this risk – or hedge your position – with the use of options and futures. Futures contracts try to 'bet' on what the value of a stock, index or commodity will be at some future date. Options and futures are complex financial contracts that involve the sale or purchase of financial instruments for future delivery. Essentially, the seller offers the buyer the right to buy (also known as 'call') or sell (known as 'put') a security at an agreed price during a certain period of time or on a specific date. Where you make money is in correctly guessing when to call or put.

Contracts for differences

This is another complex, high-risk strategy that allows you to trade on margin. Contracts for differences are similar to normal share dealing but a deposit is used as collateral to purchase the share rather than paying the full value. This deposit is normally 10% to 25% of the contract value, depending on the share in question and the time-zone difference. Without getting into technicalities, contracts for differences offer a potential reward far greater than would be possible by means of margin trading alone, but the risk is also significantly increased.

Warrants

Warrants are similar to call options, but are considered long-term instruments with expiry dates typically years in the future – unlike call options, where the life span is generally measured in months. A warrant gives the holder the right to purchase securities from the issuer of the warrant at a specific price. A recent example where warrants were offered was the Eircom plc sale.

Spread betting

Spread betting is a high risk/high reward method of betting on the future price of a share. It is possible to place a limit on your losses, but it's important to bear in mind that a volatile market can result in unpredictable and fast-changing returns.

Well, those are some of the possibilities for maximising your returns. As I mentioned at the outset, these are highly complex strategies that require detailed professional advice as to the risks involved. They are not for the novice investor. That said, they do offer the possibility for substantial reward. G

Jack O'Keeffe is a director of investment services at Davy Stockbrokers in Dublin.

The Institute of Taxation in Ireland in association with the Law Society of Ireland

THE INSTITUTE OF TAXATION IN IRELAND

Law Society of Ireland

CHANGE OF BUSINESS OWNERSHIP: TAX PLANNING AND LEGAL IMPLICATIONS

One-day conference – Alexander Hotel, Dublin, Tuesday 25 September 2001

PROGRAMME OUTLINE

9.30–10.15am	**Acquiring a new business or company – *Donall Gannon, KPMG*** **Pre-acquisition tax planning** • Why acquisitions fail: before and after the event • The expectation gap between buyer and seller • Common problems and mistakes • The adviser's role: help or hindrance?
10.15–10.45am	**Financing an acquisition – *Tim Scanlon, Matheson Ormsby Prentice*** • Method of finance: cash, debt, equity, deferred consideration • Tax implications of method of finance • Tax reliefs available
10.45–11.15am	**Tea/coffee break**
11.15–11.45am	**Tax due diligence – *John Gilmore-Gavin, BDO Simpson Xavier*** • Tax checklist and pre-investigation planning • Completion of tax due diligence report • Tax warranties • Deed of indemnities and share purchase agreement: taxation issues • Revenue clearance procedures
11.45–12.15pm	**Legal due diligence – *Sean Nolan, Kenny Stephenson Chapman*** • Project management and the role of legal and other advisers • Information request list and data room • Completion of legal due diligence report • Interaction of due diligence with warranties • Vendors' perspective
12.15pm	**Question time**
12.30–2pm	**Lunch in Davenport Hotel**
2–2.50pm	**Company/group reorganisations and reconstructions, including partition of a family company – *Terry O'Driscoll, PricewaterhouseCoopers*** • Taxes arising and reliefs available • Partitions versus reconstructions • Distribution concerns under section 130, • TCA 1997 • Advance rulings from Revenue • Company law and legal issues to be considered
2.50–3.40pm	**Tax and legal issues when preparing a private company for sale or investment – *Greg Hollingsworth, William Fry Tax Advisers*** **Pre-sale tax planning for shareholders** • Tax warranty, indemnity and disclosure issues for vendors • Equity investments into a company: tax considerations • Company law issues • Legal form of investment
3.40– 4.10pm	**Tea/coffee break**
4.10– 5pm	**Employee considerations when acquiring, selling or reorganising a company – *Maura Roe, William Fry, Solicitors*** • Employees' rights under transfer of undertaking regulations • Termination of employment • Employee share schemes

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LEGISLATION UPDATE: 12 MAY – 15 JUNE 2001

ACTS PASSED

ACC Bank Act, 2001
Number: 12/2001
Contents note: Increases the authorised share capital of ACC Bank plc; makes the necessary legislative provisions to facilitate the future sale of ACC Bank plc by providing for the disposal by the minister for finance of shares in the bank and the establishment of an employee share ownership trust. Repeals the *ACC Bank Acts, 1978 to 1999* and other acts and SIs to the extent provided as per the schedule to the act
Date enacted: 29/5/2001
Commencement date: Commencement order/s to be made (per s13(2) of the act)

Health (Miscellaneous Provisions) Act, 2001
Number: 14/2001
Contents note: Amends the *Health Act, 1970* to make further provision in relation to the supply of and payment for drugs and medicines and medical and surgical appliances in accordance with arrangements made by health boards; amends the *Tobacco (Health Promotion and Protection) Act, 1988* in relation to raising the age limit of those to whom tobacco products may be sold from 16 to 18 years, and raising the maximum fines from £500 to £1,500; amends the *Health (Nursing Homes) Act, 1990* in relation to subvention payments and convalescent homes
Date enacted: 5/6/2001
Commencement date: Commencement order/s to be made (per s5(4) of the act)

Industrial Relations (Amendment) Act, 2001
Number: 11/2001
Contents note: Gives new dispute-settling powers to the Labour Court in cases where an employer has failed to follow agreed voluntary procedures, where negotiating procedures are not in place and collective bargaining is not taking place, and where there has been no recourse to industrial action by the trade union or employees. Amends and extends the *Industrial Relations Acts, 1946 to 1990*, and provides for related matters
Date enacted: 29/5/200
Commencement date: 31/5/2001 (per SI 232/2001)

Irish Nationality and Citizenship Act, 2001
Number: 15/2001
Contents note: Amends the *Irish Nationality and Citizenship Acts, 1956 to 1994* consequent on the coming into effect on 2/12/1999 of the new articles 2 and 3 of the constitution pursuant to the British-Irish agreement done at Belfast on 10/4/1998
Date enacted: 5/6/2001
Commencement date: Section 2(a)(iii) and (d) and section 3 shall be deemed to have come into operation on 2/12/1999, being the day of the making of the declaration by the government under article 29.7.3 of the constitution (per s9(3) of the act). Commencement order/s to be made for all other sections of the act (per s9(4) of the act)

Valuation Act, 2001
Number: 13/2001
Contents note: Revises the law relating to the valuation of properties for the purposes of the making of rates in relation to them; makes provision in relation to the categories of properties in respect of which rates may not be made, and provides for related matters
Date enacted: 4/6/2001
Commencement date: Commencement order to be made (per s2 of the act)

SELECTED STATUTORY INSTRUMENTS

Aliens (Visa) (No 2) Order 2000
Number: SI 248/2001
Contents note: Specifies the classes of persons who are required to have a transit visa and the classes of persons exempt from Irish visa requirements. Revokes the *Aliens (Visas) Order 2001* (SI 36/2001)
Commencement date: 8/6/2001

European Communities (Protection of Consumers in respect of Contracts made by means of Distance Communication) Regulations 2001
Number: SI 207/2001
Contents note: Implement directive 97/7/EC on the protection of consumers in respect of distance contracts. Apply to contracts for goods or services (other than financial services) to be supplied to a consumer where the contract is made exclusively by means of distance communication, that is, without the simultaneous physical presence of the supplier and the consumer. Deal with the information which a consumer must be given before entering into a contract, subsequent written confirmation of that information, and a cooling-off period within which the consumer may cancel the contract
Commencement date: 15/5/2001

Finance Act, 2001 *(Commencement of Section 169) Order 2001*
Number: SI 212/2001
Contents note: Appoints 1/7/2001 as the commencement date for section 169 of the *Finance Act, 2001* (measurement criteria for classifying vehicle categories to determine the rate of vehicle registration tax)

Industrial Relations (Amendment) Act, 2001 *(Commencement) Order 2001*
Number: SI 232/2001
Contents note: Appoints 31/5/2001 as the commencement date for the *Industrial Relations (Amendment) Act, 2001*

Safety, Health and Welfare at Work (Confined Spaces) Regulations 2001
Number: SI 218/2001
Contents note: Impose requirements and prohibitions with respect to the safety and health of persons carrying out work in confined spaces as defined in regulation 2(1). Apply to all work activities involving confined spaces, with the exception of activities below ground at a mine and diving operations
Commencement date: 31/8/2001

Safety, Health and Welfare at Work (General Application) (Amendment) Regulations 2001
Number: SI 188/2001
Contents note: Amend the *Safety, Health and Welfare at Work (General Application) Regulations 1993* (SI 44/1993) to give effect to directive 95/63/EC amending directive 89/655/EEC concerning the minimum safety and health requirement for the use of work equipment by workers at work
Commencement date: 2/5/2001

Safety, Health and Welfare at Work Act, 1989 *(Repeal of Section 38 of the* Factories Act, 1955*) (Commencement) Order 2001*
Number: SI 219/2001
Contents note: Appoints 31/8/2001 as the commencement date for section 4(3) of the *Safety, Health and Welfare at Work Act, 1989* in so far as it applies to the repeal of section 38 of the *Factories Act, 1955*, as amended by section 21 of the *Safety in Industry Act, 1980*. These provisions are replaced by the *Safety, Health and Welfare at Work (Confined Spaces) Regulations 2001*

FOOT AND MOUTH DISEASE REGULATIONS

The following regulations are in addition to the lists published in *Legislation update* in the May and June issues of the *Gazette*:

Diseases of Animals Act, 1966 *(Foot and Mouth Disease) (Export and Import of Horses) (Amendment) Order 2001*
Number: SI 197/2001

Diseases of Animals Act, 1966 *(Foot and Mouth Disease) (Import Restrictions) (No 3) (Amendment) Order 2001*
Number: SI 179/2001

Diseases of Animals Act, 1966 *(Foot and Mouth Disease) (Regulation of Sheep Shearing) Order 2001*
Number: SI 228/2001

Diseases of Animals Act, 1966 *(Foot and Mouth Disease) (Removal of Certain Import Restrictions) Order 2001*
Number: SI 239/2001

Diseases of Animals Act, 1966 *(Foot and Mouth Disease) (Restriction on Imports from the Netherlands) (Amendment) Order 2001*
Number: SI 233/2001

Diseases of Animals Act, 1966 *(Foot and Mouth Disease) (Restriction on Imports from the United Kingdom) Order 2001*
Number: SI 178/2001

Diseases of Animals Act, 1966 *(Foot and Mouth Disease) (Restriction on Imports from the United Kingdom) (No 2) Order 2001*
Number: SI 201/2001

Diseases of Animals Act, 1966 *(Foot and Mouth Disease) (Restriction on Movement of Horses) Order 2001*
Number: SI 199/2001

Diseases of Animals Act, 1966 *(Foot and Mouth Disease) (Restriction on Movement of Horses) (Amendment) Order 2001*
Number: SI 216/2001

Diseases of Animals Act, 1966 *(Foot and Mouth Disease) (Restriction on Movement of Persons) (Amendment) Order 2001*
Number: SI 237/2001

Diseases of Animals Act, 1966 *(Foot and Mouth Disease) (Temporary Restriction on Sheep Shearing) Order 2001*
Number: SI 196/2001

Diseases of Animals Act, 1966 *(Foot and Mouth Disease) (Temporary Restriction on Sheep Shearing) (Amendment) Order 2001*
Number: SI 217/2001

Diseases of Animals (Protection of Animals during Transport) (Amendment) Order 2001
Number: SI 215/2001

Foot and Mouth Disease (Prohibition on the use of Swill) (Amendment) Order 2001
Number: SI 227/2001

Foot and Mouth (Restriction on Movement) (No 5) Order 2001
Number: SI 198/2001

Foot and Mouth (Restriction on Movement) (No 6) Order 2001
Number: SI 195/2001

Prepared by the Law Society Library

Personal injury judgments

Statute of Limitations – negligence – personal injuries arising from a motorcycle accident – letters from insurance company headed 'without prejudice' – delay in issuing proceedings – whether claim was statute-barred – whether issue of possible settlement negotiations in 'without prejudice' correspondence induced the plaintiff to refrain from issuing a plenary summons – status of 'without prejudice' letters – whether it would be inequitable to allow the insurance company to raise the _Statute of Limitations_ in the circumstances

CASE

***Desmond Ryan v Michael Connolly and Anne Marie Connolly*, Supreme Court (Keane CJ, Murphy and McGuinness JJ), judgment of Mr Justice Ronan Keane delivered on 31 January 2001.**

THE FACTS

Desmond Ryan was riding on his motorcycle and was involved in a collision with a car on 26 April 1995. The car was the property of Michael Connolly; the accident happened at Furbo Bridge in Co Galway. Mr Ryan sustained injuries in the collision and his motorcycle was damaged.

On 23 May 1995, Mr Ryan's solicitors wrote to the Connollys claiming that the accident was as a result of the car being driven from a side road and that he was seeking damages. Mr Ryan's solicitors asked that the letter be passed to the relevant insurance company.

Hibernian Insurance, which insured the car, wrote on 11 July 1995 to Mr Ryan's solicitors in a letter headed 'without prejudice'. The remaining letters from the insurance company to Mr Ryan's solicitors were, with one exception, all headed 'without prejudice'. In the letter of 11 July 1995, the insurance company raised a number of queries with the solicitor. The letter ended: 'On receipt of your reply and when our own investigation has been concluded, we shall advise you immediately as to our decision on liability. The above requests are made without prejudice to liability on our insured's part'.

Mr Ryan's solicitors replied on 1 September 1995, giving the information requested. Arrangements were also made for a medical examination of Mr Ryan by Hibernian Insurance's doctor.

On 9 July 1996, the insurance company for the Connollys wrote to Mr Ryan's solicitors: 'With regard to the above matter, we refer to previous correspondence and confirm that we have obtained a medical report on your client. We have concluded the damage claim direct with your client's insurers, Norwich Union. Please advise if you are in a position to discuss settlement at this time. We await hearing from you'.

Mr Ryan's solicitors replied on 24 July 1996 stating that they were awaiting an appointment for an up-to-date medical report and, as soon as the report came to hand, they would communicate with the insurance company.

On 13 March 1997, the insurance company wrote to Mr Ryan's solicitors: 'With regard to the above matter, we refer to previous correspondence. Please advise if you are interested in discussing the case with us at this time. We look forward to hearing from you'.

No reply was apparently received to that letter and the insurance company wrote again on 30 October 1997 asking whether Mr Ryan's solicitors would be in a position to meet for settlement discussions at the October Galway High Court or, alternatively, the February 1998 Galway High Court sittings. There was further correspondence between the parties, including a letter of 27 January 1998 when the insurance company asked: 'Could you please advise if you are in a position to meet for discussions at the forthcoming Galway High Court?'

It appears that that letter was not replied to and the insurance company wrote again on 2 July 1998: 'Could you please advise if you are in a position to meet for without prejudice talks at the forthcoming Galway High Court sessions. We have tried to phone your office on a number of times in relation to this matter but have been unable to get through'.

In fact, the three-year period of limitation within which proceedings had to be issued under the *Statute of Limitations Act, 1957* had expired on 25 April 1998.

Subsequently, Mr Ryan's solicitors wrote to the insurance company and asked them to nominate a solicitor to accept service of proceedings. Proceedings were then instituted by way of a plenary summons outside the limitation period. A statement of claim was delivered on 11 June 1999 and a defence was delivered on 14 July 1999. The insurance company pleaded that the action was statute-barred by virtue of the provisions of section 11(2)(b) of the *Statute of Limitations Act, 1957*. Mr Ryan's legal team argued that, from the time of notification of the motor accident of 26 April 1995 up to the commencement of proceedings, the insurance company caused and induced Mr Ryan to refrain from issuing proceedings within the period prescribed by statute. Mr Ryan's lawyers argued that by virtue of its conduct, the insurance company was estopped from relying on the provisions of the *Statute of Limitations Act, 1957*. Accordingly, a preliminary issue arose as to whether or not Mr Ryan's claim was statute-barred.

THE HIGH COURT

The issue came before Kelly J in the High Court. He considered that the essential matter which had to be determined was not whether the action was statute-barred (because it clearly was) but whether the insurance company was precluded from insisting on their legal rights by virtue of the circumstances which arose in the case.

In an affidavit before the

High Court, the solicitor for Mr Ryan stated that the correspondence from the insurance company indicated to him that Mr Ryan's material damage claim had been concluded with his insurers directly and that the insurance company for the Connollys was anxious to engage in settlement discussions. He said that he had at all times considered this case to be one that would be settled with the insurance company once he was in a position to meet them and that, in those circumstances, he refrained from issuing proceedings within the time prescribed by the *Statute of Limitations*.

The solicitor submitted that a climate had been created by the insurance company for the Connollys in which settlement of the case was anticipated when all the parties were ready to meet.

In the High Court, the issue arose that, given all of the letters which came from the insurance company were headed 'without prejudice', this correspondence was privileged and could not be taken into account by the court. The second matter was whether circumstances were such as to preclude the Connollys and the insurance company from maintaining the plea under the statute.

Kelly J stated that it seemed clear that Mr Ryan's legal advisers did in fact infer as a result of the correspondence that the *Statute of Limitations* would not be raised against his client. The net issue which he considered he had to decide was whether it was reasonable to draw that inference. If it was, then it would follow that the attempt on the part of the insurance company to raise the *Statute of Limitations* would be inequitable.

The High court held in favour of Mr Ryan; the Connollys and the insurance company appealed to the Supreme Court.

THE SUPREME COURT

The issues were argued before the Supreme Court and the court (Keane CJ, Murphy and McGuinness JJ) delivered judgment on 31 January 2001. Keane CJ stated that the case raised again an issue which had concerned the courts on a number of occasions, that is, the circumstances in which a defendant should not be permitted to rely on a defence under the *Statute of Limitations* which would otherwise be available to him.

He outlined the facts and referred to the issue of the 'without prejudice' letters. He referred to the law as stated in Halsbury's *Laws of England* (fourth edition, volume 17, para 2.12): 'Letters written and oral communications made during a dispute between the parties, which are written or made for the purpose of settling the dispute and which are expressed or otherwise proved to have been made "without prejudice", cannot generally be admitted in evidence'.

Keane CJ stated that it was clear that this rule had evolved because it was in the public interest that parties should be encouraged, so far as possible, to settle their disputes without resort to litigation. If parties were in the position that anything they said or wrote in the course of negotiations, even when expressly stated to be 'without prejudice', could subsequently be used against them, they would undoubtedly be seriously inhibited in pursuing such negotiations. However, the chief justice stated that it was clear from the authorities that the presence of the heading 'without

prejudice' did not automatically render the document privileged. In any case, where the privilege was claimed but challenged, the court was entitled to look at the document in order to determine whether it was of such a nature as to attract privilege.

The chief justice noted, however, that although firmly rooted on considerations of public policy, the rule relating to 'without prejudice' communications should not be applied in so inflexible a manner as to produce injustice. Thus, where a party invited the court to look at 'without prejudice' correspondence, not for the purpose of holding one's opponent to admissions made in the course of negotiations but simply in order to demonstrate why a particular course had been taken, the public policy considerations may not be relevant. It would be unthinkable, according to the chief justice, that the attachment of the 'without prejudice' label to a letter which expressly and unequivocally stated that no point under the *Statute of Limitations* would be taken if the initiation of proceedings was deferred pending negotiations would oblige a court to decide, if the issue arose, that no action of the defendant had induced a plaintiff to refrain from issuing proceedings. He said that it followed that in such a case as the present case, the court was entitled to look at the 'without prejudice' correspondence for the purpose of determining whether the circumstances were such that the defendants should not be allowed to maintain their plea under the *Statute of Limitations*.

The chief justice then considered the second issue: were the circumstances such as to preclude the Connollys and the insurance company from maintaining the plea under the *Statute of Limitations*. Referring to the decision of the Supreme Court in *Doran v Thompson Ltd* ([1978] IR 223), he quoted Griffin J's *dicta* to the effect that in the appropriate circumstances the representation, promise or assurance must be clear and unambiguous so as to found an estoppel. Applying that general principle to the category of cases in which a defendant may be held to be precluded from relying on a defence, the chief justice referred further to Griffin J's words: 'If the defendants' insurers had made a clear and unambiguous representation … that liability was not to be an issue, and the plaintiff's solicitors had withheld the issuing of proceedings as a result, I would have held that the defendants were estopped from pleading the *Statute of Limitations*'.

The chief justice added that the fact that a defendant had expressly and unambiguously conceded the issue of liability in a case would not necessarily of itself make it reasonable for the plaintiff to assume that he could defer the institution of proceedings beyond the limitation period. Where an insurance company within days of the accident accepted that no issue on liability arose (for example, in the case of a passenger wearing a safety belt), but for some reason the subsequent negotiations became dormant, the plaintiff may well find himself unable to rely on the principle under consideration if he permitted the limitation period to expire without instituting proceedings. In the absence of a statement by the insurance company from which it was reasonable to infer in the event of proceedings not being instituted within the limitation period, the affected party would refrain from relying on a defence under the statute, there seemed no reason in principle why the insurance company should not be subsequently precluded from relying on such a defence.

The insurance company, according to the chief justice, was undoubtedly interested in having negotiations for a settlement with Mr Ryan's solicitors, but the judge could find nothing in the correspondence to indicate that the insurance company was effectively treating the case as one in which any defence on liability was being abandoned, still less as one in which they would regard the institution of proceedings as superfluous and would not raise the *Statute of Limitations* as a defence if, for any reason, proceedings were instituted outside the limitation period.

Counsel on behalf of Mr Ryan in the Supreme Court relied strongly on the letter of 9 July 1996 in which the insurance company informed Mr Ryan's solicitors that they had concluded the material damage claim direct with Mr Ryan's insurers. The chief justice noted that it was well known that insurance companies in cases where the owners of two vehicles involved in a collision were comprehensively insured would dispose of the claims arising from the damage to the vehicle on what was sometimes called 'a knock for knock' basis. It may be that this was what the insurance company was conveying to Mr Ryan's solicitors in the letter of 9 July 1996.

What was certain was that the mere fact that the damage to Mr Ryan's motorcycle had been dealt with by agreement with his insurance company and the implication that it could, as a result, be excluded from any settlement negotiations or any claim in proceedings could not, on any view, have been reasonably construed as an unambiguous indication by the insurance company that liability in respect of Mr Ryan's personal injuries claim was being conceded. The chief justice said it could not be read as a representation, in the event of proceedings being instituted by Mr Ryan at a later stage outside the statutory period, that no defence under the *Statute of Limitations* would be raised. He noted that in cases such as this, the expense that a plaintiff's solicitor incurs on his client's behalf on issuing a plenary summons in order to prevent the statute running was comparatively small; the consequence, by contrast, of refraining from issuing proceedings could be extremely serious.

The chief justice allowed the appeal of the insurance company and substituted for the order of the High Court an order determining that the Connollys and insurance company were not precluded from relying on a defence under the *Statute of Limitations, 1957*.

Tort – personal injuries – prisoner attacking garda with syringe containing blood-like fluid – anxiety – post-traumatic stress disorder – delayed stress exacerbated by subsequent awareness of where needle was hidden in body of prisoner

CASE

***Anthony Shiels v Minister for Finance,* High Court, judgment of Mr Justice Roderick Murphy of 25 March 2001.**

THE FACTS

Garda Anthony Shiels sustained injury while on duty; he was stabbed with a needle in the back of his right hand while escorting prisoners from Monaghan courthouse to Mountjoy jail. The incident happened at about 5pm on 9 January 1996.

One of the prisoners, having somehow removed the handcuffs which restrained him,

attacked another member of the Garda with a syringe which contained a blood-like fluid. Apparently the prisoner began to spit and scream. He waved the syringe and threatened the gardai. While Garda Shiels and his colleague were trying to restrain the prisoner, he stabbed Garda Shiels's hand with the syringe. There appeared to be blood squirting from the syringe, and the prisoner was aggressive, kicking and shouting.

On return to Dublin, Garda Shiels was treated for his injury in the Mater Hospital. In fact, Garda Shiels stated that he was not aware that he had been stabbed until he was medically examined. He was then given a dose of hepatitis vaccination. In his evidence before the High Court, Garda Shiels stated he ascertained within a week that his assailant was not HIV positive.

Subsequently, Garda Shiels and his wife consulted with Dr Fiona Mulcahy. In her first report, Dr Mulcahy was of the opinion that Garda Shiels suffered a significant injury following the assault and put the transmission risk following such a needle stick injury with HIV positive blood to be one in 300 in respect of fresh blood. The risk in relation to the acquisition of hepatitis B and hepatitis C was, respectively, one in three and one in 33 in relation to fresh blood. The main concern of the garda at the time was the acquisition of either hepatitis B or C.

In the second report of Dr Mulcahy, the testing for HIV and both hepatitis types had been confirmed as negative. Dr Mulcahy's opinion was that Garda Shiels suffered significant anxiety as a result of the assault and could not be adequately reassured for six months. However, at the time of that report, Garda Shiels could be categorically reassured that he had not acquired any of the above-mentioned viruses as a result of the incident. Dr Mulcahy did state that this did not detract from the significant anxiety that Garda Shiels experienced.

Garda Shiels issued a special summons in the High Court pursuant to the *Garda Síochána (Compensation) Acts, 1941 and 1945*.

In his evidence to the High Court, Garda Shiels said he was now getting over the trauma. He had been transferred to other duties, but was not dealing with the public. He was due to retire in August 2002.

THE JUDGMENT

Delivering judgment, Murphy J referred to the various medical reports and, in particular, to that of Dr McHale, who had concluded that the overall pattern of symptoms and behaviour of Garda Shiels indicated post-traumatic stress disorder. Dr McHale had classified this as a severe reaction to the accumulated effects of past stressful experiences culminating in the syringe attack. This incident was described as life threatening and damaging to the physical and sexual self-esteem of Garda Shiels.

The judge referred to Dr McHale's second report which concluded that the overall pattern of symptoms and behaviour suggested that Garda Shiels continued to experience consequences of the assault which might not be immediately apparent but which had a pervasive impact upon his life. These included a low-grade depression, reflected in a loss of purpose and an inability to engage actively and meaningfully in relationships, and a loss of worth regarding his work contribution and his general sense of self, in marked contrast to his earlier personality.

The garda surgeon in a report classified the incident as serious for reasons of the six months reactive anxiety on the part of the garda and his wife. In the garda surgeon's opinion, Garda Shiels was perfectly healthy at the time of the consultation and he believed there would be no *sequelae* or consequential disability.

Counsel for the garda emphasised to the court the significant risk of injury when the source of blood was unknown. Even when the garda knew shortly after the incident that the prisoner tested negative, the source of blood in the syringe was unknown. There was accordingly considerable anxiety which had been exacerbated by the knowledge that the needle had been hidden in the prisoner's rectum. G

THE AWARD

Murphy J stated that there were three aspects of the damages suffered by Garda Shiels.

- A needle-stick injury with blood of unknown origin
- Post-traumatic stress due to the accumulated effects of past stressful experiences which culminated in the needle-stick injury, and
- The exacerbation of stress resulting from the garda's awareness that the needle had been hidden in the prisoner's rectum.

Stating that Garda Shiels exhibited bravery in coming to the aid of a colleague in the confines of the garda van, Murphy J awarded compensation in the sum of £25,000 together with agreed special damages of £380. Accordingly, he awarded a decree in the sum of £25,380.

These judgments were summarised by solicitor Dr Eamonn Hall.

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Compiled by Karen Holmes of FirstLaw

ADMINISTRATIVE

Bias

Telecommunications – bias – licensing – judicial review – whether respondent's decision in breach of fair procedures – whether licensing process flawed – whether member of respondent displayed pre-judgement in awarding licence

The applicant had applied for a radio licence in the Dublin area. The licence was eventually awarded to someone else. The applicant sought an order of *certiorari* on the basis that the respondent had displayed bias towards the license winner and the decision in question was in breach of fair procedures. In the High Court, Ó Caoimh J dismissed the case. On appeal, the Supreme Court (Murray J delivering judgment) held that there was no pre-judgement or grounds for bias and the appeal would be dismissed.

***Spin v IRTC*, Supreme Court, 02/02/2001** [FL3737]

Practice and procedure

Medicine – judicial review – practice and procedure – split trial – case adjourned to plenary hearing – product authorisations – delay – whether appropriate to try issues of liability and damages separately

The applicant had initiated judicial review proceedings regarding the approval by the respondent of medicinal products. The applicant claimed that the respondent had been guilty of excessive delay in issuing product authorisations. In the High Court, Mr Justice Kelly directed that the matter proceed by way of plenary hearing and declined to order a 'split trial'. The applicant appealed. Murphy J, delivering judgment, held that the Supreme Court should not lightly review such a matter. The High Court order would be affirmed and the appeal dismissed.

***PCO Manufacturing v Irish Medicines Board*, Supreme Court, 22/05/2001** [FL3768]

ARBITRATION

Practice and procedure

Commercial law – arbitration – delay – costs – failure to furnish submissions within time-frame agreed

The applicant sought to have a matter reconsidered by an arbitrator. The arbitrator had made his award after the time for the receipt of submissions had expired. The applicant had failed to forward submissions within the agreed time-frame. Herbert J held that, in light of the injustice that could result, the matter should be remitted to the arbitrator.

***McCarrick v Gaiety (Sligo) Limited*, High Court, Mr Justice Herbert, 02/04/2001** [FL3731]

CHILDREN AND YOUNG PERSONS

Prisons

Criminal law – children and young persons – detention and prisons – whether detention of youth in accordance with statutory requirements

Proceedings were brought in respect of the detention of the applicant which, it was claimed, was not in accordance with the relevant statutory provisions. The Supreme Court held that the applicant had been properly committed on remand to Mountjoy prison and refused the relief sought.

***O'Connell v Governor of Mountjoy Prison*, Supreme Court, 25/04/2001** [FL3721]

COMMERCIAL

Contract law, *Statute of Limitations*

Practice and procedure – Statute of Limitations – *whether matter should be tried as preliminary issue*

The proceedings concerned an application by the receiver of the defendant regarding the status of a document relating to the payment of a debt. The receiver sought to have the issue of whether the plaintiff's claim was statute-barred tried as a preliminary issue. Ms Justice Carroll was satisfied that the entire action could be disposed of if the status of the document was decided and accordingly the issue relating to the *Statute of Limitations* would be heard.

***Bula Holdings v Bula Limited*, High Court, Ms Justice Carroll, 15/12/2001** [FL3714]

COMPANY

Telecommunications, winding-up

Winding-up petition – mobile telephony services – equity – application for injunction

The proceedings concerned the termination of an agreement whereby the defendant supplied the plaintiff with mobile telephone lines. The defendant was intent on bringing a winding-up petition in order to recover monies allegedly owed. The plaintiff sought an interlocutory injunction to protect its position pending a sale of business assets. The application was refused in the High Court. On appeal, the Supreme Court held that the balance of convenience would be served by granting the injunction sought, accompanied by a number of conditions. The appeal would be allowed.

***Meridian v Eircell*, Supreme Court, 10/05/2001** [FL3771]

CONTEMPT

Planning and environmental law

Waste management – contempt of court – costs

The applicants brought the proceedings pursuant to previous court proceedings regarding the operation of a dump by Galway Corporation. Kelly J held that the respondent was in breach of a previous court order, made a further court order relating to the use of the dump and imposed a fine of £50,000.

***Curley v Galway Corporation*, High Court, Mr Justice Kelly, 30/03/2001** [FL3718]

CONTRACT

Employment

Offer of appointment – offer withdrawn – civil service – damages

The applicant issued proceedings over the issue of a letter offering him the position of a higher executive officer in the civil service. The applicant never in fact received the letter as it was returned to the respondents at their request. O'Neill J held that the appointment had been offered by the respondents but was withdrawn by them before acceptance. The applicant's claim would be dismissed.

***O'Donovan v Minister for Justice*, High Court, Mr Justice O'Neill, 09/10/2000** [FL3741]

COSTS

Film and television

Company law – practice and procedure – security for costs – insurance – issuance of completion certificates – film production – inability to pay costs

The proceedings concerned the production and completion of a film. The plaintiff issued proceedings in this jurisdiction to the effect that the issuance of completion certificates in respect of the production of a film was void and thus no obligation to pay monies arose. The present motion concerned an application for security for costs brought by the defendants against the plaintiff. McCracken J held that the plaintiff had failed to demonstrate why the order in question should not be made. An order would issue for the plaintiff to provide security for costs.

***Johnstown Limited v Thiennez Limited*, High Court, Mr Justice McCracken, 21/03/2001** [FL3766]

CRIMINAL

Autrefois acquit

Sentencing – fair procedures – double jeopardy – autrefois convict – *estoppel – plea bargaining – administration of justice*

The case was an appeal to the Supreme Court in relation to the procedure by which the appellant had been sentenced and, in particular, in relation to a meeting which had taken place in chambers between the trial judge and counsel. Keane CJ, delivering judgment, was satisfied that the Court of Criminal Appeal was not correct in declining to regard the discussions which had taken place in chambers at the original trial. The requirements of justice would dictate that the original sentences as imposed should stand and the subsequent order of the Court of Criminal Appeal would be discharged.

***DPP v Heeney*, Supreme Court, 05/04/2001** [FL3762]

Bail

Application for bail – murder charges – interference with witnesses

The applicant faced two murder charges and sought bail pending his trial. Mr Justice Kelly was satisfied that if bail was granted the applicant would not turn up for trial and bail was therefore refused.

***DPP v Desmond*, High Court, Mr Justice Kelly, 25/04/2001** [FL3725]

Appeal against conviction

Role of accused in kidnapping – whether court of trial took adequate regard of accused's explanation

The applicant sought leave to appeal against his conviction for his involvement in the kidnap of a bank manager. The applicant claimed that he had been acting under duress throughout the kidnap and that this factor had not been given adequate weight. The Court of Criminal Appeal was satisfied that the full regard was had to the totality of evidence and leave to appeal would be refused.

***DPP v Kavanagh*, Court of Criminal Appeal, 18/05/99** [FL3716]

Discovery

Sexual offences – discovery – practice and procedure – inspection of documents – privilege

The applicant sought further inspection of documents relating to his impending prosecution on charges of sexual assault. A previous court order having been made, the applicant now sought further inspection of documents. O'Neill J held that further inspection was not necessary and refused the application.

***Barry v DPP*, High Court, Mr Justice O'Neill, 02/04/2001** [FL3727]

Fair procedures

Judicial review – sexual offences – whether applicant properly returned for trial

The applicant sought to challenge a decision to return him for trial on the basis that the charge in question was not one known to law. Mr Justice McKechnie held that the return for trial was invalid and the accused person was not legally before the Circuit Criminal Court. In these circum-

stances, there was no jurisdiction to embark upon or proceed with the prosecution.

***Hatchell v DPP*, High Court, Mr Justice McKechnie, 06/04/2001** [FL3742]

Fair procedures

Road traffic offences – fair procedures – use of alcolyser – driving with excess alcohol – whether lack of scientific formulation – whether safe to proceed to conviction on foot of certificate

The case was referred to the High Court on the use of an alcolyser to found a conviction for driving with excess alcohol. O'Higgins J held that the absence of scientific formulation did not preclude the certificate on which the amount of alcohol was stated from being *prima facie* evidence. The case stated was answered in the affirmative.

***DPP v Syron*, High Court, Mr Justice O'Higgins, 07/03/2001** [FL3740]

Fair procedures

Road traffic offences – judicial review – orders of prohibition and certiorari *– community service*

The applicant had sought to challenge the manner in which the District Court judge hearing his trial had imposed convictions and sentences. Conflicting evidence emerged as to what took place at the trial. Judicial review was refused in the High Court. On appeal, Geoghegan J held that the High Court judgment was correct and dismissed the appeal.

***Scully v DPP*, Supreme Court, 03/05/2001** [FL3751]

Fair procedures

Road traffic offences – drunk driving – failure to provide sample

The proceedings were a case stated pursuant to the provisions of section 16 of the *Courts Of Justice Act, 1947*. The question arose as to whether the accused could in the circumstances of the case be convicted for the failure to provide a specimen of blood. The Supreme Court answered the case stated in the affirmative.

***DPP v Mangan*, Supreme Court, 06/04/2001** [FL3761]

Powers of arrest

Judicial review – road traffic offence – powers of arrest – fair procedures – whether applicant properly detained by An Garda Síochána

The applicant, while driving, had been detained by a member of An Garda Síochána. The applicant was subsequently arrested and found to have been driving in excess of the alcohol limit. The applicant was convicted in the District Court and brought proceedings claiming that the manner of his arrest had been unlawful and that his conviction was unsafe. Ó Caoimh J held that the District Court judge had acted within his jurisdiction and the relief sought by the applicant would be refused.

***O'Mahony v Judge Ballagh & DPP*, High Court, Mr Justice Ó Caoimh, 23/03/2001** [FL3713]

Prisons

Judicial review – prisons – detention – refusal of early release – allegations of discrimination

The applicant sought to challenge the refusal of the respondents to approve his early release request. Herbert J, delivering judgment, held that the granting or withholding of temporary release was a matter exclusively within the discretion of the minister and that the court had no jurisdiction to intervene in the process. In these circumstances, the application would be refused.

***Lynch v Minister for Justice*, High Court, Mr Justice Herbert, 26/03/2001** [FL3733]

DAMAGES

Personal injuries

Tort – personal injuries – road traffic accident – medical evidence – post-traumatic stress syndrome

The plaintiff had suffered injuries in a road traffic accident. These injuries included a stress disorder. Mr Justice Barr was satisfied that the plaintiff's psychiatric profile had suffered permanent damage. The plaintiff was awarded a total of £221,375.

***McDonnell v Walsh*, High Court, Mr Justice Barr, 01/03/2001** [FL3734]

Hepatitis C, personal injuries

Tort – personal injuries – assessment of damages – hepatitis C compensation – claim for future loss of earnings – causation – concurrent wrongdoers – Civil Liability Act, 1961

The applicant had been infected with the hepatitis C virus. Subsequently, the applicant had sustained serious injuries in a road traffic accident. A question arose as the correct amount of compensation payable. O'Neill J held that the appropriate amount of compensation payable was £442,500.

***RL v Minister for Health*, High Court, Mr Justice O'Neill, 06/04/2001** [FL3746]

DISCOVERY

Practice and procedure

Planning tribunal – discovery – legal professional privilege – solicitors – whether claim of privilege could be asserted over documents

The proceedings related to documents which were sought to be disclosed at the Planning Tribunal. The Supreme Court, Denham J delivering judgment, held that the documents in question should be listed in an affidavit of discovery. Parties were free to litigate issues regarding privilege by way of judicial review.

***Miley v Flood Tribunal*, Supreme Court, 08/03/2001** [FL3720]

FAMILY

Nullity petition

Decree of nullity – domicile of choice – domicile of origin – capacity – whether marriage of parties valid and subsisting

The petitioner sought a decree of nullity in respect of a marriage entered into with the respondent. The main issues centred on the parties' domiciles of origin and of choice. Mr Justice Lavan was satisfied that the respondent had acquired an Irish domicile of choice. In the circumstances, it was not inequitable to grant the relief sought by the petitioner.

***RB v AS*, High Court, Mr Justice Lavan, 28/02/2001** [FL3715]

INTELLECTUAL PROPERTY

Trademarks / patents

Trademarks – practice and procedure – whether time limits were complied with

The proceedings concerned a decision by the plaintiff to appeal against a decision of the controller of patents, designs and trade marks. An issue arose on a preliminary basis as to whether or not the appeal was within time. Finnegan J held that the appropriate course was to adjourn the matter to enable the plaintiff to bring an application for an enlargement of time.

***Proctor & Gamble v Controller*, High Court, Mr Justice Finnegan, 30/03/2001** [FL3726]

LITIGATION

Statute of Limitations

Practice and procedure – Statute of Limitations – *pleadings – whether to permit new issues raised to proceed*

The judgment dealt with the amendment of certain claims by the plaintiffs. Barr J held that some of the issues now raised should proceed and made the appropriate order.

***Bula v Crowley*, High Court, Mr Justice Barr, 20/02/2001** [FL3748] G

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Eurlegal

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

New EU proposal for liberalising telecoms

On 1 January 1998, telecommunications markets were fully liberalised in almost all member states of the European Community. This means that the traditional incumbents were forced to surrender their monopoly positions and allow new market entrants. This deregulation of the telecommunications industry stimulated significant market entry, which in turn has meant lower prices and a broader range of services for consumers.

The *Sixth EU implementation report on telecommunications liberalisation and implementation of the telecommunications regulatory package* (COM (2000) 814, 7 December 2000) illustrates statistically the growth in the market since the beginning of the deregulation process. The report provides, for example, that in the fixed, or land line, market there are currently some 461 operators throughout Europe offering public voice telephony for long-distance calls. This figure has increased by 89% since 1999. There are approximately 468 operators across the EU providing international calls (an increase of 67% on 1999) and 388 providing local calls (an increase of 74% since 1999).

The increase in the number of operators in the market has had a favourable impact on tariffs. The *Sixth report* provides that tariffs have been consistently decreasing since 1999, with the EU average monthly expenditure for national calls offered by incumbent operators decreasing by 10.5% on 1999 for business users and 4.6% for residential users. The average prices for international calls in relation to the same period decreased by 15.1% for business users and 13.5% for residential users. The *Sixth report* also provides that the average monthly bill for residential users of the incumbents' services is now below that of the incumbent in Japan and of Verizon in the USA. The EU average is above the bill paid by customers of Pacific Bell in the USA, which in turn is above the cheapest EU incumbent operator.

The regulation of the telecommunications market has, therefore, yielded benefits for consumers and for entrants to the market. In order to ensure that a level playing field is maintained for new entrants to the market, the European Commission has proposed the adoption of a new regulatory framework for electronic communications networks and services.

New regulatory framework

It is expected that the new regulatory package will be adopted by the European Community in the first half of next year, except for the regulation on unbundled access to the local loop, which has already been adopted. It will significantly simplify and clarify the existing regulatory framework and will bring the number of legislative measures currently in force from 28 to eight. The new regulatory package consists of the following:

- Proposed directive on a common regulatory framework for electronic communications networks and services (the *Framework directive*)
- Proposed directive on the authorisation of electronic communications networks and services (the *Authorisation directive*)
- Proposed directive on access to, and interconnection of, electronic communications networks and associated facilities (the *Interconnection directive*)
- Proposed directive on universal users' rights relating to electronic communications networks and services (the *Universal service directive*)
- Proposed directive concerning the processing of personal data and the protection of privacy in the electronic communications sector (the *Data protection directive*)
- Proposed directive on competition in the markets for electronic communications services
- Regulation on unbundled access to the local loop
- Proposed decision on a regulatory framework for radio spectrum policy in the European Community.

Each of these legislative measures is available on the DG-Information Society website of the EU Commission. Highlighted below are some of the more innovative aspects of the regulatory package.

The proposed regulatory package aims to establish a harmonised regulatory framework for electronic communications networks and services throughout the EU. This means that not only traditional telecommunications networks will be caught under the new regulatory framework but also other types of networks, including satellite, cable TV and mobile networks and networks using the Internet protocol. The European Commission expects that this will enable the regulatory environment to keep pace with the rapidly-developing technology environment. The European Commission has stated that the motivation behind the introduction of 'technology neutral regulation' is the fact that 'the traditional simple value chain based on a limited number of products is evolving into a complex and highly intertwined set of commercial relationships between companies – operators, service providers, content providers, advertisers and broadcasters – delivering an ever-growing variety of services to end users'.

However, criticism has been levelled at this principle of 'technology neutral' regulation in that it is feared that it may lead to a situation where the competitive stage of the different markets is not taken into account. It is thought that markets which have demonstrated an adequate level of competition should not be burdened with regulation designed for other markets as this might hamper appropriate investment and innovation. As an alternative, it has been suggested that there should be sector-specific regulations as long as competition in the market in question is not effective and sustainable. Sector-specific rules could be abandoned once certain requirements are met:

for example, when the relevant market is competitive, sector-specific rules could be removed and regulators could rely on the application of the principles of competition law.

One of the more significant amendments proposed in the regulatory package is the amendment to the definition of what is meant by 'significant market power' (SMP). The current rules provide that an operator with a share of 25% of a particular market is to be designated as having SMP. Where an operator's market share is close to 25% (either above or below), there are a range of criteria to be used by the national regulatory authority (in Ireland, the Office of the Director of Telecommunications Regulation) in order to determine whether the organisation has market power. Certain obligations are placed upon an operator which is designated as having SMP, such as having to meet all reasonable requests for access to its network and so on.

Currently, Eircom is designated as having SMP in the public fixed telephone network and services market, in the market for leased lines and in the national market for interconnection. Eircell and Esat Digifone are designated as having SMP in the public mobile telephony market and Eircell in the national market for interconnection. The Office of the Director of Telecommunications Regulation (ODTR) is currently involved in another review in relation to designation of SMP, the results of which should be available at the end of the year. The obligations imposed on SMP operators are more fully described in the licences of Esat Digifone, Eircom and Eircell and can be found on the ODTR website.

Under the new regulatory package, the method of deciding whether an operator has SMP will be more closely aligned with the analysis currently undertaken in competition law under article 82 of the *Treaty of Amsterdam*. In particular, article 13(2) of the proposed *Framework directive* provides that an undertaking 'shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers'. It will be up to the national regulatory authorities in each of the member states of the EU to decide which operators have SMP.

The ODTR has criticised the use of the competition-law-based dominance test for a number of reasons. In particular, it has stated that the dominance test is specifically designed to meet the objectives of competition law – in other words, to decide when an undertaking has abused its position of dominance in the particular market and to take action against that undertaking. Therefore, the result of an application of the test outlined in article 82 of the *Treaty of Amsterdam* is a determination that a firm held a dominant position in a particular market for particular products/services at a particular point in time related to a particular alleged abuse. The ODTR has suggested that a designation of SMP for a communications operator involves a very different analysis, which focuses not on what has happened but on what is likely to happen over a continuous period in the future. The ODTR considers that the application of the dominance test is not suitable in these circumstances.

The ODTR has also stated that it would be difficult to apply the normal rules of market analysis used in competition law because of the 'complex vertical structure of many large telecoms firms and the profusion of related products, prices and pricing structures within the sector'. In addition, it has suggested that as the main telecoms operators tend to possess market power in any number of closely-linked markets, these positions of power may confer even more market power than the sum of their parts (this is called the 'portfolio effect'). It has suggested, therefore, that the application of the test outlined in article 82 of the *Treaty of Amsterdam* may sometimes not adequately reflect the degree of market power possessed by a firm in such markets.

'The fees paid for licences in some member states are so enormous that the licence purchasers cannot afford to make significant investment in rolling out their networks'

It also considers the dominance test inappropriate for application to the communications market for the following reasons:

- The extraordinarily fast growth and change in the telecoms market means that markets can easily be misdefined when the dominance test is used
- Use of the dominance test will lead to widespread uncertainty in the market and this may ultimately discourage smaller operators from entering the market.

These arguments are outlined by the ODTR in a submission it made (ODTR 00/34) on the *Regulatory framework for electronic communications infrastructure and associated services*.

The *Authorisation directive*, referred to above, is intended to replace directive 97/13/EC on a common framework for general authorisations and individual licences in the field of telecommunications services (OJL 117, 7 May 1997). The commission's *Fifth report on the implementation of the telecommunications regulatory package* (COM (1999) 537, 10 November 1999) noted serious concerns in relation to the implementation of directive 97/13/EC. In particular, it noted that 'in the Community today there is no harmonised approach to authorising market entry for communications service providers but a patchwork of 15 national regimes which are widely divergent in their basic approach and specific detail … Licence categories created by member states vary from only two to no less than 18, each with its own conditions, procedures, charges and fees attached. To sustain the segmentation created, member states require many different kinds of information from service providers ranging from nothing at all under the lightest regime, to 49 items under one of the heaviest licensing schemes'. The effect of this is that any investors from outside the EU which wish to roll out a pan-European network are faced essentially with a multitude of different licensing regimes which disincentifies entry to the EU market.

In order to remedy this defect in the market, article 3(2) of the proposed *Authorisation directive* provides that the provision of electronic communications services or networks can only be subject to a general authorisation. This means that an undertaking which wishes to provide electronic communication services or networks may be required to submit a notification that it intends to provide an electronic communications service/network, but may not be required to obtain an explicit decision or any other administrative act by

the national regulatory authority (in Ireland, the ODTR) before exercising the rights stemming from the authorisation. There are different rules where the undertaking which wishes to provide the service/network needs an allocation of radio spectrum or numbers from the national numbering plan as these resources are obviously scarce and could not, therefore, be the subject of a general authorisation.

Unbundled access to the local loop

Local loop unbundling (LLU) is the process whereby the incumbent operator (in our case, Eircom) makes its local network (the copper cables that run from the customers premises to the telephone exchange) available to other operators. Other operators will then be able to upgrade these cables using digital subscriber line (DSL) technology to offer services, such as high-speed Internet access, direct to the customer. In other words, LLU will allow customers to have a high-speed data connection for Internet or video on demand delivered through their telephone line. In order to avail of these services, the customer will need to have a modem installed in his home or premises. If the customer takes all services, including voice telephony, from a new operator, he will be billed directly by the new operator. If he continues to avail of voice telephony services from Eircom then, presumably, both Eircom and the new operator will bill him.

Regulation 2000/0185 (COD) on unbundled access to the local loop (5 December 2000) required incumbent operators throughout the EU to meet reasonable requests from operators for unbundled access to their local copper loops on reasonable and non-discriminatory terms from 31 December 2000. Currently, the local access network remains one of the least competitive segments of the liberalised telecommunications market. The enforcement of the LLU regulation will mean that new entrants will be able to compete with incumbent operators in offering data transmission services for continuous Internet access and for multimedia applications based on DSL technology as well as voice telephony services.

It is noted in the recitals of the regulation that new entrants to telecoms markets do not have the widespread network infrastructures and are unable with traditional technologies to match the economies of scale and scope of the incumbent operators. This results from the fact that the incumbents rolled out their old metallic pair circuits over significant periods of time when they were protected by exclusive rights and were able to fund investment costs through monopoly rents. In particular, recital 5 of the regulation provides as follows: 'It would not be economically viable for new entrants to duplicate the incumbent's metallic local access infrastructure in its entirety and within a reasonable time. Alternative infrastructures such as cable television, satellite, wireless local loops do not generally offer the same functionality or ubiquity for the time being'.

The regulation further provides that the incumbent operators provide access to their infrastructure to other service providers at prices which are cost oriented. Incumbent operators will also be forced to publish a standard offer, which will include standard prices and terms and conditions. Commercial negotiation between the incumbent and the new entrant will be the preferred method for reaching agreement on technical and pricing issues in relation to access. However, the national regulatory authorities, such as the ODTR, will be empowered to intervene 'at [their] own initiative in order to ensure fair competition, economic efficiency and maximum benefit for end-users'.

The restructuring of the telecommunications market post-liberalisation was particularly helped by the interest in telecoms stocks up to spring 2000. For the next phase of telecommunications regulation, this particular market sector may not enjoy a similar level of interest in its stocks. The current trend is that investors appear less willing to finance market restructuring and start-ups. However, at the moment massive investment is needed, particularly for an effective unbundling of the local loop. Investment by communications network and service providers themselves has also been discouraged by certain member state governments, which have auctioned their telecoms licences. The fees paid for licences in some member states are so enormous that the licence purchasers cannot afford to make significant investment in rolling out their networks.

The EU Commission has attempted through its new regulatory package to assist the future development of the communications industry by attempting to make regulation of the sector less rigorous and more effective. Its simplification of the procedures is an acknowledgement that legal and regulatory barriers can often act as a disincentive to investors. In a sector such as the communications sector, the aim of the commission appears to be to encourage investment so that the European communications industry can keep pace with the other large world economies. It will be interesting to see whether the new regulatory package will have the desired effect, when the EU Commission adopts it next year. G

Lynn Sheehan is a solicitor with the Cork law firm Ronan Daly Jermyn.

Recent developments in European law

COMPETITION

Micro Leader Business v European Commission ([2000] All ER (EC) 361). The applicant is a wholesaler of office and computer equipment. Up to 1995, Micro had obtained supplies of Microsoft software from Canadian distributors for resale in France. These products were identical to Microsoft products sold in France. Micro sold its software at prices lower than French Microsoft software. In 1995, Microsoft endeavoured to stop these parallel imports. It issued a bulletin to French distributors informing them that steps would be taken to prevent this undercutting, which was harming their trade. The result of the Microsoft initiative was that the export of French-language software from Canada to France all but halted. In 1996, Micro complained to the European Commission, arguing that Microsoft and Microsoft France had entered into agreements containing export bans in violation of article 81 of the treaty. It also complained that Microsoft had abused its dominant position. The commission rejected the complaint. It held that the two companies were a single economic unit and could not be separate parties to an agreement and found no evidence of a breach of article 82. The Court of First Instance upheld the finding on article 81. It held that there was no evidence of any agreement in breach of this article. Furthermore, the two companies constituted a single economic entity. The CFI held that even if there had been an agreement preventing the export of French language software from Canada to France, it would have been lawful. The *Computer software directive* only provides for exhaustion of rights within the EU. Thus, the marketing of the software by Microsoft in Canada did not exhaust its copyright. The CFI held in favour of Micro on its article 82 arguments. Evidence had been produced showing price differences between France and Canada for what was the same software. The prices charged by Microsoft in France were excessive. The court held that enforcement of domestic copyright did not in general involve abuse of dominance but in exceptional circumstance mere enforcement could be abusive. The court annulled the commission's decision dismissing the article 82 complaint.

EMPLOYMENT

Gender discrimination

Case C-258/98 *Tanja Kreil v Bundesrepublik Deutschland*, 11 January 2000. In 1996, Ms Kreil, who had been trained in electronics, applied for voluntary services in the German army, requesting duties in weapon-electronics maintenance. Her application was rejected, as German law bars women from military service involving the use of arms. She claimed that her rejection based on her sex was contrary to EU law. The ECJ held that it is for member states to take appropriate decisions on the organisation of their armed forces to ensure their internal and external security. Such decisions do not, however, fall entirely outside the scope of EU law. The principle of equal treatment is of general application and thus directive 76/207/EEC on equal treatment of men and women as regards access to employment can be of relevance in this situation. Article 2(2) of the directive allows states to exclude from its scope occupations for which gender is a determining factor – either by virtue of their nature or the context in which the occupation is carried on. However, the court noted that as this is a derogation from rights contained in the directive, it must be interpreted strictly. In previous cases, the court had allowed this derogation for posts such as those of prison warders, policing situations where there are serious disturbances and for service in certain combat units. Such a derogation must be proportionate. The court pointed out that the German law imposed a blanket ban on women serving in the military. It held that the fact that women might be called on to use arms could not justify the ban. The derogation allowed for by the directive only applies where it is justified by the specific activity concerned. That was not the case here, and so the German ban contravened the directive.

INTELLECTUAL PROPERTY

Joined Cases C-414/99, C-415/99 and C-416/99 *Zino Davidoff SA v A&G Imports Ltd, Levi-Strauss & Co* and *Levi-Strauss (UK) Ltd v Tesco Stores, Tesco plc and Costco Wholesale UK Ltd*, Opinion of Advocate General Sticx-Hackl, 5 April 2001. Davidoff SA is the proprietor of two trademarks, *Cool Water* and *Davidoff Cool Water*, which are registered in the UK for toiletries and cosmetic products. These products bear batch code numbers and are sold by Davidoff or on its behalf within and outside the European Economic Area (EEA). A&G acquired stocks of these products, which had been placed on the market in Singapore by Davidoff or with its consent. A&G imported these stocks into the EU, specifically into England, and started to sell them there. The only difference between these products and Davidoff products sold in England was that the batch code numbers had been removed or obliterated. Levi-Strauss own the trademarks *Levi's* and *501* which are registered in the UK for jeans. Tesco and Costco obtained genuine Levi 501 jeans from a supplier who imported them into the EU from third countries and sold them to Tesco and Costco. Davidoff and Levi-Strauss brought proceedings in England claiming that the importation of these goods into the EU and their sale was an infringement of their registered trademarks. The defendants pleaded exhaustion of the rights deriving from the trademarks. The *Trademarks directive* provides that a trademark proprietor cannot invoke his exclusive rights under the trademark where the goods bearing the mark have been put on the market in the EU by him or with his consent. This does not apply where legitimate reasons justify the trademark proprietor in opposing further commercialisation of the goods. The advocate general said that the exhaustion principle is designed to prevent trade between member states being restricted through the invocation of trademark rights. In the case of parallel imports from non-member states, the free movement of goods is not affected. The advocate general said that where such importation occurs, the national court must examine whether the conduct of the trademark proprietor can be construed as a waiver of his right to control distribution within the EU. The advocate general said that in relation to the absence or obliteration of batch code numbers, it is for the national court to examine whether the damage to the reputation of the trademark is sufficiently serious in that respect. G

Mutual respect

The Irish Solicitors' Bar Association, London, recently held a reception at the Law Society, London, to mark the tenth anniversary of the admission of Irish solicitors in England and Wales without having to undergo any further examinations. Pictured at the event are *(from left to right):* Ken Murphy, director general of the Law Society of Ireland; Ward McEllin, president of the Law Society of Ireland; Irish Ambassador Ted Barrington; ISBA London President Cliona O'Tuama; Niall MacCabe, senior manager at AIB GB, which sponsored the reception; Goldman Sachs International Chairman Peter Sutherland; Michael Napier, president of the Law Society of England and Wales; and Janet Paraskeva, chief executive of the Law Society of England and Wales

Joining forces

(From left to right) Deborah Hegarty, solicitor, Cork Corporation, Edward Hughes, law agent of Dun Laoghaire-Rathdown County Council and member of the Law Society Council, and Norman Grieve, chairman of the Scottish Local Authorities' Solicitors Association traded expertise following a recent Blackhall Place meeting of in-house local authorities' solicitors from the British Isles and the Republic of Ireland

Retired but not retiring

Pictured at a presentation to three solicitors retiring from their Tipperary government posts are *(from left to right):* Judge Michael Reilly; Pat Treacy, retiring state solicitor for North Tipperary; President of the Tipperary Bar Association Kieran Cleary; Don Binchy, retiring county council solicitor; Bryan Maguire, retiring state solicitor for South Tipperary; and Judge David O'Riordan

Calcutta Run

The third annual Calcutta Run was bigger and better than ever before. This year nearly 1,300 runners and walkers took part in the 10k run on Sunday 27 May to raise money for GOAL and the Aruppe Society, which are helping homeless children in Dublin and Calcutta.

The runners and walkers followed the now-familiar route, leaving from the gates of Blackhall Place through the Phoenix Park and returning back to the Law Society. This year the first past the post for the men was Cillian Lonergan and for the women it was Laura McGinley. The finish line saw many happy faces before the last person made it home. Students from the Institute of Physical Therapy were on hand at the end of the race to provide much-needed leg massages to many of the participants.

The traditional post-race barbecue was once again a great success. The party continued long after the last runner made it home, with everyone enjoying the sunshine and the music in the grounds of the Law Society. A great day was had by all.

Of course the day is not just about fun, it's about raising money to give much-needed help to homeless children. We are hoping to beat last year's total and raise £120,000. We will be announcing our grand total in the coming weeks, but if you still have sponsorship money to submit, please send it to The Calcutta Run, 25-28 North Wall Quay, Dublin 1.

Thank you to everyone who took part on the day or who contributed to our grand total. We hope to see you all again next year.

Eoin MacNeill

Limbering up
Participants gather and stretch outside Blackhall Place

And they're off
Ken Doherty looks on as Judge Robert Barr signals the runners to hit the streets

Working out the kinks
Massage services for tired legs were provided by students from the Institute of Physical Therapy

Squaring off in the South
Members of the Waterford Solicitors' Golf Society gathered with the team from the Southern Law Association Golf Society on 11 May, the day of their match at Fota Island Golf Club

Annual Dinner of the Law Society 2001

Promoting competition
(From left to right) Director General Ken Murphy, Dr John Fingleton, chairman of the Competition Authority and Rory Brady SC, chairman of the Bar Council

Enjoying the evening
Judge Mary Devins *(left)* met with Ann McEllin, solicitor

Serious stuff
A pre-dinner discussion between *(from left to right)* Independent Adjudicator Eamon Condon, Pat Rabbitte TD, Justice Michael Moriarity, and Gordon Holmes, a member of the Superior Courts Rules Committee

All smiles
Judge Bryan McMahon chats with Law Society Senior Vice-President Elma Lynch

Linking up in Limerick
Pictured at a recent meeting between the Limerick Bar Association and the Law Society's president and director general are *(front row, left to right)* Lorraine Power, Robert Kennedy, Ken Murphy, Gearoid McGann, Ward McEllin, Karen Kearney, Paddy Glynn and David Punch; (*back row*) John Battles, Pat Wallace, Kieran O'Brien, Richard O'Hanrahan, Gerry O'Neill, Cora Hagney, Gwen Bowen, Sonya Morrissey-Murphy, Jane O'Connor and Eamon O'Brien

A capitol performance
(From left to right) Paul Madden, Aisling Kelly, Nora Staunton and Madeleina Loughrey-Grant made up the Law Society team representing Ireland at the international finals of the Philip C Jessup Moot Court Competition held in Washington DC. The Irish team was placed 16th out of 70 teams

OBITUARY

Hilary E Walpole: an appreciation from her colleagues

Hilary passed away peacefully in the Cork University Hospital at the end of January 2001. She returned unwell from a family holiday the previous January and was diagnosed as having cancer. She was given the bleak diagnosis of having between six weeks and six months left to live. Notwithstanding this devastating news, she lived a full and complete life, preserving her sense of humour and sense of proportion throughout. Always practical, Hilary organised her affairs with careful planning for her beloved spouse, Aidan, her daughters Angela and Sheila, Uncle Tom and sister Clodagh.

Hilary loved her work and her job in PriceWaterhouseCoopers in Cork. She had a feel for tax since her university days and thrived in the heady environment of the tax department of that firm. She had an uncanny knack of helping her numerically-challenged solicitor colleagues to understand tax – a rare achievement. Being both a solicitor and a tax consultant, she understood the interface between the professions and exercised her talents in each profession to a high standard. She taught, published and lived law and tax. She exuded competence and talent in her work, and still managed to be an outstanding wife and loving mother. Her sense of loyalty was legendary and, notwithstanding her illness, she maintained her outstanding contribution to the Law School and the *Family law manual* (Blackstone) and the *Family law practitioner* (Roundhall Sweet & Maxwell). She also won a prize for article of the year at the Institute of Taxation last year.

Hilary contributed greatly to the business life of the city of Cork, not least through her dedicated work and commitment in the Cork Chamber of Commerce, where she served as chairperson of the Local and Economic Development Committee and the Budget Submission Task Force and, in the last year of her life, as vice-president. Had she lived, Hilary would have been the first woman to be appointed as president of the Cork Chamber of Commerce. The fact that she achieved so much within such a short time is truly remarkable.

From a sporting perspective, sailing was Hilary's 'thing' and she was a keen sailor and competitor. She also took up horse riding before her illness in order to keep up with her sporty daughters. Her almost annual New Year's Eve parties were thronged with friends and colleagues from work and sport, their parents and children along with her own extended family. Everyone was made to feel welcome and special. Hilary was a hurricane of fresh air, but also gentle, compassionate and funny and possessed of a great sense of personal style.

The sense of loss to her family and friends is enormous, but so too is the sense of joy at having known such a rare and talented person. Her removal and funeral mass were thronged with a multitude of people from all walks of life, all of whom were there to celebrate a life well lived. Practical to the end, she left instructions that there should no flowers but she welcomed contributions to be given to fight cancer. To the very end, Hilary thought of others rather than herself. She was a true professional.

Hilary was deeply loved and we, her friends and colleagues, will miss her terribly.

Deborah Hegarty, Cork Corporation

The Irish Digest

(2001 EDITION)

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on 26 July 2001

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OBITUARY

James P Gilvarry

The recent death of James P Gilvarry, retired judge of the District Court, marked the end of an era for many solicitors practising in the counties of Cavan, Monaghan, Roscommon, Mayo, Sligo and Leitrim. At the time of his retirement in 1994, Judge Gilvarry had been one of the longest-serving judges in the history of the state. Jimmy, as he was affectionately known to his legal colleagues, qualified as a solicitor in 1947. He worked for a brief period in Clonmel before establishing a practice in Ballina. He was appointed a temporary judge of the District Court on 16 September 1960 and served until 31 December 1960. He then returned to private practice until his appointment as a permanent judge in February 1963. He was appointed judge for the Cavan/Monaghan area (court area no 5) in 1964 and served there until 1969. He was then appointed to Roscommon District Court area (no 4), where he served until 1982. His final posting as a judge was in the court area of Sligo/Leitrim (no 2), where he presided from 1982 until his retirement in 1994.

As a judge, Jimmy combined the characteristics of humility, kindness and generosity, backed up by a steely determination to do 'the right thing'. His exercise of judicial authority was always tempered with mercy. He always displayed great courtesy and kindness to legal practitioners, the gardaí and litigants. In particular, he extended great patience to young legal practitioners who were learning their trade. His sense of humour and quick wit was legendary. Even when you were on the wrong side of a decision, he always let you down gently, and your clients always left the court knowing they had received a full and fair hearing.

His ability to put a nervous witness at ease did much to facilitate the cause of justice in his court. He always maintained an avid interest in the law, and, in particular, all developments affecting District Court practice and procedure. His large brown well-worn leather briefcase, which went with him to all courts and became his trademark, was a veritable treasure trove of legal precedents and textbooks pertaining to the District Court. Following lengthy legal argument in any case, a practitioner could be assured that Jimmy would pull from his briefcase some relevant precedent. Jimmy's briefcase always carried the most up-to-date case and statute law, and was an impressive forerunner to the mandatory laptop computers used by the judges of today. His courts were a pleasure to work in, with the bench showing respect and fairness to everyone.

Following his retirement, Jimmy acted as tutor in the Law Society's Law School, where his breadth of experience and depth of legal knowledge proved to be an invaluable asset to teachers and students alike. His encouragement and kindness to nervous students did much to give them confidence.

Off the bench, Jimmy's ability and passion for golf were renowned. His captaincy of the Enniscrone Golf Club saw it established as one of the premier clubs in the country. Jimmy also hosted many legal golf outings, and the memorial competition founded in his honour will continue to be played on an annual basis at Enniscrone. His ability for repartee and telling a good story, particularly against himself, made him a welcome addition to any company. He loved life and life loved him.

In his final months, Jimmy bore his illness with dignity and bravery. He never complained and he never lost his sense of humour. This reflected the fact that he went to God with a clear conscience, having lived a full and good life. Our deepest sympathies are with his wife, Phyllis, whom he often described as the 'light of his life', and his daughter, Helen, and his sons Michael, Terry, Declan and David. He hasn't gone far, he is gone to God and God is always very near.

May he rest in peace.

Keenan Johnson

SADSI
Solicitors Apprentices Debating Society of Ireland

SADSI Career Development Day

The SADSI Career Development Day will be held in the Presidents' Hall in Blackhall Place on Friday 27 July from 2–6pm. The event will be followed by a wine reception and summer barbecue. Each apprentice will receive a copy of the itinerary in the coming weeks.

The diversity of opportunities available to newly-qualified solicitors is reflected in the variety and depth of speakers present at the event. Broadcaster Gerry Ryan will launch the event and will speak about 'opportunities beyond the law'. Other speakers include practitioners and non-practitioners from the private and public sectors. The careers day aims to highlight the scope and flexibility of the legal profession, and will cover such issues as the reciprocity of Irish qualifications in other jurisdictions, setting up a sole practice and working in a large firm. Recruitment consultants Benson & Associates will discuss opportunities in Ireland and abroad, including Britain and Australia.

Special thanks are due to Benson & Associates, who are sponsoring the event, and TP Kennedy, who is always available to help. Many thanks also to Lillian O'Sullivan for organising the wine reception and barbecue.

Any firm that wishes to distribute literature about opportunities in their firms on careers day should contact Deirdre Crowley at sadsi2001@ireland.com.

Minimum Wage Act

Last March SADSI made an application to the Education Committee of the Law Society in relation to the *Minimum Wage Act*. The purpose of our application was to secure payment for apprentices on the PPC1 and PPC2, as payment during courses of study or training is provided for under section 16 of the act. The Education Committee has now accepted the application of the act to apprentices, as outlined in last month's *Gazette* (page 2).

We are awaiting a guidance note from the committee on the specific implications of the act for masters and apprentices. In the interim, copies of the legislation are available in the Law School and any queries can be addressed to sadsi2001@ireland.com (please note that this is a change of address.)

Claire O'Regan

Western people

Friday 8 June saw SADSI go west, with a barbecue in NUI Galway's college bar, followed by a boogie in the Warwick and CPs. SADSI western representative Daragh Feeney and pre-professional course representative Dawn Carney played hosts with style. Many thanks to both of them and to all the gang who travelled from Dublin. Thanks too to Ulster Bank for its continued generous sponsorship.

Claire O'Regan

Galway apprentices John Forde, Olivia Lynch, Dermot Murphy and Lorna Cahill at the recent SADSI barbecue in Galway

Hill-walking extravaganza

Well, lets hope everybody has begun their training program for August 18th. That's right, only the fittest pint-holding arms will survive the trip to Killorglin. The hill walk is the warm up, but the main event will be the craic that evening. Anyone interested can send an e-mail to cmoson@hotmail.com for further details.

SADSI e-mail address

SADSI's new e-mail address is **sadsi2001@ireland.com** and not **sadsi2001@yahoo.com**

If you are interested in submitting articles to the *Apprentices' page*, please contact Conor Delaney at **cdelaney2@ireland.com**.

Who ate all the pies?

While the precious stars of the FA Premiership are relaxing on their summer holidays, 16 teams from Dublin law firms have commenced battle against each other in the fourth annual inter-law firms soccer tournament in Blackhall Place. Eugene F Collins & Co and Beauchamps kicked off this year's competition for the *George Overend Memorial Trophy*, with Eugene F Collins emerging victorious in a five-goal thriller.

From an initial pool of eight teams back in 1998, the competition has grown in popularity over the last three years. Last year's winners, John Black & Co, will start as favourites to retain the trophy. However, with talk of some teams having engaged in punishing pre-season training and a last minute flurry of activity in the transfer market, a number of others fancy their chances.

There will be over 50 games played in the tournament this year under the watchful eye of referee Fran McLaughlin, providing plenty of opportunity for people to come and cheer their teams on. The competition runs from mid-June to mid-August, with the winners and runner-up from the two eight-team groups going on to contest the semi-finals. The final will be played on 9 August.

The competition organisers would like to thank the sponsors, A&L Goodbody and the Law Society, for their continued support.

EXAM RESULTS

For those of you who attended the PPC1 in October 2000, the exam results will be available on or before Friday 24 August

Deirdre Crowley, vice-auditor and welfare officer

WHERE THERE'S A WILL THIS IS THE WAY...

When a client makes a will in favour of the Society, it would be appreciated if the bequest were stated in the following words:

*"I give, devise and bequeath the sum of **X** pounds to the Irish Cancer Society Limited to be applied by it for any of its charitable objects, as it, at its absolute discretion, may decide."*

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LOST LAND CERTIFICATES

Registration of Title Act, 1964
An application has been received from the registered owners mentioned in the schedule hereto for the issue of a land certificate as stated to have been lost or inadvertently destroyed. A new certificate will be issued unless notification is received in the registry within 28 days from the date of publication of this notice that the original certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the certificate is being held.
(Register of Titles), Central Office, Land Registry, Chancery Street, Dublin
(Published 6 July 2001)

Regd owner: Rosetta Cullen, 63 Bolton Street, Cavan; Folio: 10912; Lands: Kiltrasna**;** Area: 4.4812 acres; **Co Cavan**

Regd owner: Anne Kearney and John Kearney; Folio: 1881F; Lands: Known as a plot of ground situate in the Townland of Maulicarrane, the Barony of Carberry West, and the County of Cork**; Co Cork**

Regd owner: FMC International AG; Folio: 12003L; Lands: Known as a plot of ground situate in the Townland of Wallingstown, the Barony of Barrymore and the County of Cork; **Co Cork**

Regd owner: Cork Polio and General Aftercare Association; Folio: 24274F; Lands: Known as a plot of ground situate in the Townland of Gortnaclohy, the Barony of Carbery West (East Division), and the County of Cork; **Co Cork**

Regd owner: Michael O'Donovan; Folio: 33516; Lands: Known as a plot of ground situate in the Townland of Garranes, the Barony of Carberry East (East Division), and the County of Cork**; Co Cork**

Regd owner: Daniel Gallagher, Lower Meenagran, Gurteen, Frosses Inver, Co Donegal; Folio: 10630; Lands: Meenagran (Parts); Area: 9.50 acres; **Co Donegal**

Regd owner: William James Scott, Lismonaghan, Letterkenny, Co Donegal; Folio: (1) 22974, (2) 23052; Lands: (1) Woodpark and Lismonaghan, (2) Calhane and Woodpark; Area: (1) 4.625 Woodpark, 2.626 Lismonaghan, (2) 2.062 Calhane, 39.75 Woodpark; **Co Donegal**

Regd owner: John and Susan Horan, 24 Seacrest, Balbriggan Road, Co Dublin; Folio: DN101049F; Lands: Dublin**; Co Dublin**

Regd owner: Martin Mates and Pauline Mates, 164 Clonard Road, Crumlin; Folio: 54417L; Lands: Dublin; **Co Dublin**

Regd owner: Ann Gittens, 294 Laurel Lodge, Castleknock, Co Dublin; Folio: 19506F; Lands: Townland of Blanchardstown and Barony of Castleknock; **Co Dublin**

Regd owner: Janet Molloy, 7 Fairways, Rathfarnham, Dublin 14; Folio: 36843L; Lands: Dublin; **Co Dublin**

Regd owner: Damien McKenny, Mairead McKenny, 130 Carrigwood, Ballycullen Road, Dublin 16; Folio: 60492F; Lands: Dublin; **Co Dublin**

Regd owner: Dorothy O'Riordan, 152 Forest Hills, Rathcoole, Co Dublin; Folio: 15856L; Lands: Townland of Rathcoole and Barony of Newcastle; **Co Dublin**

Regd owner: Telardin Agencies SA, 28/32 Lower Pembroke Street, Dublin; Folio: 44862; Lands: Townland of Roundstone and Barony of Ballynahinch; Area: 0a 0r 2p; **Co Galway**

Regd owner: Richard O'Neill; Folio: 3699F; Lands: Townland of Timolin in the Barony of Narragh and Reban East; **Co Kildare**

Regd owner: Emily O'Hara; Folio: 6573F; Lands: Part of the Townland of Clane in the Barony of Clane; **Co Kildare**

Regd owner: Gisela Holstein; Folio: 5053F; Lands: Property no 1: Townland of Collinstown, property no 2: Townland of Collinstown, in the Barony of Carbury; **Co Kildare**

Regd owner: Andrew Coyle and Annie Coyle; Folio: 70L; Lands: Part of the Townland of Naas West in the Barony of Naas North; **Co Kildare**

Regd owner: Michael Byrne (deceased) (one-third share); Folio: 940; Lands: Part of the lands of Foxhill in the Barony of Narragh and Reban East and part of the lands of Ballycullane in the Barony of Narragh and Reban East; **Co Kildare**

Regd owner: Francis Kelly; Folio: 15961; Lands: Clogrenan and Barony of Slievemargy; **Co Laois**

Regd owner: Brian Matthews; Folio: 4929F; Lands: Maryborough and Barony of Maryborough East; **Co Laois**

Regd owner: John Christopher Doherty, Liscarbon, Aghacashel, Co Leitrim; Folio: 11395; Lands: Liscarban (Part); Area: 19.875 acres; **Co Leitrim**

Regd owner: The Minister for Education; Folio: 6545F; Lands: Townland of Sreelane and Barony of Clanwilliam; **Co Limerick**

Regd owner: John and Elizabeth Mullen, 64 O'Hanlon Park, Dundalk, Co Louth; Folio: 7062F; Lands: 64 O'Hanlon Park; **Co Louth**

Regd owner: John Bruton, Cornelstown, Dunboyne, Co Meath; Folio: 1861 and 1862; Lands: Ballymacoll and Cornelstown; Area: 60.475 acres and 15.362 acres; **Co Meath**

Regd owner: John James Curley, applicant: Michael Curley, Tiramoan, Emyvale, Co Monaghan; Folio: 12447; Lands: (1) Tiramoan, (2) Derrylea; Area: (1) 12.568 acres, (2) 2.093 acres; **Co Monaghan**

Regd owner: LM Ericsson Limited, Cornamaddy, Athlone, County Westmeath; Folio: 7231F, 7230F; Lands: Blyry Lower; Area: 8.300 acres and 3.310 acres; **Co Westmeath**

Regd owner: Paul McAuley Dixon and Irene Dixon; Folio: 5239; Lands: Townland of Drummin East in the Barony of Newcastle; **Co Wicklow**

Regd owner: Thomas McCallion and Susan McCallion; Folio: 14859F; Lands: Part of the Townland of Ballinahinch and Barony of Newcastle; **Co Wicklow**

WILLS

Burke, Patrick, late of Cloonkeary, Ballinrobe in the county of Mayo. Would any person having knowledge of a will made by the above named deceased who died on 12 May 2000, please contact McGuire Desmond, Solicitors, The Arch, 7 Fr Matthew Quay, Cork, tel: 021 427 3630

Flewitt, Edith Edna (deceased), late of 55 St Albans Park, Ballsbridge, Dublin 4. Would any person having knowledge of the whereabouts of a will for the above named deceased who died on 6 June 1997, please contact Tanham Hawthorne, Solicitors, 25 Upper Mount Street, Dublin 2, tel: 676 5989, fax: 662 2828

Kelly, Ellen Teresa (deceased), late of 'Alcantara', Iona Park, Mayfield, Cork. Would any person having knowledge of the whereabouts of an original will made on 1 July 1997 of the above named deceased who died on 3 June 1999, please contact Timothy J Hegarty & Son, Solicitors, 58 South Mall, Cork, tel: 021 427 0351, fax: 021 427 6580, ref: 5/NA/18230

Kissane, Maurice (deceased), late of 32 St David's Court, Castle Avenue, Clontarf, Dublin 3. Would any person having knowledge of a will executed by the above named deceased who died on 2 March 2001, please contact Eugene P Kearns, Solicitor, 10 Lower Abbey Street, Dublin 1, tel: 01 874 2023, fax: 01 874 2029

McGarry, Owen (deceased), late of 6 Eglinton Road, Bray, Co Wicklow. Would any person having knowledge of a will executed by the above named deceased who died on 16 January 1998, please contact Bohan Solicitors, 4 Arran Square, Arran Quay, Dublin 7, tel: 872 2330, fax: 872 2355

McDonald, Benjamin Gerard (deceased), late of 9 Ferndale Road, Dublin 11. Would any person having knowledge of a will made by the above named deceased who died on or about 23 May 2001, please contact Early & Baldwin, Solicitors, 27/28 Marino Mart, Fairview, Dublin 3, tel: 01 833 3097, fax: 01 833 2515, ref: MOD/4860

Merchant, Vincent (deceased), late of Hightown, Coralstown, Mullingar, County Westmeath. Would any person having knowledge of a will made by the above named deceased who died on 16 February 2001, please contact NJ Downes & Co, Solicitors, Mullingar, County Westmeath, tel: 044 48646, fax: 044 43447

Murphy, Norman, late of 65 Dodder Park Road, Dublin 16. Would any person having knowledge of the whereabouts of a will made by the above named deceased who died on 17 November 1999, please contact B&P Byrne, Solicitors, 7 Eustace Street, Dublin 2, tel: 679 7937, fax: 679 3812

Turner, Patrick (deceased), late of 4 Chamber Street, Dublin 8. Would any person with any knowledge of a will executed by the above named deceased who died on 21 March 2001, please contact Ferrys Solicitors, 443 South Circular Road, Rialto, Dublin 8, tel: 454 4275, fax: 453 6911

EMPLOYMENT

County Clare: solicitor with PQE required. Two to three years for Ennis office. Experience in conveyancing essential. **Reply to Box no 61**

Solicitor required for general practice in the North County Dublin area. Please phone 8438766 for further details

Experienced solicitor capable of working on his/her own initiative required, specialising primarily in conveyancing and probate work. Reply with CV to Messrs Patrick V Boland & Son, Solicitors, Main Street, Newbridge, Co Kildare. Salary commensurate with experience

Cork city: solicitor required with experience in conveyancing, litigation, family law. Minimum of one to two years' experience. Colm S O Riain & Co, Solicitors, 4 Washington Street West, Cork, e-mail: csoriain@iol.ie

Midlands: experienced solicitor seeks part-time position (conveyancing and litigation). Might suit holiday/locum cover. Reply in confidence to **Box no 62**

Consultant locum available Dublin, commencing early September 2001. Experienced in all areas of general practice. Replies to **Box no 63**

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

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

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 KJ Neary

Personal injury claims, employment, family, criminal and property law specialists in England and Wales. Offices in London (Wood Green, Camden Town and Stratford), Birmingham and Cardiff. 'No win, no fee' available for accident and employment claims, legal aid for family and criminal cases. Contact Levenes Solicitors at Ashley House, 235-239 High Road, Wood Green, London N22 8HF, tel: 0044 20 8881 7777. Alternatively, e-mail us on info@levenes.co.uk or visit our website at *www.levenes.co.uk*

For sale: ordinary seven-day publican's licence. Offers to Corrigan Coyle Kennedy MacCormack, Solicitors, Castleblayney, tel: 042 974 0010, fax: 042 974 0329

For sale: ordinary seven-day publican's licence. Contact James Binchy and Son, Solicitors, Charleville, Co Cork, tel: 063 81214, fax: 063 81153

Irish silver: Interesting 18th and 19th century items for sale. Reply to **Box no 64**

TITLE DEEDS

Hugh Joseph Nolan (deceased). Would any solicitors holding any deeds to any property in Ireland in the name of the above named deceased, please contact Messrs Park Nelson of 1 Bell Yard, London WC2A 2JP, tel: 020 7539 2000, fax: 020 7405 4266