LAW SOCIETY
Gazette
€3.75 June 2008

NO MORE MONKEY BUSINESS:
The Fyffes decision

INSIDE: LISBON – PRO AND CON • LYNN STRUCK OFF • CONFESSIONS OF A CRIMINAL MIND • NERVOUS SHOCK

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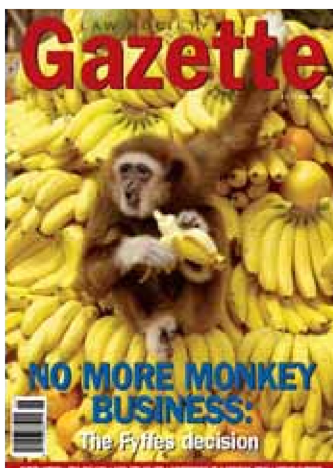

On the cover

Insider trading used to be the golden cow from which executives amassed fortunes at the expense of the market. But surely that's just bananas!

PIC: GETTY IMAGES

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June 2008

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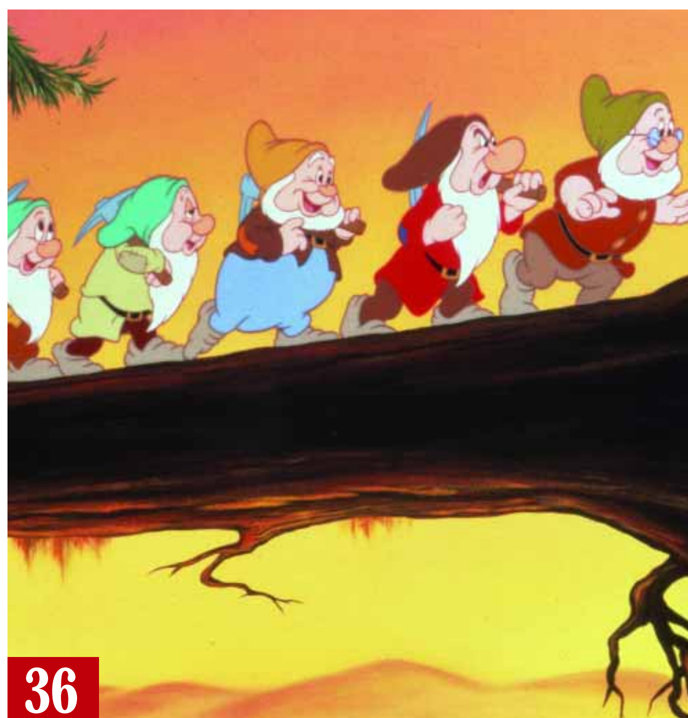

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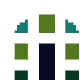

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Molann an obair an fear

May 2008 was a proud month for the solicitors' profession and for the Law Society of Ireland. On 7 May, for the first time in the history of the state, a solicitor was elected Taoiseach. I know that colleagues throughout the country, of every political persuasion, applaud Brian Cowen on his achievement and wish him well with his important duties. The profession was further honoured by the appointment of Dermot Ahern as Minister for Justice, Equality and Law Reform, and Peter Power as Minister of State at the Department of Foreign Affairs.

As colleagues, we wish them well as they discharge their duties.

17 May

Given that it was the tenth anniversary of the Calcutta Run, the organisers were determined that it should be more successful than ever. They set the ambitious target of raising €300,000 for the Fr Peter McVerry Trust and GOAL's orphanages in Calcutta, to bring the combined receipts generated over the last ten years to €2 million.

I am delighted to say that the greatest number ever of solicitors and their office staff participated. In all, 1,500 runners/walkers/pram-occupants took part and it looks like the fundraising total will be in the region of €340k. Fundraising continues, however, and it is never too late to support these wonderful charities, each of which make sure that every euro received is put to the best possible use. And of course there will be next year – provisionally, the date has been set for 16 May 2009, so put it in your diary!

21 May

Walter Swift from Detroit in the United States, who had spent 26 years in prison for a crime he did not commit, is exonerated. He, like many others before him, was the victim of a miscarriage of justice brought about by the gross indifference of people in authority to his fundamental rights, rights we as solicitors are committed to uphold. His release was brought about through the wonderful work of the Innocence Project, which is spearheaded by well-known US attorney Barry Scheck.

Both Walter Swift and Barry Scheck were fulsome in their praise for the work of our colleague, Niamh Gunn who, while a student here, spent time on a placement with the Innocence Project and got to work on Walter's file. Through her continuing efforts, long after the placement finished, critical new facts were established that led to the exoneration. Barry Scheck attributed her success to her Irish brogue and an ability to charm cooperation out of even the most unlikely source. I myself suspect it has rather more to do with the tenacity for which the county of Cork is famous.

Amazingly, despite 26 years of illegal detention, Walter Swift is not a bitter man, as he bravely goes about rebuilding his life. He has kindly accepted the Society's invitation to visit Ireland and share his experiences with us, as a reminder of the difference that committed and conscientious lawyers can make and of the continuing need to be vigilant regarding miscarriages of justice, whether at home or abroad.

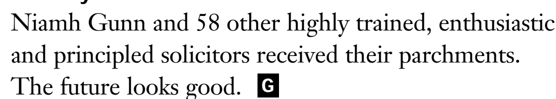
"Walter Swift was the victim of a miscarriage of justice brought about by the gross indifference of people in authority to his fundamental rights, rights we as solicitors are committed to uphold"

23 May

Michael Lynn is struck off the Roll of Solicitors by order of the President of the High Court.

29 May

Niamh Gunn and 58 other highly trained, enthusiastic and principled solicitors received their parchments. The future looks good. G



James MacGuill
President

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DUBLIN

Well-known District Court practitioner Yvonne Allen has been good enough to let me know of a change in relation to the renewal of auctioneers' licences. A special date has been fixed for 26 June with a requirement that the application be filed by 18 June, together with an accountant's certificate. The hearings will take place in Court 52 Richmond.

Arrangements are well in place in relation to the so-called 'golden oldies' event for those colleagues among us who have fulfilled a half-century of legal practice. This year, the 1958 bunch of invitees will include Judge Timothy H Crowley, Johnny Hooper, Judge Gillian Hussey, Enda Marren, Franklin O'Sullivan, Judge Peter Smithwick, Noel Tanham and Liam Young. The event, to take place in the Four Seasons Hotel on 19 June, will be hosted by Michael Quinlan and the DSBA Council.

Meanwhile, it continues to be full steam ahead for China, with Beijing and Shanghai being the venues for the DSBA conference in mid-September. Michael Quinlan reports that the numbers are at a very healthy level, and rising.

And, speaking of Michael, it's not everyone who would take so well to living cheek-by-jowl with a TV crew in your home over several weeks as Michael and his lovely wife Sarah have done in the making of the eco-series *My Family are Wasters!* Currently showing on RTÉ over six weeks, it's all in the interest of saving the planet. Deep down, we all know that Michael is really a tree-hugging, sandal-wearing eco-warrior!

PIC: ADRIAN BUTLER, THE LIMERICK LEADER

A visit to the home of the Heineken champions!
(From l to r): Shaun Elder (president of the Limerick Bar Association), James MacGuill, Julianne Kiely (Limerick Bar Association) and Ken Murphy before a bar association meeting on 20 May

MIDLANDS

Charlie Kelly of the Midland Bar Association tells me that a VAT seminar is scheduled in Mullingar for 24 June next, which has already generated much interest.

The bar association is furthermore, and justifiably, basking in the afterglow of the election of one of its Offaly members as Taoiseach! To celebrate his achievement, and to honour one of their own, it is hoped to have a special function in the midlands in the near future, to which Brian Cowen will be invited as guest of honour.

MEATH

The retirement of Judge John Brophy was noted in Dunshaughlin District Court earlier in the month, on the occasion of his last sitting, following 17 years of service as a judge of the District Court. Liam Keane, on behalf of the Meath Bar Association, congratulated Judge Brophy for his courtesy and common sense. The judge had at all times been fair, he said, and had given the lead when addressing court matters that had their basis in social problems, and the increase in road-traffic offences and antisocial behaviour. Law Society Council member James McCourt thanked Judge Brophy for his many years of service and complimented him for his directness and frankness.

MAYO

A dinner in honour of Liam MacHale (Ballina), to honour his 50 years in practice, was held in Pontoon. This coincided also with the annual awards, in which Michael (Miko) Browne (Westport) was the popular and worthy first recipient of the Judge Daniel Shields Perpetual Award for Mayo-based solicitors (see p41).

Pat O'Connor advises that refurbishments of both Swinford and Ballina courthouses are in the pipeline. The realignment of the District Court areas is at a consultative stage, with draft proposals being in line with what was expected, and the likelihood that Mayo will be treated as one district. The Sligo personal injury list has just recently taken place in Castlebar.

On the social scene, Caroline Barry is organising a barbecue to take place on 18 July in Paddy's, and a dinner dance being arranged by Dermot Hewson will take place at Mount Falcon on 6 December.

The Law Society recently ran a CPD course in Claremorris, which is reported to have been well received. Meanwhile, Caroline Barry is organising a CPD session in September on VAT.

DONEGAL

Brian McMullen and the bar association recently organised a very successful seminar on probate (Paula Fallon), commercial law (Paul Keane), taxation (Brian Bohan), and transfer of family business.

CORK

The legal secretary's course run by the Southern Law Association came to an end, with 45 legal secretaries successfully completing the course, which ran for 23 weeks. A reception was held for the graduates at the Clarion Hotel on 23 May to celebrate their achievement. The course is run biannually by the association, covering the subjects of litigation, conveyancing, family law and probate. Lectures are delivered by solicitors. G

'Nationwide' is compiled by Kevin O'Higgins, principal of the Dublin law firm Kevin O'Higgins.

Legal Practice Irish for solicitors

The old first and second Irish examinations will be replaced by the *Legal Practitioners (Irish Languages) Bill 2007*, when enacted. Course manager Maura Butler has delegated responsibility for the implementation of this new legislation in the Law Society – initially for trainee solicitors taking the Professional Practice Course, and thereafter for those solicitors who wish to become registered with the Law Society as practitioners *as Gaeilge* or jurist linguists.

Maura formed a multi-skilled team, which includes Caroline Kennedy (IT coordinator for education), Alison Egan (CPD scheme executive), and Maritta Moran (trainee administrator). A course language instructor and general translator, Kevin O'Hara, has been engaged. He has collaborated on aspects of the course design, which are specific to the needs of language teachers and which have been adapted technologically. Timetable restrictions have been overcome by designing a 'blended learning' course called 'Legal Practice Irish' (LPI), which in effect increases the time the learner is engaged by combining traditional teaching contact time with online resources and tasks.

In related news, the new Certificate in Legal Irish was launched on 10 May *(l to r)*: Kevin O'Hara (lecturer), Attracta O'Regan (head of CPD Focus) and participants Judge Carroll Moran, John Dolan, Deirdre Thompson, Declan Duggan, Rita Hamilton, Pól Ó Murchu, Alan McCrea and Áine Sheahan

The abiding strength of the course is that it melts traditional barriers between education and technology.

Improvements mean that the Education Centre's standard Moodle resource now accommodates a bilingual language interface that incorporates best-practice teaching and learning outcomes. Adapted core PPC materials are released online on a weekly basis using a variety of IT tools to facilitate seeing, hearing and speaking *as Gaeilge*.

Law Society President James MacGuill launched the first elementary LPI course on 30 April, and it will run until 18 June.

Diploma programme '08/09 launched

With your *Gazette* this month you will have received the *Diploma Programme Booklet '08/09*, with details of the diverse range of diploma and certificate courses offered by the Education Centre for autumn. This includes the launch of two new diplomas – a Diploma in Corporate Law and Governance, and a Foundation Diploma in Legal Practice. All diploma courses take place in the evenings or on Saturday mornings and run over a period of six months, culminating with an exam. The Diploma in Corporate Law and Governance is aimed at practitioners who are keen to gain an in-depth knowledge of corporate transactional work and related corporate governance best practice. The course will build upon a basic understanding of the essential elements of the corporate legal structure, to provide an in-depth analysis of more complex, corporate transactions.

The diploma will focus also on the increasingly indispensable area of corporate governance, setting out the applicable regulatory and legislative framework under the Office of the Director of Corporate Enforcement.

Motivated staff

The Foundation Diploma in Legal Practice is aimed at legal executives, law clerks, secretaries and those who provide administrative or secretarial support. The objective is to provide knowledge of procedural requirements in areas relevant to support staff, to include probate, debt-collection and conveyancing.

In addition, practical workshops will be provided for specialised IT tuition in software applications. A session on communications and customer service skills will be provided by The Communications Clinic.

A further innovation for the diploma team will be the provision of our first online diploma, which will be in the area of employment law. In addition, the team will also be providing a number of online certificates in the spring of 2009, including the District Court Certificate and Certificate in Judicial Review.

For full details on all diploma courses, contact a member of the diploma team or access the diploma section on the homepage of the Law Society's website; email: diplomateam@lawsociety.ie; web: www.lawsociety.ie, tel: 01 672 4802, fax: 01 672 4992.

CPD'S NEW RULES

As we enter the second half of the current annual CPD cycle, practitioners should remember the new rules. There are only six months left to complete the new CPD scheme requirements for 2008, *writes James O'Sullivan, chairman of the Education Committee.* Now an annual requirement, solicitors have to do a *mandatory* ten hours of CPD this year. The three hours' management and professional development requirement still remains. Finally, as members will be aware, practitioners have been chosen at random over the past number of weeks to verify their attendances for 2006/07 – the review is ongoing.

CPD queries should be addressed to Alison Egan at 01 672 4802.

Law Society welcomes expulsion of disgraced solicitor from the roll

The name of Michael Lynn has been struck off the Roll of Solicitors by order of the President of the High Court, Mr Justice Johnson.

Reacting to the news on 23 May, President of the Law Society James MacGuill said that the Society, on behalf of its members, utterly condemned the actions of the former solicitor. "Mr Lynn has brought deep disgrace upon himself and disrepute on his profession through systematic abuse of the trust placed in him as a solicitor. He has shown he is not fit to be a solicitor and the profession will very much welcome his expulsion today," Mr MacGuill said.

The Society said it was pleased that its action to have Lynn struck off the roll had been endorsed by the independent Solicitors Disciplinary Tribunal and ultimately by the President of the High Court.

PIC: COLLINS PHOTOS

Law Society 'utterly condemns' the actions of the former solicitor

€2 million fine

The Society said it believed that the unprecedented €2 million fine imposed was commensurate with the level of fraud perpetrated by Mr Lynn. The Society also thought it very appropriate that the President of the High Court ordered papers to be sent to the DPP.

Mr MacGuill went on to say that, when concerns about the nature of Mr Lynn's activities first came to the attention of the Law Society in September 2007, the Society had moved quickly. In accordance with its statutory powers and obligations to protect the interests of clients, the Society successfully applied to the High Court to have the bank accounts of Mr Lynn's practice 'frozen' and took control of over 4,000 client files. The Society wrote to Mr Lynn's clients inviting them to transfer their files to other solicitors.

Where Lynn's clients have sustained loss in consequence of his dishonesty then, subject to the relevant provisions of the *Solicitors Acts*, they have been entitled to make application for grants out of the Society's compensation fund. The fund currently has assets of over €30 million and insurance of an additional €30 million. To date, €1,010,000 has been paid out by the Society to Lynn's clients. The full extent of the claims that may validly be made on the compensation fund in the Lynn case will not be known for some time.

In October 2007, the Society retained the services of forensic accountants to investigate the financial affairs of Mr Lynn's practice and analysed, in depth, numerous individual transactions. It reported the progress of its investigations on an almost weekly basis to the President of the High Court and, in December 2007, was prepared to examine Mr Lynn in court, in relation to the contents of his affidavit, when he failed to appear. Lynn's current whereabouts are unknown to the Society, although recent media speculation has placed him in Portugal.

Throughout this period, the Society has given every assistance it can to the Garda Fraud Investigation Unit, which is also investigating Mr Lynn. The Society will make no further comment on this to avoid any risk of prejudicing a trial in any criminal prosecution that may be brought in the future.

Procedures tightened

The Society has had numerous meetings with the Irish Bankers' Federation to ensure that all possible lessons are learned from the Lynn case and, insofar as possible, that what happened in this case cannot happen again. Since the Lynn case has come to light, lending institutions have tightened their procedures considerably on registration of securities in commercial lending cases.

In addition, in residential lending cases, lending institutions have been much less prepared to accept the undertakings of solicitors who are borrowing on their own behalf (not on behalf of clients). The Society is at an advanced stage in preparations for a regulation to prohibit solicitors giving undertakings to financial institutions where the solicitor himself or herself is the borrower.

"We have taken steps, in cooperation with the Irish Bankers' Federation, to close the gaps that were abused in this case," said Mr MacGuill. "Ultimately, the introduction of e-conveyancing, which we enthusiastically support, will remove a lot of these potential areas of abuse. But systems are not enough in themselves. By our actions and deeds, we must reassure consumers that the profession remains one that is trustworthy, independent and valued in our society".

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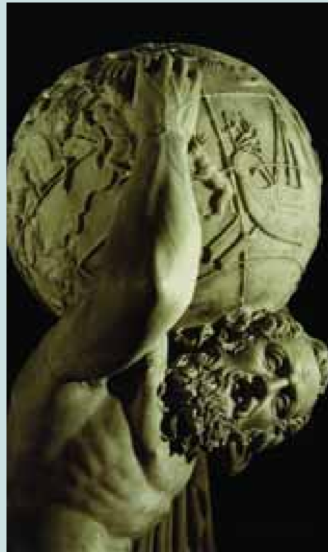
What is stress? In technical terms, it's when the pressures experienced by a person are perceived by that individual as exceeding their capacity to deal with them, in a situation where coping is perceived as being important. Putting it simply – stress happens when you know that you can't cope.

Not all stress is bad. Without some stress, we wouldn't bother to get out of bed in the morning, but the problem occurs when stress builds to such levels that it turns into 'distress'.



Lawyers at high risk

So why does it happen to lawyers? Studies have concluded that lawyers are at high risk from compulsive behaviour (that is, over-use of alcohol, drugs and food) because of the type of personality attracted into the legal profession. Lawyers are most often hard-driven, tense, 'A-type' personalities who are also perfectionist, over-conscientious, driven, competitive, ambitious, unable to delegate, status-aware, highly aspirational individuals. They can find it hard to admit, even to themselves, that there are occasions when they can no longer solve the problems of the world, but actually need help in dealing with what troubles them.

LawCare's experience is that 80% of those seeking help in relation to alcohol abuse or addiction say that they started drinking due to stress at work. Also, repeated 'shots' of the adrenaline caused by stress will, over a period of time, cause health problems by weakening the immune system, resulting in frequent illnesses such as colds, flu, viruses, asthma, skin complaints and constant exhaustion, among others.

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There is also a network of volunteers of lawyers who have been through alcohol, stress, depression and drug abuse, either personally or through contact with family or friends. If appropriate, they are available to offer support for as long as is necessary. LawCare is seeking to recruit volunteers, so if you have relevant experience and would like to help, please contact us through the free helpline.

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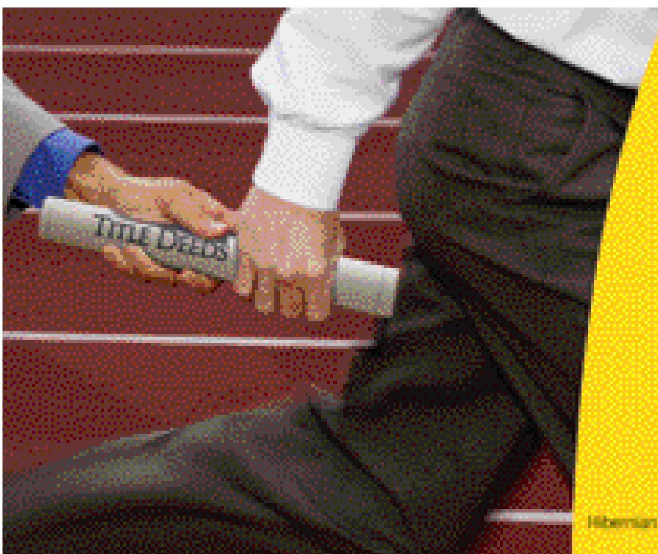

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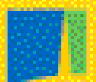

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First solicitor elected Taoiseach

For the first time in the history of the state, a solicitor has been elected Taoiseach. Brian Cowen was admitted on the Roll of Solicitors in 1983, subsequently practising in the firm O'Donovan & Cowen in Tullamore, Co Offaly, which continues to proudly bear his name.

He could not focus his complete attention on a legal career for long, however, as he was elected to the Dáil in 1984 in a by-election following the untimely death of his father, Ber Cowen. He has continued to represent the voters of Laois-Offaly – a five-seat constituency in which no less than three of the TDs are solicitors – since then. In the May 2007 general election, he recorded the highest vote for any candidate in the country, with a whopping 19,102 first preferences.

Within hours of Cowen's election as Taoiseach, Law Society President James MacGuill wrote to him: "It is my very great honour and privilege, on behalf of the solicitors' profession, to congratulate you on your election as Taoiseach today. As citizens, we wish you every success and good fortune in discharging your onerous responsibilities. As colleagues, we take a particular pride in your achievements to date and wish you well in the future."

The president's letter continued: *"Is abhár bróid é dúinne gur aturnae atá tofa mar Thaoiseach. Sa bhreis ar sin, is cúis áthais í do sheasamh láidir ar son na Gaeilge, anois go háirithe agus úsáid na Gaeilge sa chóras dlí faoi chaibidil. Beidh muid ag súil le comhoibriú a dhéanamh leat sa réimse seo, agus réimsí eile, amach anseo."*

On his return to the Dáil following receipt of his seal of office from the President of Ireland, the new Taoiseach announced a number of changes in his cabinet. One of these was the appointment of the former Minister for Foreign Affairs, Dermot Ahern, as Minister for Justice, Equality and Law Reform.

An Taoiseach, Brian Cowen

Dermot Ahern qualified as a solicitor in 1976 and practised in Dundalk in the firm now known as Woods Ahern Mullen until his first appointment as a minister in 1997.

Dermot Ahern is by no means the first solicitor to be appointed as Minister for Justice. Among his predecessors were, in the 1970s, Des O'Malley and Paddy Cooney. In the mid 1990s, Mervyn Taylor served as Minister for Equality and Law Reform and, from 1997 to 2002, the Minister for Justice, Equality and Law Reform was the now Ceann Comhairle, John O'Donoghue.

On the nomination of the Taoiseach, the government has also appointed Peter Power as Minister of State in the Department of Foreign Affairs. Peter Power qualified as a solicitor in 1990 and practised in Limerick in the firm Holmes O'Malley Sexton.

Dermot Ahern, Minister for Justice, Equality and Law Reform

Peter Power, Minister of State in the Department of Foreign Affairs

The Society has also written to Ministers Dermot Ahern and Peter Power to congratulate them and wish them well in their new responsibilities.

CLIENT SERVICE AWARD FOR BCM HW

BCM Hanby Wallace has been named 'Client Service Law Firm of the Year 2008 – Ireland' by legal publishers Chambers & Partners. The announcement was made in Barcelona on 12 May. The award was made following interviews with the clients of law firms.

Society opposes sea change

The Law Society has expressed deep reservations about the proposal that the DPP might consider giving reasons for decisions to prosecute or not. Here are those reservations

In January, the Director of Public Prosecutions sought views on a discussion paper in relation to the giving of reasons when a decision is made not to prosecute or to withdraw a prosecution.

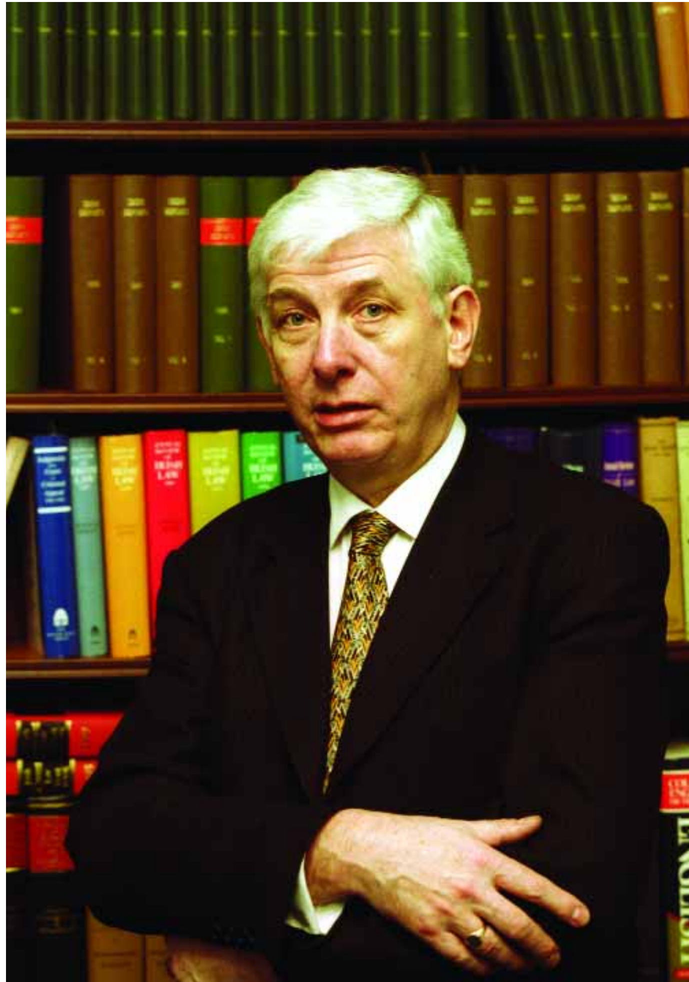
Responding to the initiative, the Law Society – through its Criminal Law Committee – made a submission expressing its deep reservations about the proposal that the DPP might, in future, consider giving reasons for his decisions.

The Society acknowledges that cases can arise where a decision – usually not to prosecute – may be controversial, and can, on occasion, be surprising. Indeed, in a contemporary framework of openness, the Society recognises that the giving of reasons in every case would be the ideal. "However, the DPP, by contrast, occupies a highly-specialised and sensitive position and more subtle considerations must apply," it says.

The Society has taken care to point out that much of the 'public interest' in matters relating to criminal justice relate "not to justifiable public interest in the operation of the criminal justice system itself, but is directed at prurient, all-too-frequently media-driven issues relating to individual cases. It is of course in relation to those individual cases that this submission is directed", the Society states.

In 1983, the DPP issued a press statement in relation to his policy of not giving reasons. The Society – notwithstanding changes in other jurisdictions – submits that the then-stated policy still holds good.

It goes on to directly address



Director of Public Prosecutions James Hamilton

the specific questions raised by the DPP in the discussion paper.

Should the current policy be changed?

The Law Society believes that the current policy should not be changed because of the potential effect it would have on the concept of the presumption of innocence.

In cases where a decision not to prosecute is made – and the reasons for not so doing are made known, even in limited circumstances – it is all too easy for questions to be posed as to the integrity of the reputation of the proposed accused.

"If the DPP were permitted to give reasons, such reasons would have to be focused and direct, as banalities would serve no-one – neither the victim, family of the victim, nor the proposed accused," says the Society. "Reasons such as 'insufficient evidence' might label proposed accused persons as criminals, or such explanations as 'a lost exhibit', 'death or unavailability of a witness' might easily imply guilt, with no venue or forum available to the proposed accused to ventilate the issues. This is particularly relevant in today's changed circumstances, where it is now not uncommon for newspapers to name suspects in ongoing criminal investigations.

"The DPP must be able to retain total objectivity and be able to make unpopular decisions, either to prosecute or not prosecute, without having to provide reasons, no doubt a first step to having to justify those reasons," the Society says.

If so, should reasons be given to only those with a direct interest, the victims of crime or their relations?

"In most cases, An Garda Síochána will liaise with the victim/family. Experience suggests that most victims/families are kept satisfactorily apprised on the ongoing investigation," the submission says.

"As a consequence, it is, in the experience of the solicitors who have contributed to the Society's submission, a relatively rare event when a decision to prosecute (or not) comes as a surprise to the victim/family."

The Society reiterates the view that the office of the DPP enjoys full public confidence, and it does not believe that the relatively limited category of cases in which the director directs no prosecution – a family having apparently expected one – would justify changing an established policy.

Should reasons also be given to the public at large?

Since the Society has a principled position that not even the victim/family should be given reasons, it follows that reasons should not be given to the public at large. "This is particularly so in any case where a suspect is either named or identifiable. The reputation of

in DPP's 'reasons' policy

any suspect – and this is linked closely to the presumption of innocence, which is a cornerstone of the Irish system of criminal justice and is a constitutional entitlement – is all too easily put at hazard by publicity.

"A decision by the DPP not to prosecute is usually final. Any reasons that might be given that might suggest that there is some, but insufficient, evidence against a suspect, threatens those constitutional cornerstones outlined above."

And there are other aspects that must be considered: "The director has identified other legal issues arising in relation to this discussion, which not only include the protection of the reputation of a suspect, but also the protection of the reputation of a witness. The DPP might, for example, if reasons were to be given in specific cases, feel constrained to suggest that a particular witness was, for one reason or another, thought to be unreliable. Witnesses are also citizens, and are equally entitled to the protection of their reputations for (different) constitutional reasons.

"The director has also identified the possibility of future developments in a case being prejudiced by the publication of sensitive material, and the protection of police sources. These are, in the view of the Society, entirely legitimate considerations and, quite self-evidently, the greater the extent to which information comes into the public domain, whether by giving reasons or otherwise, the greater the potential threat that comes into being in respect of those considerations as well."

If reasons are given, should they be general or detailed?

The Society's position is that neither general nor detailed reasons should be given. "However, for the record, the Society submits that the giving of detailed reasons, as opposed to general, presents a greater risk of harm to any and all aspects as previously outlined."

Should they be given in all cases, or only in certain categories of serious cases? If so, which?

The general position of the Society is that the current policy is not only sound, but is in general a more prudent option. "Once the principle of having to give reasons is conceded, it becomes very difficult to impose practical, not to mention theoretical, limits. Suppose, for example, that the director opts to give reasons in cases of murder and rape. How is it possible to limit 'murder' otherwise than by reference to all apparent homicides/ unlawful killings? What is the difference, in principle, between acts of violence that kill a victim and those that maim? If it is decided to admit serious assaults to the category, what constitutes 'serious'?

"Likewise, it is not only theoretically, but practically, difficult to limit the category of cases of 'rape', as many assaults that allege rape also constitute allegations of aggravated sexual assault, sexual assault, and so on. Then there are additional cases in this category, such as incest-type cases or 'statutory rape', which are also extremely serious and which, presumably, would be subsumed within the policy of giving reasons in rape cases."

The Society's submission states that it is difficult, in theory, to see a justification for giving reasons in particular categories of cases, albeit serious ones, and not to extend that policy to all cases.

> *"A decision by the DPP not to prosecute is usually final. Any reasons that might be given, that might suggest that there is some, but insufficient, evidence against a suspect, threatens constitutional cornerstones"*

How can reasons be given without encroaching on the constitutional rights to one's good name and the presumption of innocence?

This is the ultimate cornerstone of the Society's objections, based as it is on pure constitutional considerations. "The Society can imagine no means whereby reasons might be given without offending these principles, and in that regard the statement of the DPP in 1983 is entirely apposite."

Should the communication of reasons attract legal privilege?

The Society is opposed to the giving of reasons, generally. The Society adopts the position that communications "in good faith and without malice, from the Director of Public Prosecutions, should be privileged, and it may be necessary to legislate for this eventuality, should the DPP decide to amend his policy".

How should cases where a reason cannot be given without injustice be dealt with?

"It has been noted that the relationship between the victim/family and An Garda Síochána is a continuing one, and in cases where there has been a perceived injustice (by virtue, that is, of not prosecuting), it should be possible for the gardaí to reassure concerned complainants that the evidence in the case was assessed by the highest authority, reassessed at deputy director level if need be, and that a decision has been taken that a prosecution cannot be brought to meet the required legal onus and standard." Although the Society believes that reasons should not be given, "if it were to be decided that they should be, then An Garda Síochána would be the most appropriate body to pass on reasons to complainants".

In the discussion paper, the DPP referred to the specific context of a *nolle prosequi*. The director canvassed the possibility of an individual's reputation being sullied if a *nolle* is entered and no explanation is given.

The Society is of the view that, while this does represent a slightly more complex situation, nonetheless, the principle remains the same and, in its view, the giving of reasons is a sea change in policy to which it is opposed. **G**

Missionary zeal at

At the second European Collaborative Law Conference, in Cork, Colin Murphy encountered the evangelists of this young – yet significant – legal model

"I had not thought to live and be moved by the words of an attorney general," said poet Theo Dorgan, to laughter. Dorgan followed Attorney General Paul Gallagher, who were both guest speakers at the second European Collaborative Law Conference, held on the May bank holiday weekend at the Sheraton, Fota Island, Cork.

Though Dorgan went on to talk of poetry, and the Attorney General had talked of law, there was, surprisingly, much in common between them. Both spoke of the dignity of humanity, of the precedence of that dignity over man-made legal systems, and of the trauma that results from marital breakdown.

"If law is something that grows from human experience, humanity should not be twisted into law. Rather, human experience should dictate what law should be doing," Paul Gallagher had said.

"Advocacy, and the adversarial system, undoubtedly has its place in our legal system, but we must mature in our ideas of what law is about. Human experience teaches us that, in the area of family law, we have a crying need for other forms of dispute resolution."

The collaborative model, which seeks to achieve dispute resolution without recourse to court, could help offer that alternative, he suggested.

Family-law situations contained "difficulties that do not exist in other forms of litigation". They were "completely bound up with the dignity of the person" and "with the welfare and dignity of the children", he said.

PICS: PROVISION

Patricia Mallon, of the Association of Collaborative Practitioners

"The courts are needed to resolve those cases that cannot be resolved in any other way, but it seems to me that, long before one should ever get to court, one needs a mechanism whereby people have an opportunity to resolve their disputes in a way that preserves their dignity and in a way that maximises the welfare of their children."

Collaborative law, he said, involved "looking at winners and losers from a different perspective".

"Collaborative law enables lawyers to see things beyond the immediate demands of a client who is in a very difficult and very charged situation, and to say there is a solution that will fulfil your needs, and yet fulfil something that is just as important, and that is the needs of the dignity of the people who are involved in the dispute."

Collaborative law, he said, "is and will be of even greater benefit in this jurisdiction".

His concerns were echoed closely by President Mary McAleese, who observed that "the old adversarial model of a day in court with a winner and a loser was never designed effectively to address the profound human needs and vulnerabilities at the heart of family relationships".

Collaborative practice, she said, promoted "a culture of cooperation and openness" that would lead to "less stress and more mutually respectful and consensual decisions".

"It does so in a controlled and professional environment at some remove from the otherwise tactical defensiveness or aggression that can characterise the negotiating environment of conventional adversarial systems.

"An ever-growing cohort of solicitors, trained as collaborative practitioners with the backing of the Legal Aid Board, are set to help us consciously shift our legal culture into a new era."

According to solicitor Patricia Mallon, president of the Association of Collaborative Practitioners in Ireland, collaborative law is the fastest growing legal specialisation internationally, with 400 Irish lawyers already trained. The adversarial model of dispute resolution, which could have "sometimes terrible and destructive effect" on families, raised "serious and uncomfortable questions for lawyers", she said, many of whom were more comfortable with the traditional system in which "distributive bargaining is king and where victory is the sole mission".

Collaborative practice offered the possibility that considerations of law could be joined with considerations of equity, justice and respect, and could offer "client-centred, family-oriented solutions", she said. Such was its growth internationally and in Ireland that it could become the mainstream form of resolution of family-law disputes within a decade, she suggested.

The true function of a lawyer

The practice of collaborative law was first devised by Minneapolis lawyer Stu Webb in the early 1990s. Addressing the conference, he quoted Mahatma Ghandi as having demonstrated a precedent for the collaborative model. In Ghandi's words: "I realised that the true function of a lawyer is to unite parties riven asunder. The lesson was so indelibly burnt into me that that a large part of my time during the 20 years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby – not even money, certainly not my soul."

Webb, who neither looked nor spoke like a conventional lawyer – he was casually dressed, with a gentle, pottering speaking style – brought a dose of American 'new age' psychology and spirituality to his address. He cited Eckhart Tolle's *The Power of Now* and spoke of encouraging people to "get into a serenity space".

Victoria Smith, a practitioner and academic in Toronto, said people needed to think in terms of a new metaphor for dispute resolution. The prevailing metaphor, she said, was 'war'. She suggested, instead, that collaborative practice be thought of as 'a dance'.

The Irish public, and particularly professional communities, are typically less comfortable than Americans with

Cork conference

this kind of lyricism being applied to the professional context. Patricia Mallon was keen to stress that collaborative law was not "some esoteric, touchy-feely fad … It is a way of dispute resolution that can be accurately measured in very functional terms – out-turns and value for clients, speed of delivery, cost effectiveness", she said.

Hard analysis

Yet even those speakers who indulged in what Irish people might think was 'touchy-feely' rhetoric combined this with hard analysis of the family-law context.

Victoria Smith said she wasn't suggesting "that lawyers have a 'litigation lobotomy' … We're not letting go of our primary duty to our client. We're there to represent our clients' interests – as broad as we now understand them to be".

Pauline Tesler, a Californian lawyer who has trained all of the Irish practitioners, provided a solid social-science context for this understanding of the clients' interests.

Traditional dispute resolution was based on an 18th century idea of man as 'homo-economicus', she said – the rational individualist of Adam Smith's economic theory, who could be relied upon to engage in behaviour designed exclusively to maximise his own economic gain.

"We are taught to see our clients as isolated, self-contained bundles of legal rights and entitlements," she said. Instead, collaborative practice represented a move "towards addressing the entire spectrum of human needs that arise in a divorce".

Susan Gamache, a psychologist from Vancouver, sought to emphasise the mental-health aspect of collaborative practice and, accordingly, designed her presentation to provoke her mostly lawyer audience into a different mindset.

Minister for Justice Brian Lenihan, with Helen Collins, Rachel Murphy and Audrey Byrne of the Association of Collaborative Practitioners at the conference

"Lawyers love details, but we've no time for details," she said. So she used metaphors – "which hold so much more information" – to explain her 'teamwork' approach to collaborative practice.

The traditional, adversarial model of litigation was "doubles tennis", she said: both sides (lawyer and client, or perhaps barrister and solicitor) slugging the issues back and forth across the net.

Collaborative practice, instead, was "hurling" – but all the parties were together on one team, and the enemy – the other team – consisted of the issues that threatened the family, be they concrete, such as financial issues and geographical dislocation, or emotional, such as fear.

Gamache advocated using mental-health professionals in the collaborative process. In this model, counsellors act as 'divorce coaches' to the separating couple, and a child specialist is tasked with bringing the child's opinions to the table.

"Once the lawyers come out of the template of litigation, it can be overwhelming for them," she said. "They worry, what to do with all this *emotion*?"

The interdisciplinary approach to collaborative practice, involving mental health professionals in the process, mitigated these difficulties, she said.

Evangelical element

A pair of commercial lawyers came at collaborative practice from the opposite angle. Paul Faxon and Robert Lopich advocated the use of the practice in business disputes, particularly involving small and medium-sized enterprises.

"Think of a family business of several generations in Ireland," said Paul Faxon. "Father founded it, he has since passed away, and the siblings are in a major dispute over control of the business.

"You have a dispute that has, in many ways, the dynamics of a divorce. It's not only a business: this is people's lives and their family.

"One of the key ingredients we look for, to identify whether the collaborative model is suitable for resolving a business dispute, is whether there is the possibility that the disputants may at some point down the road want to maintain a relationship – as a contractor or subcontractor, as people in related synergistic industries, or as family members."

There was an evangelical element to the conference as a whole that would have surprised disinterested observers. Although the North American advocates were typically quicker to talk of 'paradigm shifts' and 'changing the world', it was clear that the Irish Association of Collaborative Practitioners (ACP) is actively pushing the discipline. There was a proselytising energy about the event, and the ACP committee was rallied by the strong endorsements from the President and the Attorney General.

Collaborative practice "could become the mainstream form of resolution of family law disputes within a decade", suggested Patricia Mallon.

That seemed like hyperbole when stated in the press release, but when Paul Gallagher said there was a "crying need for other forms of dispute resolution" in family law – and that collaborative practice might provide that – Mallon's claim seemed more realistic than idealistic. **G**

For more information on the collaborative law process, see the June 2005 Gazette *(p24), available at www.lawsociety.ie/Gazette/june05.pdf.*

In favour of the *Lisbon Treaty*

Head of EU, Competition and Regulatory law at Eugene F Collins, David Geary argues that the treaty seeks to make the EU more efficient and proactive, while retaining its intergovernmental nature and protecting the sovereignty of its member states

The *Lisbon Treaty* will greatly improve the European Union. It introduces reforms to allow the EU to function more effectively and will also allow the EU to be a more effective actor in an increasingly globalised world.

As with all European treaties, *Lisbon* is the result of years of negotiation and compromise by the 27 member states. Naturally, not every element will be to everyone's liking but, viewed as a whole, it is a very good treaty, and its skilful negotiation by Ireland is a credit to our politicians and civil servants.

Lisbon contains many of the reforms identified in the *Constitutional Treaty*. This should be no surprise: after all, these reforms are necessary. However, *Lisbon* is different in a number of significant respects. In particular, it amends rather than replaces the current EC and EU treaties, and the concept of constitutionalism (to which many French and Dutch voters objected) has been dropped. Therefore, from a legal perspective, *Lisbon* maintains the status quo as regards the position of the European treaties and legislation vis-à-vis national constitutional law.

In terms of the structure of the EU, the treaty drops the confusing distinction between the European Union and the European Community and, in future, just one entity – the European Union – will exist. As a result, the current *EC Treaty* will be renamed the *Treaty on the Functioning of the EU*.

The EU will have its own legal personality, which will enable it to conclude international agreements and join international organisations, similar to the current status of the EC, and it is specifically foreseen that the EU will sign the *European Convention on Human Rights*.

Democracy enhanced

Lisbon significantly enhances democracy in the EU. The European Parliament is given equal status to the Council of Ministers in legislative procedures, as the 'co-decision' legislative procedure will become the ordinary legislative procedure. This marks a sea change for the European Parliament, which originally was little more than a talking shop with very few powers. The parliament's powers in relation to the budget and workings of the EU are also enhanced.

Lisbon also improves democracy in the Council of Ministers, as a new qualified majority voting (QMV) system will better reflect the number of citizens resident in each member state. The new system will require a double majority of the member states and population of the EU to adopt a provision. The use of QMV is also extended to some new areas (which mostly concern 'freedom, security and justice'). However, Ireland retains its veto in the key areas of taxation, foreign direct investment, defence and social security.

In practice, the council operates on the basis of compromise and consensus and the Department of Foreign Affairs recently confirmed that it could not identify any instance where Ireland used a veto in the past 25 years.

The role of national parliaments in overseeing the work of the EU is also enhanced, as they gain additional time to scrutinise draft EU legislation and a right to draw concerns about proposals to the European Commission. The increased involvement of national parliaments may well become one of the hallmarks of the EU system and, in future, Irish citizens will be able to hold their TDs to account for EU legislation that affects them.

Under the *Nice Treaty*, it was agreed to reduce the number of European commissioners to make the commission more efficient. *Lisbon* provides that, from 2014, only two-thirds of member states will have the right to nominate a commissioner at any one time – this right to be rotated equally. Ireland won a significant concession in securing that this also applies to the large member states, such as Germany and Britain, who originally had the right to nominate two commissioners. A citizens' initiative procedure will also allow EU citizens to directly petition the European Commission for the first time.

The European Council, which gives political direction to the EU, will be formalised as an EU institution, and this will ensure better coherence and continuity of policymaking. As with all institutions, it will have a permanent president (the position currently rotates between member states every six months) whose role will include chairing meetings of the European Council and representing the EU abroad on certain matters.

Policy changes

An important feature of *Lisbon* is that it identifies the policy areas over which the EU has

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Against the *Lisbon Treaty*

Expert witness on foreign and security policy in the landmark *Crotty* case, Joe Noonan argues that, instead of organising relations between member states, the *Lisbon Treaty* focuses on asserting the EU's own interests

The *Treaty of Lisbon*, if ratified by all member states, will transform the legal structure and operation of the EU. At present, there are two bodies: the European Community and the European Union. After *Lisbon*, only one body will remain. *Lisbon* consolidates and amends the existing treaties – we will be left with two linked treaties, the *Treaty on European Union* (TEU) and the *Treaty on the Functioning of the Union.*

Lisbon contains over 90% of the *Treaty establishing a Constitution for Europe*, rejected by voters in France and the Netherlands in 2005. Following further negotiations, the *Lisbon Treaty* emerged in December 2007. None of the member states, except Ireland, now seek approval for ratification by referendum. This has attracted some comment.

"The most striking change [between the *Lisbon Treaty* and the *Constitution Treaty*] is perhaps that, in order to enable some governments to reassure their electorates that the changes will have no constitutional implications, the idea of a new and simpler treaty containing all the provisions governing the union has now been dropped in favour of a huge series of individual amendments to two existing treaties. Virtual incomprehensibility has thus replaced simplicity as the key approach to EU reform. As for the changes now proposed to be made to the constitutional treaty, most are presentational changes that have no practical effect.

They have simply been designed to enable certain heads of government to sell to their people the idea of ratification by parliamentary action rather than by referendum" (Dr Garret FitzGerald, *The Irish Times*, 30 June 2007).

Given the implications of *Lisbon* for our legal landscape, the lack of public debate among Irish lawyers is remarkable. In this article, it is possible only to sketch some of the proposed changes. Nothing is a substitute for reading the treaty text. On its own, it is virtually impenetrable. Fortunately, an excellent document showing the effect of the *Lisbon* changes on the existing treaties has been compiled by Peadar Ó Broin (google 'Peadar O Broin annotated treaties'). The changes are colour coded, with new text shown in yellow or blue. Deleted text remains, struck through in red.

Scope of the union

The *Lisbon Treaty* is an important legal document. It proposes the abolition of the European Community and the reconstruction of the European Union as a new single body with its own legal identity separate from its member states. *Lisbon* will change the legal relationship between this new union and the member states. Some changes have attracted public interest, such as the reduced number of commissioners, changes in qualified majority voting, and the removal of various national vetoes. Of particular constitutional significance in Ireland, however, will be the changes to the objectives of the union and its increased scope.

At present, the stated tasks of the European Community focus on the promotion of economic development, social progress, and economic and social cohesion and solidarity among member states (article 2, *Treaty Establishing the European Community*). The stated task of the present European Union is the organisation of relations between the member states and between their peoples: "The union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this treaty. Its task shall be to organise, in a manner demonstrating consistency and solidarity, relations between the member states and between their peoples" (article 1, TEU pre-*Lisbon*).

These tasks render the present European Community and European Union the servants of the member states and of their citizens. This will change under *Lisbon*, which removes these tasks and provides no equivalent replacement tasks. *Lisbon* abolishes the European Community, folding its operations into the new union. Instead of organising relations between member states and between their peoples, the new union's aims and objectives will focus on identifying and asserting the union's own interests and the "well-being of its peoples" (article 3, TEU post-*Lisbon*).

The aims and objectives of the new union are elaborated in that article 3. This should be read in full, as it is too long to reproduce here. Article 3 reflects the fact that the new union will have more scope than the existing bodies. For example, *Lisbon* gives the union greater competence in the justice and home affairs area. Ireland, along with Britain, has

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competence to act, and it confirms that the EU is not authorised to act beyond the competences conferred on it by member states.

Under *Lisbon*, 'freedom, security and justice' will be subject to the ordinary legislative procedure of the EU. This will allow the EU to better tackle the trans-border crime that has emerged since the internal barriers in the EU were removed. Ireland has chosen to opt out of the legislative procedures in this area for an initial three years, but intends to opt in whenever possible.

Lisbon enhances the EU's ability to act internationally. Given the EU's inadequate response to crises such as Bosnia and the reality of globalisation, this is urgently required. *Lisbon* develops cooperation on 'external action', although decisions in this field will still require unanimity by member states. The new post of High Representative for Foreign Affairs and Security Policy will increase the coherence between the different strands of EU policies that have an external element and the combined impact of these policies.

In addition, the security and defence policy, introduced by the *Maastricht Treaty*, will be brought more clearly into the EU framework, but will remain subject to special decision-making arrangements based on intergovernmental cooperation.

Under *Lisbon*, national security remains the responsibility of member states, although the aspiration of a common defence is strengthened. There is no obligation to increase military spending or take part in military cooperation. *Lisbon* clarifies the missions the EU may undertake, such as peacekeeping, conflict prevention and humanitarian assistance, and Ireland can veto operations it does not believe comply with the EU's values.

> *"There is no obligation to increase military spending or take part in military cooperation"*

Ireland's neutrality is also protected, as *Lisbon* confirms that the security and defence policy "shall not prejudice the specific character of the security and defence policy of certain member states" – a reference to the neutral position of countries such as Ireland and Austria, which became permanently neutral following World War II. The *Irish Constitution* also prohibits participation in a common defence.

The treaty also accords the EU *Charter of Fundamental Rights* the same legal value as the treaties, meaning that courts in the EU will be empowered to give effect to the various workers' rights provided by the charter. Public services ('services of general interest') also remain a matter for member states.

Significantly, *Lisbon* gives the EU a specific mandate to combat climate change. This will allow the EU to continue to take the lead globally in addressing this crucial issue.

Future amendments

An important legal point that has arisen in the debate on *Lisbon* concerns future amendments to the treaties. It is important to note that, under *Lisbon*, any future changes will continue to require ratification by member states in accordance with their constitutional requirements, which may require a referendum in Ireland in accordance with the *Crotty* judgment.

The EU is constantly developing and improving and the *Lisbon Treaty* is the next step in this process. Many of the arguments against *Lisbon* are the same arguments made by the same people who oppose every referendum on Europe, and developments such as the euro, the single market and enlargement.

The reality is that the EU has been good for Ireland, Europe and the wider world. It is in need of reform, and the *Lisbon Treaty* strikes the right balance between making the EU more efficient and proactive, while retaining its intergovernmental nature and protecting the sovereignty of its member states. It deserves our support. G

David Geary is head of EU, Competition and Regulatory law at Eugene F Collins and sits on the EU and International Affairs Committee of the Law Society.

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Dublin Simon Community

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opted out of this part of the treaty, but will review the opt-out in three years. If *Lisbon* is ratified by Ireland, despite their initial opt-out, the government will have authority to opt in to these areas if and when it sees fit in the future. (See the former Minister for Justice's statement on justice matters relating to the *Lisbon Treaty*, made at the Law Society's annual conference and reported in last month's *Gazette*, p15, where Minister Brian Lenihan stated: "We have lodged a declaration making clear our intention to participate to the maximum extent possible on justice cooperation and justice proposals").

Citizenship

Under *Lisbon*, we are no longer referred to as "the peoples of the member states" – instead, we are referred to for the first time as "its peoples", that is, the peoples of the new union. Similarly, post-*Lisbon*, the union will refer to us as "its citizens" – a subtle change from present references to us as citizens of member states. EU citizenship as a concept came into existence with *Maastricht*, which provided that EU citizenship "shall complement national citizenship and not replace it". This changes with *Lisbon*, which says that EU citizenship shall be "additional" to national citizenship but shall not replace it. The full implications of this change for Irish citizens remain to be seen.

Similarly, members of the European Parliament, currently described as "representatives of the peoples of the member states brought together in the community", will become "representatives of the union's citizens" in the new union.

Charter of Fundamental Rights

Article 6 of the new TEU makes reference to a *Charter of Fundamental Rights of the EU*, which it says "shall have the same legal value as the treaties". The guide to the treaty issued through the Government Publications Office by the National Forum on Europe says that the treaty status conferred on the charter will "significantly increase the jurisdiction" of the European Court of Justice.

The practical consequences for human rights law in Ireland are unclear. Gerard Hogan SC suggests that the charter could amount to "the most profound change" in relation to judicial review and the protection of fundamental rights since the adoption of the Constitution (*The Irish Times*, 24 April 2008, "Charter could eclipse Supreme Court").

Ireland and the wider world

The freedom to manage relations with other countries is a hallmark of statehood. That was at the heart of the *Crotty* judgment. The Supreme Court found that the *Single European Act* would be unconstitutional without a referendum because it would commit the government to endeavour to coordinate foreign policy with other member states. Even though the commitments were expressed in soft language, the court found that, as a matter of international law, these commitments would bind the government. *Lisbon*, similarly, is a treaty written in the language of international law. It is important to remember this when considering the *Lisbon* articles, which impose new commitments on Ireland in the areas of EU common foreign and security policy (CFSP), including common security and defence policy (CSDP).

Commission President Barroso has acknowledged the significance of these changes: "The new treaty will turn the European Union into a full external political actor by giving the union legal personality … It will allow the emergence of a true common European defence. It will introduce a mutual defence clause and a solidarity clause" (4 December 2007, speaking at the European Parliament).

> *"Lisbon will oblige member states, for the first time, to 'progressively improve' their military capabilities"*

Military/security commitments

Among the new commitments are article 28A.7 of the TEU (post-*Lisbon*), which is a mutual defence clause obliging all member states to come to the aid of any member state that is the victim of armed aggression in its territory. This resembles the defence pact in article V of the *NATO Treaty*. In the NATO pact – as in the new *Lisbon* defence clause – each country reserves a discretion as to the precise manner in which it may respond. Some have argued that the existence of a reservation of this kind in *Lisbon* allows Ireland to deny that it is a defence pact. By that logic, NATO itself would not be a defence pact either.

Lisbon will also give proper treaty status to the European Defence Agency. The agency was established by the EU heads in 2004. Ireland was among the first to join when the government committed us to agency membership, which includes financial commitments. The agency has a range of military and security goals that are not confined to the territory of the EU. Article 14 of the current TEU, which relates to CFSP, allows the European Council to adopt "joint actions which shall address specific situations where operational action by the union is deemed to be required". A citizen would be unlikely to have understood article 14 as providing for the establishment of the agency, but this became the purported treaty authority for the agency in 2004.

Lisbon will oblige member states, for the first time, to "progressively improve" their military capabilities. The agency will monitor whether countries are making the necessary improvements.

Lisbon weakens the current limitation on EU military action, which in general terms confines such actions to humanitarian or peacekeeping operations. *Lisbon* will give the union scope to deploy military force for such purposes, at such locations and in such circumstances as it sees fit. There is no obligation at present on the EU to seek UN sanction before deploying EU forces outside the union. This will not change.

Law is ultimately about power and how it is to be exercised. The *Lisbon* referendum is about the redistribution of power between Irish citizens and the Irish government, between big and small states in the EU, and between member states and the EU. *Lisbon* will reshape the European Union with implications that will last for a long time. We cannot afford to underestimate the significance of this referendum. G

Joe Noonan is a partner in Noonan Linehan Carroll Coffey, Solicitors, Cork. He was an expert witness on foreign and security policy in the landmark Crotty *case (1987), in which the Supreme Court decided that the* Single European Act *should be put to the Irish people by way of referendum. The* Crotty *judgment is the reason Ireland is holding a referendum on the* Lisbon Treaty *on 12 June.*

Successful insider-trading claims must show that the insider has information that is not generally available, but, if it were, would be likely to materially affect the price of securities. Following last year's *Fyffes* judgment, Conor Feeney peels that banana

no more MONKEY BUSINESS

MAIN POINTS

- Insider trading and manipulation of price-sensitive information
- Measuring price sensitivity in insider dealing claims
- High Court and Supreme Court approaches

The much-publicised case of *Fyffes v DCC* involved the first civil claim of insider dealing in this jurisdiction. Ironically, the superior courts' first opportunity to review the legislation on insider dealing came at a time when that legislation was being replaced by a new regime. The *Fyffes* claim was brought under section 108(1) of part V of the *Companies Act 1990*. Part V has been repealed by section 31 of the *Investment Funds, Companies and Miscellaneous Provisions Act 2005* and, pursuant to section 30 of that act, the *Market Abuse (Directive 2003/6/EC) Regulations 2005* have replaced the old regime with the harmonised EU regime on market abuse, including insider dealing.

The banana skin

The appeal from the High Court to the Supreme Court in *Fyffes* concerned the question of whether the information that was the subject of the claim of insider dealing was price sensitive. The test for price sensitivity of information in both the 1990 act and the *Market Abuse Regulations* is based on a statutory hypothesis. For an application to be successful under section 108(1), the claimant is required to show that the insider possesses "information that is not generally available, but, if it were, would be likely materially to affect the price of those securities". Similarly, regulation 5(1) requires proof of "inside information", which is defined in regulation 2 as "information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments or related derivative financial instruments".

Now that's *real* inside trading

In the High Court, Laffoy J interpreted the phrase "would be likely materially to affect the price of those securities" as setting down an objective test. She further found that this test was to be approached from the viewpoint of the 'reasonable investor' and found support for this approach in foreign case law dealing with similar legislative provisions.

Laffoy J gave the reasonable investor test the following formulation, within the factual matrix of the case: "The hypothetical test is whether on 3 February 2000, 8 February 2000 and 14 February 2000, had it been available to him, the information contained in the November and December trading reports, viewed by him against the 'total mix' of information about Fyffes' trading and earnings available on those dates, would have impacted on the judgment of the reasonable investor in relation to an investment decision about Fyffes' shares to the extent that he would have concluded that the information probably would have a substantial effect on Fyffes' shares."

In terms of the profile of the reasonable investor, Laffoy J was of the view that, in general terms, it was not necessary to profile the reasonable investor any more than it was necessary to profile the reasonable man in applying the principles of the tort of negligence. However, she did provide that the reasonable investor had to "represent the type of investor who was typically found in the market at the time". Thus, if, on the evidence before the court, the typical investor at the time of the share sales at issue in the case was "one who was anxious to own internet stocks or stocks with an internet element", that was a relevant factor in the profile of the reasonable investor.

Banana split

The Supreme Court, while agreeing that section 108(1) set down an objective test, rejected the use by the High Court of the reasonable investor approach and found that the jurisprudence relied upon in the High Court was not of assistance in interpreting the section. The court found that the reasonable investor approach was not expressly or impliedly required by the section and that, in any event, it was not an appropriate or useful legal tool. Denham J stated: "There is a myriad of factors and investors in a market, and to choose some or either as representative of a reasonable investor appears subjective and arbitrary. The issue is the effect on the share price in the market of the information if the information were generally available."

The Supreme Court favoured an objective test, closely based on the wording of the section, which asked whether the information at issue, "if it were generally available, would be likely to materially affect the price of the shares having regard to the total mix of information available in the market".

Significantly, the *Market Abuse Regulations* expand on the statutory hypothesis and expressly require the use of the reasonable investor test in assessing whether information, if made public, would be likely to have a significant effect on share price. This results from regulation 2, which provides the following definition: "...'information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments or related derivative financial instruments' means information that a reasonable investor would be likely to use as part of the basis of the investor's investment decisions, and includes cognate expressions".

This definition does not appear in the *Market Abuse Directive*, to which the *Market Abuse Regulations* give effect. However, it is provided by article 2(1) of Commission Directive 2003/124/EC (the implementing directive). (The *Market Abuse Directive* was the first directive to be implemented under the 'Lamfalussy process', which involves four levels or stages for properly implementing EU legislation. Under level 2, implementing directives flesh out the provisions of the principal directive.)

Banana republic

While the state was required to transpose the provisions of the implementing directive into national law, there are question marks over whether the expanded definition reflected in regulation 2 replaced the basic test for price sensitivity laid down by the *Market Abuse Directive* (that the information, if

made public, "would be likely to have a significant effect" on price), with a reasonable investor test. Indeed, the Committee of European Securities Regulators (CESR), in its second set of level 3 implementing guidance on the *Market Abuse Directive*, has pointed out that article 17(2) of the directive provides that the implementing measures provided in the implementing directives shall not modify the provisions of the *Market Abuse Directive* (July 2007, CESR/06-562b, paragraph 1.11).

One could foresee an argument being made on the basis of article 17(2) that, despite the wording adopted by the state, the court can interpret the *Market Abuse Regulations* in line with the wording of the *Market Abuse Directive* and apply the statutory hypothesis *simpliciter*, without resort to the reasonable investor. There would seem to be support for this from the CESR's comment that the reasonable investor test merely "assists in determining the type of information to be taken into account for the purposes of the 'significant price effect' criterion".

However, in the absence of such an argument being run successfully, the wording of the new legislation means that, in terms of price sensitivity, the Supreme Court judgment in *Fyffes* may have less impact in the future than the High Court judgment it overturned. Regardless of the unanimous rejection of the reasonable investor approach in the Supreme Court judgments, that is the approach required under the wording of the new statutory regime. The obvious question in this regard is whether the test as formulated in the new provision is the same as that adopted by Laffoy J in the High Court in *Fyffes*.

The test in the *Market Abuse Regulations* can be construed from regulation 5(1), in conjunction with the definitions in regulation 2, and is as follows: *was the information such as a reasonable investor would be likely to use as part of the basis of his investment decisions?*

The reasonable investor test employed by Laffoy J was as follows: *would the information have impacted on the judgement of the reasonable investor in relation to an investment decision about the shares to the extent that he would have concluded that the information probably would have a substantial effect on the shares?*

It is submitted that there is a subtle, yet potentially significant, difference between the test adopted by Laffoy J and that set out in the regulations. While the regulations ask whether the information would have been *used* by the reasonable investor in his decisions, Laffoy J's test merely asks whether the information would have *impacted* on the judgement of the reasonable investor.

> ***"In terms of price sensitivity, the Supreme Court judgment in Fyffes may have less impact in the future than the High Court judgment it overturned"***

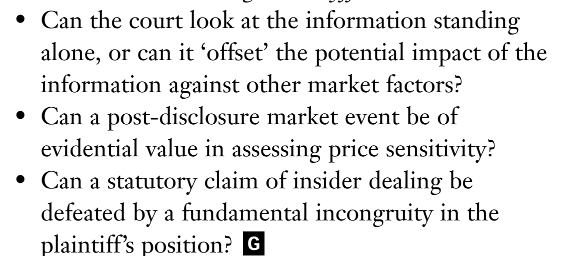
Bananarama

It could be argued that, for a piece of information to be price sensitive under the new statutory test, it is not enough that it would have been a mere 'factor in the mix' with all other market factors at the time of the reasonable investor's decision. It would have had to have been positively used by the reasonable investor and formed part of the basis of his decision. By contrast, Laffoy J's test might be considered to cover such information on the basis that, as a factor in the mix, however small, it had an 'impact'.

As will be seen in the second part of this article (next month), this distinction may have some bearing on the question of whether the court can look at the information standing alone or can 'offset' the potential impact of the information against other market factors.

While it is true that the Supreme Court rejected the use of the reasonable investor primarily on the basis that it was not required by the statute, and that in rejecting the test it focused on the formulation of the test adopted by Laffoy J, the judges undoubtedly also expressed more general criticism of the principle of the reasonable investor being employed as a tool in measuring price sensitivity. It will thus be interesting to see, in any future claim of insider dealing, how a court will approach the provisions of the *Market Abuse Regulations* and, in particular, whether it draws a distinction between the test adopted by those regulations and that employed by Laffoy J in *Fyffes* or, indeed, whether it seeks to steer around the wording of the new provisions and employ the simple objective test used by the Supreme Court in *Fyffes*.

In the next issue, we will look at the following additional issues arising from *Fyffes*:



- Can the court look at the information standing alone, or can it 'offset' the potential impact of the information against other market factors?
- Can a post-disclosure market event be of evidential value in assessing price sensitivity?
- Can a statutory claim of insider dealing be defeated by a fundamental incongruity in the plaintiff's position? G

Conor Feeney is a Dublin-based barrister.

LOOK IT UP

Cases:

- *Fyffes plc v DCC plc, S & L Investments Ltd, James Flavin and Lotus Green Ltd* (Supreme Court, 27 July 2007, [2007] IESC 36; High Court (Laffoy J), 21 December 2005, [2005] IEHC 477)

Legislation:

- Commission Directive 2003/124/EC
- *Companies Act 1990*
- *Investment Funds, Companies and Miscellaneous Provisions Act 2005*
- *Market Abuse Directive* (2003/6/EC)
- *Market Abuse (Directive 2003/6/EC) Regulations 2005* (SI 342 of 2005)

SHOCK to the SYSTEM

Damages for nervous shock have been recoverable for over 100 years in this country, but Michael Boylan asks whether Irish law relating to post-traumatic stress disorder is now lagging behind

The recent decision of the Supreme Court in *Devlin v National Maternity Hospital* makes disappointing reading for the many hundreds of parents whose children's organs were wrongfully removed and retained by hospitals in this state in past decades during the post-mortem process. Effectively, the decision heralds the death knell for organ retention claims. Thus, many hundreds of parents who have suffered because of overly paternalistic and defective hospital policies that existed from the 1970s onwards are now left with no legal remedy and are not entitled to be compensated for any psychiatric injuries suffered.

In *Devlin*, a baby girl was stillborn in May 1988. The hospital unlawfully carried out a post-mortem without the knowledge and against the express wishes of her parents. Later, the parents were led to believe that performing a post-mortem was standard practice within the hospital. They were not informed that many organs had been removed and were retained by the hospital. Some 12 years later, following extensive media publicity surrounding the retention of organs, Mr Devlin made discreet enquiries through his solicitor (not wishing to upset his wife) as to whether his daughter's organs might have been retained. The hospital informed Mrs Devlin personally, by letter, that the organs had in fact been retained and continued to be retained by the hospital up to that time. Consequent to this shocking information, Mrs Devlin suffered 'nervous shock', that is, post-traumatic stress disorder. She instituted the proceedings that were ultimately dismissed following the Supreme Court's decision last November.

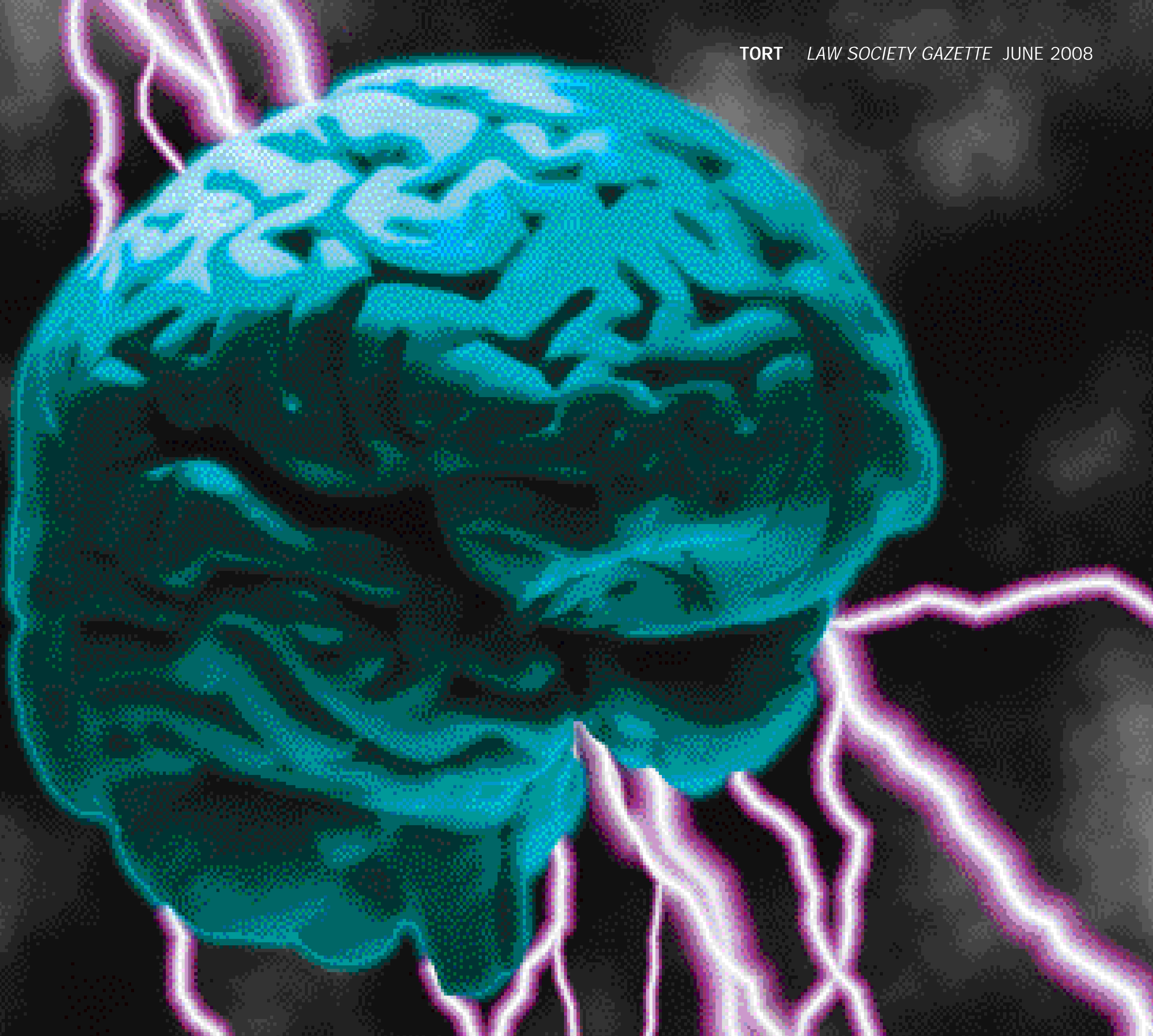
Leading the van

Damages for nervous shock (pure psychiatric injuries unaccompanied by physical injury) have been recoverable for over 100 years in this country. Indeed, it is fair to say that Irish tort law was ahead of other common law jurisdictions, and two leading 19th century Irish cases placed the Irish jurisprudence in the vanguard of developments of the law in this area. In the first case, *Byrne v Southern & Western Railway Company*, a train, having sped into a siding after a railway point had been negligently left open, crashed through the wall of a telegraph office at Limerick Junction. On hearing the noise and seeing the wall collapse, the plaintiff, a railway employee working in the office, "sustained a nervous shock which resulted in certain injuries to his health". He sustained no physical injuries but suffered "great fright and shock". The plaintiff obtained a substantial award of damages.

In the second case, *Bell v Great Northern Railway Company of Ireland*, the court – with a perception of the relationship between mind and body well ahead of its time – followed *Byrne* and, from that time onwards in Ireland, damages for pure nervous shock were recoverable. These two Irish cases were cited

MAIN POINTS

- Nervous shock, or post-traumatic stress disorder
- Relevant case law
- Divergence in the law relating to nervous shock between Ireland and Britain



with approval in subsequent leading English cases.

One hundred years later in *Kelly v Hennessey*, the plaintiff's husband and two daughters suffered severe injuries in a motor accident. The plaintiff was informed by telephone of the incident and suffered shock that was then aggravated by the sight of her injured family in hospital. Hamilton CJ set out five conditions to be satisfied in order to succeed in an action for nervous shock:

1) The plaintiff must establish that he/she actually suffered 'nervous shock' – this term has been used to describe any recognisable psychiatric illness,
2) A plaintiff must establish that his/her recognisable psychiatric illness was shock induced,
3) A plaintiff must prove that the nervous shock was caused by a defendant's act or omission,
4) The nervous shock sustained by the plaintiff must be by reason of actual or apprehended physical injury to the plaintiff or a person other than the plaintiff, and
5) The plaintiff must show that the defendant owed him or her a duty of care not to cause him a reasonably foreseeable injury in the form of nervous shock.

Rigid boundaries

These criteria have been followed in many subsequent Irish cases and were cited with approval in the subsequent Supreme Court decisions in *Fletcher* and *Devlin.* I doubt if Hamilton CJ envisaged, when setting out these criteria, that he was effectively going to rigidly set the boundaries of the law in this area for decades to come and was going to set Irish law on a more restrictive path than British law. However, following *Devlin*, it would appear that the test formulated by Hamilton CJ in respect of a specific set of 'aftermath' circumstances now effectively governs all cases of pure nervous shock, irrespective of their particular facts.

In *Devlin*, Denham J applied and approved the

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criteria set out in *Kelly v Hennessey*. The court held that, because Mrs Devlin's negligently inflicted, foreseeable nervous shock was not caused by reason of the actual or apprehended physical injury to the plaintiff or a person other than the plaintiff, therefore she was not entitled to damages. Although Mrs Devlin was found to have satisfied all of the other criteria in *Kelly*, her case failed condition 4, as the wrongful desecration of the remains of her stillborn child against her express wishes did not constitute actual or apprehended injury to either herself or another 'person'.

The rationale for the court's decision would appear to be based on policy grounds and is summarised in the panel (right).

It is perhaps unfortunate that the Supreme Court's judgment does not deal at all with the line of British cases of *Owens v Liverpool Corporation* or *Athia v British Gas*, despite both of these cases forming a major part of the plaintiff's submissions on appeal in *Devlin*. The facts and the judgment in both these cases illustrate that the British courts approach nervous shock cases in a far more flexible and sympathetic manner. In *Owens*, a family of mourners were deeply shocked when the hearse that bore the remains of a family member collided with a tramcar, causing the coffin to be upset. The Court of Appeal found that the right to recover damages was not limited to cases in which apprehension as to a person's human safety was involved.

Similarly, in *Athia*, the plaintiff was entitled to recover damages solely for mental injury sustained as a result of a shock she sustained on seeing her unoccupied home and valued contents being destroyed by fire. The defendants argued that, as a matter of policy, the law should not allow Mrs Athia to recover damages because her shock arose from fear of injury to her property rather than another person. However, such an approach was explicitly rejected by Bingham LJ in the Court of Appeal (see panel)

Legion of the rearguard

It would now appear that there is a marked divergence in the law relating to nervous shock between Ireland and Britain. We have somehow gone from being in the vanguard of the development of the law in this area 100 years ago, to now being considerably more restrictive and less sympathetic than the approach being adopted by our British counterparts. Effectively, the Supreme Court has decided, on policy grounds, to fix the boundary stone and not to expand or develop the law in this area, in favour of having 'certainty'. It is difficult to imagine how the 'floodgates' could have been opened to many more claims, given that a plaintiff (such as Mrs Devlin) would still have to satisfy all the other control mechanisms and criteria set out in *Kelly v Hennessey*. Undoubtedly, we will have to wait a considerable time before we find a case "so compelling on its facts" to tempt the Supreme Court to revisit the matter and find out whether they would ever be prepared to move the boundary again. **G**

Michael Boylan is a partner with Augustus Cullen Law, Wicklow.

EXTRACT FROM DENHAM J'S JUDGMENT IN *DEVLIN*

"It is clear that the common law was stated by Hamilton CJ in *Kelly v Hennessey* with five conditions subsequently endorsed by Keane CJ in *Fletcher*. On this law, the plaintiff is not entitled to succeed, because the fourth condition is not met … On this basis, the plaintiff is not entitled to succeed and the appeals would be dismissed. However, counsel for the plaintiff pressed the court if it found that the current law did not apply to extend the general principles of the law of negligence. This is a matter of significant general importance. Such a decision could have serious repercussions. In considering extension of the common law liability for nervous shock, policy issues arise … Thus there are limits in law to liability for nervous shock. The common law provides illustrations of successful cases where damages for nervous shock were awarded. However, those cases relate to persons perceiving an accident or its immediate aftermath … This is a tragic case … It is a hard case. However, the law as it stands does not entitle them to damages and I would not extend the law. Any such development would give rise to uncertainty in the law of liability generally and to potentially unforeseeable repercussions."

EXTRACT FROM BINGHAM'S JUDGMENT IN *ATHIA*

"I should not for my part erect the boundary stone … it would not be long before a case would arise so compelling on its facts as to cause the stone to be moved to a new, more distant resting place. The suggested boundary line is not, moreover, one that commends itself to me as either fair or convenient … I do not think a legal principle which forbade recovery in these circumstances could be supported. The only policy argument relied on as justifying or requiring such a restriction was the need to prevent a proliferation of claims. The familiar 'floodgates' argument. This is not an argument to be automatically discounted, but nor is it, I think, an argument which can claim a very impressive record of success. All depends on one's judgment of the likely result of a particular extension of the law."

LOOK IT UP

Cases:

- *Athia v British Gas* (1987) 3 AER 455
- *Bell v Great Northern Railway Company of Ireland* (1890) 26LR (IR) 428
- *Byrne v Southern & Western Railway Company* (1884) 26 LR (IR)
- *Devlin v National Maternity Hospital*, 2007 IESC 50 (14 November 2007)
- *Fletcher v Commissioners of Public Works in Ireland* [2003] IESC 13
- *Kelly v Hennessey* (1995) 3 IR 253
- *Owens v Liverpool Corporation* (1939) 1QB394

CRIMINAL MIND

Frank Buttimer has been involved in some of the country's highest-profile murder cases. He describes the trial of Wayne O'Donoghue as "the most extraordinary criminal case I've ever been involved in". Colin Murphy got on his case for the *Gazette*

Frederick Flannery was charged with murder in 1995, and Frank Buttimer took the case. "It was my first exposure to a serious criminal trial. I put vast amounts of work into the case, with Patrick McEntee, my senior counsel."

Parsing the book of evidence, he noticed discrepancies. The sequence of statements didn't seem to add up: names of witnesses appeared briefly, not to be mentioned again. The prosecution case involved evidence that the murder had occurred at a specific time in a specific place, but it seemed there was evidence that the victim had been seen alive elsewhere, later.

"I was going to interview witnesses myself – literally going door to door. I was gathering up information that there may have been sightings of this individual after he had allegedly been killed. I was digging and digging and digging.

"The trial became a trial about how the guards had investigated the case, until Judge Bobby Barr stopped it. He said there had been a concerted and deliberate effort to suppress the giving of relevant material to the defence. It was sensational."

It was the first of a number of high-profile murder cases Frank Buttimer would act in – most notably, of late, the trial of Wayne O'Donoghue over the death of Robert Holohan.

"That was the most extraordinary criminal case I've ever been involved in. Of all the cases I've done, it was the one where the need for strategy was of the gravest importance."

He recalls being called and asked to go down to the O'Donoghues to talk to Wayne, after he had confessed to his parents. "I had never spent a day like that in my life. I arrived about two o'clock and left around midnight. I was sitting there, listening to this utterly stunning tale of psychological collapse, and grief, and all the emotions that flow from that.

"But still, you have to detach yourself from that and remember that, at the end, there is going to be a criminal trial.

"Going into the room to meet him, my guiding principle was that, months down the line, there would be 12 anonymous people reviewing and evaluating what went on."

Ultimate determination

This strategic approach is crucial in criminal cases, he says. "The minute I go into a garda station, I'm trying to determine what the jury is ultimately going to be dealing with.

"People always ask 'did you win the case? Did you get your client off?' My position always is 'did what you predicted at the outset of this process happen?

MAIN POINTS

- High-profile murder cases
- The trial of Wayne O'Donoghue
- The importance of strategic analysis

AL

Did it happen the way you thought it would?' If it did, you've done a decent job."

Clearly somebody thinks he's doing a decent job. Frank Buttimer & Co is the largest criminal firm outside Dublin, he says.

"It's all word of mouth. You can advertise till the cows come home. But one good case gets you four good cases, and four good cases get you 16 good cases…"

That word of mouth is typically based on performance in the courtroom. But, at times in the recent past, Frank Buttimer has seemed ubiquitous in the media. The occasion has normally been the defence of his client, Wayne O'Donoghue, who was recently released from jail after serving three years for the manslaughter of 11-year-old Robert Holohan.

At Wayne O'Donoghue's sentencing hearing, O'Donoghue was implicitly accused of sexual abuse of Robert Holohan in the victim impact statement. Frank Buttimer's reaction was immediate. "I went on a media rampage. For three days, I did nothing else. I did 17 radio and TV interviews – I counted them up. I did *Prime Time* and others.

"I never made a public statement about Wayne O'Donoghue until then, apart from a short statement thanking judge and jury when O'Donoghue was acquitted of murder.

"He was vilified as a paedophile. If I hadn't done it, I would have felt less of myself, because he had nobody to speak for him. I would do it again. But there were unique circumstances whereby it had to be done.

"We're criminal practitioners, but it was a public relations exercise, primarily, because he wasn't able to speak for himself – he was locked up."

He speaks of O'Donoghue, and of other clients he has defended on murder charges, with evident sympathy. But at one point he breaks off to say he is "very, very conscious of the fact that there is a family out there – the family of the victim".

"One ought never to be glib, to be triumphalist, to be anything but completely aware of the tragedy that has been visited upon a family. One has to be mindful of their sensitivities and concerns. They are not only suffering the trauma of the loss, but also suffering the trauma of having to listen to it teased out and probed in every way in court."

In contact with the real world

Frank Buttimer is the first generation of lawyer in his family. His father, from outside Dunmanway in West Cork, and his mother, from Ballylongford in North Kerry ("so that's a good mix of volatility in the Gaelic football field"), were both teachers. The family lived in

"It's all word of mouth. You can advertise till the cows come home. But one good case gets you four good cases, and four good cases get you 16 good cases…"

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Kilcrea Park, near UCC in Cork, and Frank attended the school where his father taught – 'the Mon', the Christian Brothers' North Monastery. He was the second of five children. His two brothers and sisters are all involved in education.

Sport was clearly a big influence. Though the Mon was a big hurling school – and he dabbled – soccer was his first love. Today, he is a keen golfer and plays off a handicap of 13.

He decided to study law at UCC "by a process of elimination – I just figured it was something that would interest me". He studied there from 1974 to 1976. Academically, he "just about managed – I always knew just what had to be done". He played sport and spoke at Law Society debates. "Those days were amongst the happiest days of my life," he says. It's a cliché, but he says it with obvious passion.

After graduating, he took off and spent two years away, most of it in California – heady days, though he missed the height of the 1970s Californian experience by a few years. The experience was a formative, if not a financially successful, one – he had to get a loan to come home.

"I was working on sites, working in McDonald's, working on roofs, working in painting … I don't know how many jobs I did out there.

"That exposes you to a different kind of life – it takes you out of the academic confines.

"The best lawyers are those who are in contact with the real world, with real people. Life experience is a great teacher for anybody keen on going into law."

He had started his apprenticeship, under Fachtna O'Driscoll at O'Flynn, Exham & Partners in the South Mall, while studying at UCC, and had qualified before he left for the US. On his return, he went to work with Gerard O'Keefe in Kanturk, North Cork, who ran "a very large rural litigation practice". There, he had "immediate exposure to court-related work".

In Kanturk, he was also exposed to another significant influence – a young woman by the name of Ger Murphy, who was working as a legal secretary and happened to live next door. They married, and now have four children, Aoife, Julie, Frankie and Mikey.

In 1986, Frank Buttimer and Gerard O'Keefe set up a joint practice, and shortly afterwards the firm moved to Washington Street in Cork city. Gerard O'Keefe left in the early '90s, when the firm became Frank Buttimer & Co. Today, it has two additional partners, Emmet Boyle and Ger Hanley, and employs two more solicitors, Michael Quinlan and Niamh McNamara.

The firm does some non-litigation work, but is primarily a criminal practice and he is explicit that that is where his interests lie.

Judges of fact

"I've no interest in conveyancing or commercial law. I like the challenge of litigation, the cut and thrust. Your interaction with people is constant and regular. There's always something new, you've never learned it all."

Given the stakes in, for example, a murder trial, and the public exposure, one might expect a lawyer involved to experience an adrenalin rush? "No", he says. "It requires calm. The ability to listen. The ability to piece together the context in which evidence slots in.

"It's a strategic event. What you're doing is an exercise that involves creating the impression that you desire, opposite 12 people. They're the judges of fact. The issues of law will take care of themselves, but it's the facts that influence the jury."

He relishes watching a good counsel at work: "It's a performance. The finest barristers are the finest actors – in the subtlety of their words, the subtlety of their intonation, the creation of a view which suggests that what they're being told is to be treated with disdain, with disbelief. The best of them can do it without even opening their mouths."

Yet the strategy in a criminal trial can often be surprisingly simple. "You often operate on the basis of never actually receiving instructions but just probing the evidence as is presented. The instructions may simply be 'I'm pleading "not guilty" – now challenge the evidence'. The criminal process is all about the burden of proof, which rests on the state."

Given that traditional burden of proof, he worries about a steady threat to the "sacrosanct position" of the right to silence. "The *Criminal Justice Act 2007* significantly curtails the right to remain silent, where the prosecution can draw inference from material facts that are put to a person in custody, if the accused person refuses to answer. The jury can be told that the accused's silence regarding a material fact can be corroborative of other evidence. That is a significant attack on something that has worked very well for centuries."

At the very least, he says, if there is going to be such significant legislative change, "it merits much more serious attention" than that received by the *Criminal Justice Act*. G

"My position always is, did what you predicted at the outset of this process happen? Did it happen the way you thought it would? If it did, you've done a decent job"

Part V of the *Planning and Development Act 2000* aims to encourage residential integration. But what does it mean in practice? John Gore-Grimes gets down to the bricks and mortar

House of the RISING

The purpose of part V of the *Planning and Development Act 2000* (as amended by the *Planning and Development (Amendment) Act 2002*) is to address the manifest shortage of land for social and for affordable housing. In an open market economy, the cost of purchasing a site, or indeed a developed house, is beyond the means of a very large number of residents in Ireland.

The legislation has introduced a mechanism whereby developers of residential developments are required to cede land at its existing use value to the planning authority. As a matter of social policy, a planning authority is required under the act to take into account the need to counteract undue segregation in housing between people of different social backgrounds. More particularly, the planning authority must also take into account the needs of elderly people and people with disabilities in preparing a housing strategy.

The aim of part V is to encourage residential integration. Conversely, part V is also designed to counteract undue segregation. It is a process that does and will produce its own problems, but the sacrifices that are made now will be well worthwhile. Part V proposes to integrate communities in a manner that will demolish and replace ghettos and poorly developed, underspecified residential areas, where an unspoken anxiety often damages both the social and physical fabric of the lives of the residents and the dwelling units that they inhabit.

MAIN POINTS

- Social and affordable housing
- Planning permission issues
- Obligations, conditions and preconditions

Obligations

If an application for planning permission is lodged for "the development of houses" or for mixed development with a residential element, and the land that is the subject matter of the application is zoned or partly zoned for residential use, the planning authority *must* impose a part V condition in any permission it grants, provided that its development plan contains a housing strategy that requires that a percentage of residentially zoned land – up to a maximum of 20% – shall be made available for social and for affordable housing.

All planning authorities in Ireland have provided a housing strategy in their development plans. The housing strategy requires that, in appropriate cases, a percentage of land will be made available for social and for affordable housing development. It is unlikely that the social and affordable housing strategy will be omitted from future development plans, at least until the aims of the policy have been achieved. For the moment, it can be readily assumed that no objection can be made against the imposition of a part V condition on the grounds that the planning authority has not incorporated a housing

strategy into its development plan.

It is important to note that the maximum percentage of residentially-zoned land to be provided is 20%. A planning authority may decide to request a lower percentage or, perhaps, no percentage at all, where the particular area already has a high level of social and affordable housing and where the opposite balance is required (for example, the provision of market housing) in order to encourage social integration.

As stated, the application for permission must be for development of housing or for mixed development with a residential element. A house is defined as:

- A building or part of a building that has been built for use as a dwelling, and
- In the case of a block of apartments or other building or part of a building comprising two or more dwellings, each of those dwellings.

(The second of these is a new definition provided by section 4(96b) of the *Planning and Development (Amendment) Act 2002*.)

The final part V obligation is that the land to which part V is to apply must be zoned for residential use or, if not wholly zoned for residential use, it must be zoned for a mixture of residential and other uses.

The following types of planning applications are excluded from the social and affordable housing provisions of part V:

- Development consisting of the provision of houses by an approved housing body for social housing, where the houses are for letting only,
- The conversion or reconstruction of a building to create one or more dwellings, provided 50% of the existing external fabric building is retained, or
- The carrying out of works on an existing house.

The act also provides for the exclusion of certain small housing developments from the social and affordable housing provisions of part V. A person intending to apply for permission to develop four houses or fewer, or for housing on land on 0.1 hectares or less (approximately half an acre or less), may apply for an exemption under section 97. The applicant who applies for planning permission for one of these types of small development must apply to the planning authority for a certificate of exemption. This section 97 exemption certificate will certify, in appropriate cases, that the part V conditions do not apply to the grant of a planning permission. If a section 97 certificate is refused, there is a right of appeal to the courts. Planning permission will, of course, still be required for a housing development, even where a certificate has been granted. No permission will be granted without

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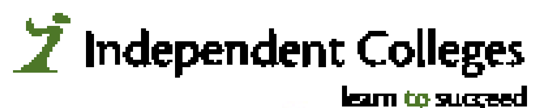

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social and affordable housing conditions unless the section 97 certificate is available. The application for a certificate of exemption under section 97, in respect of a proposed housing development on land of less than 0.1 hectares, should be made and the exemption certificate should be obtained prior to the submission of an application for planning permission in respect of that development.

Considerable trouble has been taken in the legislation to ensure that developers do not try to avoid social/affordable housing-supply conditions by making multiple applications for small-scale residential developments. It is a criminal offence to make a statutory declaration or to provide information or documentation that is false or misleading in any material respect when application is being made for a section 97 certificate of exemption.

Consultation

In all cases where social and affordable conditions are a necessary part of a developer's application for planning permission, it is best to assess and anticipate the type of condition that is likely to be imposed. With this in mind, it would be of benefit to make use of the pre-application consultation that is provided for in section 247 of the 2000 act. In endeavouring to reach an agreement with the planning authority, it is essential, at the earliest possible stage, that the most advantageous conditions required by the developer in relation to a part V condition should be communicated to the planning authority and the required conditions that the planning authority have in mind should be communicated to the developer. A consensus between the developer and planner is more likely to be achieved by using the consultation process in section 247.

Conditions

The 2000 act offers three types of conditions that the planning authority may impose by way of agreement between the authority and developer:

a) Transfer land that is subject to an application for permission for residential property to a planning authority for provision of social and/or affordable housing up to a maximum of 20%.
b) Build units and transfer completed houses to the planning authority or to persons nominated by the authority over an agreed area at a price determined on the basis of site cost plus the cost of the houses, calculated at existing use value, allowing some margin of profit for the builders. The house must be located on the developer's own site.
c) Alternatively, a developer can transfer partially serviced sites to a planning authority or to its nominee.

The 2002 amendment act has not undermined the principle of a 'housing strategy', but it has been extended in a pragmatic way. In addition to the existing options listed above, the following options are also available:

"Before development takes place, a part V agreement must have been entered into, concluded, signed and exchanged between the planning authority and the developer"

1) To transfer to the planning authority the ownership of any other lands within its functional area,
2) To build or transfer, on completion, to the ownership of the planning authority, or persons nominated by them, new houses on other lands within the functional area of the planning authority,
3) Transfer partially-serviced sites on other lands within the functional area of the planning authority,
4) To pay an amount of money as specified in the agreement to the planning authority,
5) A combination of the transfer of land within the site of the developer, but for a lesser amount of land than specified in the housing strategy, and doing any of the matters referred to in paragraphs (a), (b) and (c) above and in paragraphs 1 to 4 above, or
6) A combination of doing any two or more of the things referred to in paragraphs (a), (b) and (c) above and in 1 to 5 above.

The 2002 amendment act provides that the developer or other applicant for planning permission cannot be compelled to provide serviced sites or completed units and, where the developer does not wish to take advantage of the various options referred to above, the only option that he can be compelled to comply with is the option to transfer to the planning authority an area of up to 20% of the land that is the subject matter of his application for planning permission.

Preconditions

In conclusion, it must be stressed that the conditions that *must* be imposed by a planning authority in any grant of planning permission for the development of land for housing that is zoned or partially zoned for residential development under part V are preconditions in a planning permission. In effect, this means that, before development takes place, a part V agreement must have been entered into, concluded, signed and exchanged between the planning authority and the developer before work commences. Since it is a precondition, it is essential that a copy of the agreement is furnished with the developer's contract.

If the part V agreement is not furnished or if it is not available, the contract should not be signed and exchanged until the purchaser is fully aware of the contents of the agreement. If the agreement requires payment of money, the planning authority's receipt for the full amount of the payment must be obtained. Pre-contract requisitions must be raised requiring the production of the concluded agreement and a full receipt for all monies payable. G

LOOK IT UP

Legislation:

- *Planning and Development Act 2000*
- *Planning and Development (Amendment) Act 2002*

John Gore-Grimes is the author of Key Issues in Planning and Environmental Law. *He continues to lecture on planning subjects for the Law Society. His sailing days in Arctic waters (see March 2003* Gazette*) have come to an end. In his own words: "The trouble with being a tough skipper is that you are left with nobody to sail with!"*

Heigh-ho, heigh-

Following last month's article on overtime, Michael Prendergast considers the *Organisation of Working Time Act 1997* and asks whether the legislation was worker-safety driven or economically driven, and if the balance struck in 1997 is as applicable today as it was a decade ago

The *Organisation of Working Time Act 1997* transposed European Council Directive 93/104/EC into Irish law. This directive had been adopted as a health and safety measure on the basis of article 118A of the *Treaty establishing the European Community*. While article 118A states that "member states shall pay particular attention to encouraging improvements especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonisation of conditions in this area, while maintaining the improvements made", the 1997 act incorporated, perhaps inadvertently, both economic and social legislation tangential to the core objective of article 118A. In this article, I will seek to highlight this tangential legislation and pose the question 'Was the 1997 act really about health and safety?'

The transposition of Directive 93/104/EC into Irish law repealed existing legislation dating back to 1936. The relevant repealed Irish legislation was outlined in schedule IV of the *Organisation of Working Time Act 1997*, and included the *Conditions of Employment Acts 1936-1944*, the *Night Shift (Bakeries) Acts 1936-1981*, the *Shops (Conditions of Employment) Acts 1938-1942*, the *Holidays (Employees) Act 1973* and section 4 of the *Worker Protection (Regular Part-Time Employees) Act 1991*.

Legislative foundation

Prior to the enactment of the 1997 act, the *Conditions of Employment Act 1936* was the legislative foundation of employment law in Ireland, defining in part I categories of workers, types of work, public holidays, and so on, while in part II, conditions as to piece work, employment of certain classes of people and annual leave were outlined. In part III, basic conditions of employment were detailed. This legislation was later supported by the *Industrial Relations Act 1946*, allowing for employment regulation orders (EROs) and registered employment agreements (REAs) to be agreed between employers and employees within specific industry sectors. It was within this framework that the 1997 act, and *de facto*, the European directive were introduced.

The focus of the 1936 act was industrial employment, and it outlined in section 3 what did and what did not constitute industrial work. The 14 classifications of industrial work in section 3 led inevitably to the EROs and REAs, as the classification in themselves were not all inclusive and did not include agricultural, domestic or commercial-type work.

Further classifications were outlined in the act, covering 'adult worker' (man or woman), 'woman' and 'young person' (aged between 14 and 18), and the working restrictions that applied to the employment of young people and female workers, with neither being able to start work before 8am and the latter not being able to work more than 40 hours per week. Female workers were not permitted to work between 10pm and 8am, while young persons were restricted to working only between 8am and 8pm.

ho...

They work all day and get no pay: Dopey, Sneezy, Bashful, Sleepy, Happy, Grumpy and Nobby

Annual leave was covered under section 24, allowing the worker six days' leave per annum and requiring the employee to give two weeks' clear notice of his intention to take leave. Section 32 prohibited shift work, unless on a continuous process under licence, and then only under strict conditions as determined by section 33. Similarly, under section 49, work on Sundays or public holidays was not permitted, unless under conditions as laid down by the act – and even then for a limited period not exceeding three hours on aggregate over two or more periods. Saturday was referred to as a 'short day' within the act, requiring the payment of premia for work performed on that day.

Overtime and the maximum working week were also legislated for by the 1936 act, with the working week being limited to 48 hours and overtime being limited to 240 hours per year for 'adult workers' and 200 hours per year for 'young persons'. The overtime pay rate was set at a minimum premium of 25% on the standard rate.

Section 7 of the act designated six public holidays, and the working time provisions provided a mandatory half-hour rest period after five hours, and a further half hour before the commencement of overtime exceeding one-and-a-half hours' duration.

In the intervening years prior to 1997, annual leave was extended to seven days in 1939, ten in 1961 and 15 in 1973, with public holiday entitlements increasing to seven days in 1974, eight in 1977 and nine in 1994. Also enacted during this period was the *Protection of Young Persons (Employment) Act 1996*, which distinguished between children (14 and 15-year-olds) and young persons (16 and 17-year-olds), and outlined employment restrictions applicable to both.

Driving force

As outlined at the outset, the 1936 act was repealed in its entirety by the *Organisation of Working Time Act 1997*, and while the driving force for the repeal may indeed have been Directive 93/104/EC, the outcome implies that other factors may have been salient.

Most notable about the 1997 legislation – in contrast to the 1936 act – is that (a) it applies to all employment types (other than industry-related), save those as outlined in sections 3 and 4, and to sectors or businesses that are subject to collective agreements; and (b) no distinction is made between worker types – rather, all workers are collectively referred to as 'employees'.

Annual leave was increased to four weeks, and the nine public holidays were outlined in the second schedule. Sunday work was, as in the 1936 act, given specific mention. However, no restrictions were allotted to this work, with the act focusing on the compensation for such work, but refusing to quantify it. The act also introduced the concept of 'night work', being the period between midnight and 7am on the following day, and of 'zero-hour' working, which includes the practice where an employee is asked to stay available for work without there being a guarantee of that work.

MAIN POINTS

- Health and safety in the workplace
- Overtime compensation lacuna
- Redefinition and extension of working week

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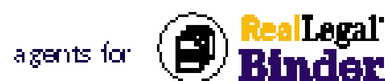

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The act maintained the maximum working week at 48 hours. No reference is made in the act to overtime or to the compensation levels applicable to any overtime worked by an employee. This omission, in conjunction with the simultaneous repeal of the 1936 act, created an overtime compensation lacuna unregulated by the new act for employments not covered by collective agreements.

Rest periods and intervals were also addressed by the act, with the employee being entitled to 11 hours' consecutive rest in 24 hours and a 15-minute break after 4.5 hours or a 30-minute break after six hours. No requirement for a rest period prior to the commencement of overtime was outlined in the act, and the concept of 'additional hours' was introduced in section 17.

Part VI of the 1997 act dealt with collective agreements and the Labour Court, the making of complaints to the Rights Commissioner, and the enforcement and penalties for non-compliance with the provisions of the act. Also included in part VI are the requirement for the maintenance of records, the prohibition of double employment and provisions in relation to outworkers.

Resulting from the introduction of the act, some 17 statutory instruments have been passed outlining exemptions and inclusions (nos 392 and 475 in 1997; nos 20, 21, 44, 49, 52, 57, 444 and 485 in 1998; no 10 in 1999; no 11 in 2000; nos 419 and 473 in 2001; and nos 494, 817 and 819 in 2004).

Liberalisation or protection?

The *Organisation of Working Time Act 1997* was primarily to be viewed as a piece of safety, health and welfare at work legislation, designed to protect employees against excessive working hours and to provide adequate rest and recovery periods, including holidays. The act, while addressing these issues, also addressed unrelated issues in the areas of industrial relations. By its repeal of the *Conditions of Employment Act 1936*, the act also redefined and extended the working week, liberalised the work performed by various employee types, extended the categories of employment to which the act applies, introduced the concept of zero-hour working, and omitted any reference to 'overtime', as defined in the earlier act. This omission negated the 25% premium that had been applicable to overtime after 48 hours' work – thus contravening article 7 of the International Labour Organisation's *Hours of Work Convention 1930 (No 30)* – a convention that has yet to be ratified by Ireland.

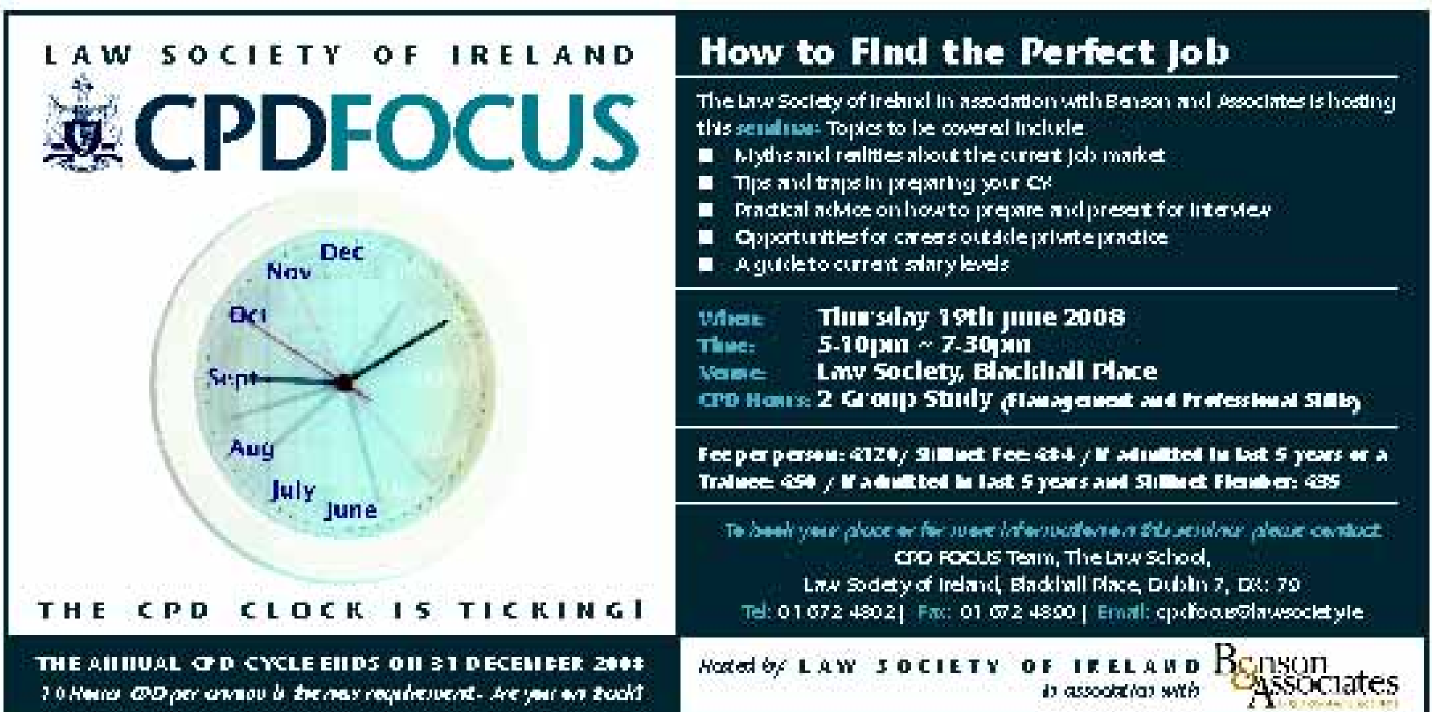
It is in this light that one must ask whether the 1997 legislation, presented in the shadow of the European directive but more wide-ranging in its scope, was worker-safety driven or economically driven, and if the balance struck in 1997 is as applicable today as it was a decade ago. **G**

Michael Prendergast is a practising barrister on the Western Circuit.

LOOK IT UP

Legislation:

- European Council Directive 93/104/EC
- *Industrial Relations Act 1946*
- *Organisation of Working Time Act 1997*
- *Protection of Young Persons (Employment) Act 1996*
- *Treaty establishing the European Community*



We did it – Calcutta Run breaks the €2M barrier!

Grey clouds threatened throughout the morning, but nothing could dampen the spirits of the 1,500 participants who made their way over the finishing line at the end of the 10k Calcutta Run on 17 May, *writes Maree Crowley*. As the warm-up began, the sun finally

Send in the clowns

Three-legged race

Warm up act: President James MacGuill and RTÉ's Michael Lester

Bend me, shape, any way you want me

showed, lending its support to what would be the biggest year yet for this, the tenth anniversary year of the Calcutta Run.

A hugely ambitious fund-raising goal of €300k was set for the day. Attempting to meet – or surpass – that target was a great mix of solicitors, trainees, Law Society staff, families and friends, who set off from the Society's headquarters on the 10k run/walk through the Phoenix Park, before heading back to Blackhall Place to be met by a cheering crowd of (patient!) supporters. They not only met their target but surpassed it, to achieve a total of €340,000. This has pushed the overall funds raised by the Calcutta Run over the past ten years to an astonishing €2 million. Each year, the charities to benefit include GOAL orphanages in Calcutta and the Fr Peter McVerry Trust in Dublin – helping to keep homeless youngsters off the streets in both cities.

The organisers of the Calcutta Run ensure that every cent raised goes directly to these two charities. This is made possible by the generous support of IrishJobs.ie – proud main sponsor again this year – and the valuable support of Riverrock, DX, File Stores and Greyhound Recycling.

Last year, the run was designated a 'green' event for the first time – and this year was no different. Greyhound recycled almost 95% of the material collected throughout the day.

The organising committee is grateful to everyone who participated in any way. Congratulations to all the runners and walkers, to the numerous volunteers who donated their valuable time and energy, and to all who lent their financial support. Keep your diary free for next year's event!

The hokey cokey in action

The relaxing aftermath

MSBA awards dinner 2008

Mayo Solicitors' Bar Association (MSBA) held an awards dinner in honour of Liam MacHale (Ballina) to honour his 50 years in practice in Pontoon. This coincided with the annual awards, in which Michael 'Miko' Browne (Westport) was the popular and worthy first recipient of the Judge Daniel Shields Perpetual Award for Mayo-based solicitors, in recognition of his years of hard work for the MSBA.

Swinford solicitors – Brendan Donnelly, Samantha Geraghty, Anne Leonard and Patrick O'Connor

Liam MacHale celebrates his golden anniversary of legal service with his family *(l to r)*: Liam Jnr, Elizabeth, Jacqueline, Liam, Catherine, Jennifer and Patrick O'Connor (president of MSBA)

Michael Browne received the 'Judge Dan Shields Perpetual Award' from MSBA president Patrick O'Connor, in recognition of his many years of hard work for the MSBA, seen here with Liam MacHale

Ballina solicitors out in force – Leo J Loftus, Lorraine Davenport, Liam MacHale, Jacqueline MacHale and Assumpta Joyce

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PIC: LENSMEN

Political party!

Visitors to the Law Society on 22 April 2008 for a dinner to honour the election of solicitor John O'Donoghue as Ceann Comhairle included *(front, l to r)*: Senator Lisa McDonald, Thomas Byrne TD, John O'Donoghue TD, James MacGuill (Law Society president), Nora Owen, Peter Power TD and Charlie Flanagan TD. *(Back, l to r)*: Philip Joyce (past-president), Mary Keane (deputy director general), Gerry Doherty (Council member), John O'Connor (Council member), Ken Murphy (director general) and John D Shaw (senior vice-president)

PIC: LENSMEN

Garda Commissioner visit

Visiting Blackhall Place on 17 April 2008 were *(front, l to r)*: Mary Keane (deputy director general), Claire Loftus, Mr Justice Garrett Sheehan, Garda Commissioner Fachtna Murphy, President of the Law Society James MacGuill and Frank Cassidy. *(Back, l to r)*: Barry Donoghue (deputy DPP), Michael Staines, John D Shaw (senior vice-president), Ken Murphy (director general), Stuart Gilhooly (Council member), Philip Joyce (past president), Thomas D Shaw (past president), Michelle Ní Longáin (Council member), Shane Murphy SC and Dara Robinson

PIC: LENSMEN

Just desserts!

At the dinner held in honour of members of the High Court bench at Blackhall Place on 19 May 2008 were *(l to r)*: Liam Kennedy, Ken Murphy (director general), Mr Justice John Edwards, Tony Burke, James MacGuill (Law Society president), Mr Justice George Birmingham, John D Shaw (senior vice-president), Mary Keane (deputy director general) and Philip Joyce (past president)

PIC: LENSMEN

Two former Ministers for Justice
At the Law Society on 22 April were dinner guests *(l to r)*: John O'Donoghue TD, James MacGuill (Law Society president), Nora Owen and Ken Murphy

PIC: LENSMEN

CCBE gathering
At the Law Society CCBE lunch on 29 April *(l to r)*: John Fish, Michael Irvine (past president), Peter MacNamee, James MacGuill (Law Society president), Ken Murphy (director general), Mary Keane (deputy director general) and Eva Massa (Law Society)

PIC: LENSMEN

Meet the panel to assist solicitors

Birthday boy!
At the Law Society dinner for criminal list judges on 28 April (when, incidentally, Mr Justice Paul Carney also celebrated his birthday) were *(back, l to r)*: Dara Robinson, Mr Justice Barry White, Mr Justice Paul Butler, Claire Loftus, Mr Justice Pat McCarthy, Mary Keane (deputy director general), Alan Gannon, Mr Justice Kevin C O'Higgins, Pat McGonagle, Barry Donoghue and Emer O'Sullivan. *(Front, l to r)*: Ken Murphy (director general), Mr Justice Paul Carney (who had just come from the Nelson Mandela Day celebrations in the South African Embassy) and James MacGuill (president, Law Society of Ireland)

Panel workshop to assist solicitors

A workshop focusing on the panel of solicitors to assist solicitors in difficulty with the Law Society was held on 23 April 2008. The workshop was facilitated by the director of regulation, John Elliot, members of the Guidance and Ethics Committee, and panel members.

The scheme exists to assist solicitors with their initial response to the Law Society, following notice to the solicitor of a complaint or other difficulty in relation to their practice. However, panel solicitors often find that they are also asked to become involved later on in the regulatory process.

Panel work within the ambit of the scheme itself is on a voluntary basis. However, if a solicitor is taken on as a client later in the regulatory process, it is presumed that a fee is charged. The solicitor's professional indemnity insurance cover includes this work, as it would any other legal service.

RDJ scores with Munster Rugby!

In a first for Irish rugby, Ronan Daly Jermyn (RDJ) has scored something of a commercial try and conversion by winning the contract to provide legal services to Munster Rugby.

John Dwyer, managing partner at Cork-based RDJ, says: "Our firm has a long history with Munster Rugby, and this agreement makes the connection official … One of our first projects has been advising Munster Rugby on their agreement with the All Blacks, whose game versus Munster has been confirmed for 18 November at the new Thomond Park Stadium."

Munster chief executive, Garrett Fitzgerald (no, not the former taoiseach), says that the team had grown significantly in the past number of years: "We are delighted to have a law firm in place who can offer us advice on our growing commercial agenda and a wide range of issues that arise in successfully running a professional organisation of our size."

Odd-shaped balls
At the announcement of RDJ becoming the official legal advisor to Munster Rugby were *(from l to r)*: Peter Stringer, John Dwyer (managing partner RDJ), Garrett Fitzgerald (CEO Munster Rugby), Doug Howlett and Tomás O'Leary

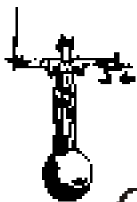
May Day merger for Connacht's CallanTansey

CallanTansey merger
Partners of the newly merged firm of CallanTansey *(front, l to r)*: Christopher Callan, Damien Tansey. *(Back, l to r)*: John Duggan, John O Kelly, Roger Murray, Niamh Ni Mhurchú, Brian Gill and John V Kelly

The legal practices of CE Callan & Co (Boyle, Co Roscommon) and Damien Tansey & Associates (Sligo) have merged to become CallanTansey. The announcement was made on 1 May. The merger creates the largest law firm in Connacht, with over 20 solicitors and 35 support staff providing a full range of legal services to corporate and private clients throughout Sligo, Roscommon, Donegal, Leitrim, Mayo, and further afield.

CE Callan & Co has been delivering private client and business services for clients for nearly 90 years. Damien Tansey & Associates have concentrated on specialist litigation services, particularly in the area of medical negligence. It represents many parents of children with autism who are challenging the state for better education and services.

CallanTansey will continue to operate and develop its offices in Boyle and Sligo. The development reflects a growing trend in the Irish legal sector towards mergers to create practices of sufficient scale to provide a comprehensive and efficient service to clients.



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Tender for Case Management Service

Tenders are requested from solicitors or legal firms for the management of a number of the caseload of the Equality Authority under the Employment Equality Acts [illegible] – [illegible], the Equal Status Acts [illegible] – [illegible] and the Intoxicating Liquor Act [illegible].

The management of the casefiles will include:

- Processing and progressing of applications to and in respect of the Equality Authority in relation to cases under the equality legislation
- The provision of legal advice and legal representation in the Equality Tribunal, Labour Court, District Court and Superior Courts in respect of claims under the equality legislation

Relevant experience includes litigation experience in equality, and employment law.

The tender is for a nine month period.

The case management services will be located in the Equality Authority. Tenders will also be considered for the management of casefiles on a part-time basis.

Further information and the tender document may be viewed on www.etenders.gov.ie

Please submit tender document by [illegible]pm on Wednesday [illegible] June, [illegible] to:

[illegible],
The Equality Authority, 2 Clonmel Street, Dublin 2. Tel: (01) 4173361

She may be contacted for information about the tender.

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student spotlight

Cork trainees negotiate their way to the top

Students at the law school in Cork have done it again! Val Moran and Anthony Murphy showed dexterous negotiation skills to win out at the National Negotiations Competition at King's Inns in Dublin on 26 April.

Four teams took part in the national final – two teams of trainee barristers from the Inns and one team each from the law schools in Cork and Dublin. The students were given separate sides of a negotiation and were required to negotiate for their 'client' against their opposite number. The negotiation problem involved the teams attempting to agree terms and conditions for a prospective employee of a not-for-profit hospital.

The Cork duo will now travel to London in July to take part in the International Negotiations Competition 2008. Teams from around the world, including Australia, the USA, Canada, Britain and Northern Ireland, will converge on London during the second week of July in a bid for the laurel wreath.

Anthony Murphy, trainee at Holmes O'Malley Sexton, with his training solicitor Robert Bourke (partner) and Siobhan Buckley (partner)

Val Moran, trainee at McCarthy & McCarthy Solicitors, with the two principals in the firm, Mary McCarthy *(left)* and Phil McCarthy *(right)*

The week-long competition will see each team participating in three negotiations. Marks will be awarded for team work, effectiveness, negotiating ethics and the relationship that is established between the negotiating teams.

Both Val and Anthony have just completed their PPCI course at Cork and are currently back training at their respective offices – Val at the Ballincollig firm of McCarthy & McCarthy Solicitors, and Anthony in Limerick at Holmes O'Malley Sexton.

Both offices have been extremely supportive of their trainees and, together with the Law Society, are sponsoring the team at the international event in July. We wish them every success in London.

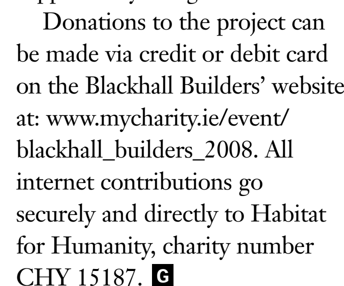
Blackhall Builders tool up for Zambia

Following on from the great success of the Blackhall Builders last year, another team of trainee solicitors will head for Zambia this July to build houses with Habitat for Humanity.

Together with Jane Moffatt (course manager) and Caitriona Moran (Law Society), the 14 trainee solicitors will travel to Lusaka, the capital of Zambia. Under the supervision of local tradesmen, the volunteers will labour on a building site, working hand-in-hand with some of the families who will occupy the houses. The team will also provide financial support to the community by fundraising for the purchase of some of the building materials used in the construction.

The fundraising campaign started in earnest in May with an event in the Laughter Lounge, and others will run until July. The volunteers have a target of €48,000 – and they need all the support they can get.

Donations to the project can be made via credit or debit card on the Blackhall Builders' website at: www.mycharity.ie/event/blackhall_builders_2008. All internet contributions go securely and directly to Habitat for Humanity, charity number CHY 15187.



Newly-qualified solicitors at the presentation of their parchments on 9 November 2007

PIC: JASON CLARKE PHOTOGRAPHY

President of the High Court Mr Justice Richard Johnson, Professor Lonni Rose, President of the Law Society James MacGuill, and Director General of the Law Society Ken Murphy were guests of honour at the 9 November 2007 parchment ceremony for newly-qualified solicitors: Noman Ali, Orla Begley, Melanie Boyle, Davinia Brennan, Hugh Byrne, Karen Carmody, Claire Colfer, Diarmuid Cunniffe, Stephen Cooney, Ronan Curran, Eimear Daly, Caroline Deacy, Yvonne Flanagan, Sarah Fleming, Siobhan Gallagher, Sarah Griffiths, Una Hanahoe, Kevin Harnett, John Higgins, Niamh Keegan, Emma Jane Kelly, Deirdre Kennedy, Lee-Ann Kennedy, Dylan Latimer, Ciaran Leavy, Desmond Lynch, Sinead Lyons, Macaire McAuley Adams, Emily-Jane McGuire, Kate McInerney, Ronan McInerney, David Mangan, Deirdre Mitchell, Keira-Eva Mooney, Cliona Mulligan, Fiona Murphy, Stephen Mulvey, Kate Murphy, Trevor Murphy, Deirdre Nagle, Patrick Nelson, Louise O'Brien, Shane O'Brien, Diarmuid O'Comhain, Allan O'Connor, Nigel O'Connor, Eimear O'Gara, Ciara O'Leary, Mary Gill O'Leary, Uilliam O'Lorcain, Mary O'Reilly, David O'Shea, Niall Pelly, Michael Purcell, Jane Quinn, Seetha Ramkissoon, Joanne Redmond, Ronan Regan, Mary B Sankey, Finian Scallan, Barbara Sherry, Julie Anne Sweeney, Owen Sweeney, Ciara Tierney, Elizabeth Veale and Fiona Zellman

Newly-qualified solicitors at the presentation of their parchments on 20 December 2007

PIC: JASON CLARKE PHOTOGRAPHY

Former Minister for Justice, Equality and Law Reform Brian Lenihan, President of the High Court Mr Justice Richard Johnson, Dr Carol Coulter (legal editor with *The Irish Times*), President of the Law Society James MacGuill, and director general Ken Murphy were guests of honour at the 20 December 2007 parchment ceremony for newly-qualified solicitors: John Bermingham, Louise Boland, Elaine Burke, Adrian Carey, Killian John Carty, Pierce Cooney, Nigel Crawford, Aoife Crowley, Michelle Egan, Orla Ellis, Susan Fay, John Paul Feeley, Lyn Flanagan, Owen Henson, Roisin Hickey, John Kealy, Eileen Kelleher, Michelle Lee, Ciaran McNamara, Dermot Monahan, Aoife Mulligan, Graham Quinn, Greg Rogers, Paul Ryan, Cliadhna Sheridan, Michelle Spellissy and Dervla Sugrue

Newly-qualified solicitors at the presentation of their parchments on 25 January 2008

PIC: JASON CLARKE PHOTOGRAPHY

President of the High Court Mr Justice Richard Johnson, Sir Brian Kerr (Lord Chief Justice of Northern Ireland), President of the Law Society James MacGuill, and Director General of the Law Society Ken Murphy were guests of honour at the 25 January 2008 parchment ceremony for newly-qualified solicitors: Angel Bello Cortes, Maria Boyce, Alice Cowman, Sharon Davern, Catherine Deignan, Sarah Deignan, Hilary Delahunty, Patrick Dempsey, Bridin Farren, Kenneth Fitzgibbon, Cliodhna Foley, Robin Hayes, James Hunt, John Kerr, Aoife Langan, Lochlann MacDonald, Niamh MacEvilly, David McAlinden, Marcus McDwyer, Jane Moffat, Patrick Moroney, Karen Nevin, Ciara O'Connell, Conor O'Sullivan, Ross Phillips, Karen Ruddy, Padraig Sheehan, Andrew Whitty

Newly-qualified solicitors at the presentation of their parchments on 13 March 2008

PIC: JASON CLARKE PHOTOGRAPHY

Mr Justice Michael Peart, Turlough O'Donnell SC (chairman of the Bar Council), President of the Law Society James MacGuill, and director general Ken Murphy were guests of honour at the 13 March 2008 parchment ceremony for newly-qualified solicitors: Eimear Buckley, Brendan Burke, Audrey Byrne, Ciara Cahill, Michele Caulfield, David Clery, Hugh Clohessy, Tony Collier, Maeve Doyle, Francis Fox, Simon Fraser, Leonora Frawley, Gerard Gallagher, Naomi Gardiner, Salome Hennessy, Melanie Hughes, Declan Hynes, Michelle Kellegher, Lauren Martin, Conor Matthews, Andrew McCudden, Terry McLoughlin, Ross McMahon, Sinead McNelis, Conor Minogue, Cliodhna Mulcahy, Conrad Murphy, Louise Murphy, Daniel Murphy, Orla Nally, Tomas Nyhan, Tom O'Byrne, Jane O'Flynn, Sarah O'Keeffe, Fiona O'Keeffe, Donal O'Regan, Claire Reilly, Philippa Reilly, Suzanne Roche, Wendy Ruddy, Patrick Ryan, Robert Ryan, Anna Scanlan, Silke Shanley, Roisin Slattery, Keith Underwood, Yvonne Walsh, Dorothy Walsh and Aishling Walsh

Newly-qualified solicitors at the presentation of their parchments on 17 April 2008

PIC: JASON CLARKE PHOTOGRAPHY

Mr Justice Garret Sheehan of the High Court, Garda Commissioner Fachtna Murphy, President of the Law Society James MacGuill, and director general Ken Murphy were guests of honour at the 17 April 2008 parchment ceremony for newly-qualified solicitors: James Allen, Collette Bennett, Andrea Brennan, Rory Byrne, William Clarke, John Peter Cleary, Peter Corkery, Neil Cosgrave, Alice Cowman, Rachel Coyle, Mairead Cronin, Conor Dalton, Laura Daly, Diane Dawson, Lisa Marie Deegan, Laura Duffy, Susan Elliott, Carol Feely, Emer Gallagher, Karen Grant, Eimear Grealy, Karl Griffin, Jamie Hart, Cathy Heneghan, Aileen Hogan, Anthony Hughes, Damian Jordan, Jason Kelly, Yvonne Kelly, Michael Lane, Gillian McAuley, Aoife McDermott, Jolene McElhinney, Stephen McKenna, John McNulty, Ciaran Maguire, Brian Malone, Padraig Mawe, Carolann Minnock, Stephen Murphy, Owen Nicholson, Aine Ní Dhuibhir, Mark Nixon, Roy O'Carroll, Deirdre O'Sullivan, Jane Marie O'Sullivan, Sinead Roycroft, Martina Ryan, Sam Saarsteiner, Yvonne Snow, Stephen Walsh and Alma Whelan

books

Literature, Judges and the Law

WN Osborough. Four Courts Press (2007), 7 Malpas Street, Dublin 8. ISBN: 978-1-84682-079-3. Price: €55.

Nial Osborough is to be warmly applauded for his excellent new book. It is a delightful collection of easily read passages on judges' use of literary citation in the course of giving written judgments. It is beautifully structured, so as to allow the reader to adopt a comprehensive or thematic approach or simply to pick it up from time to time and read a short excerpt on a series of cases with the same literary theme. With issues ranging from the lung capacity of swans to the true meaning and origin of 'shibboleth', this book is a genuine trove of esoteric and value-laden accounts of the law in operation.

Osborough describes the use of literary and biblical references in a range of key areas of law. When faced with such references in the course of their work, the pragmatist or practitioner under pressure may wonder what their use could possibly contribute to the quality of the judgment and whether in fact a simple, short and straightforward approach to written decisions is more appropriate in contemporary legal practice. Certainly, I imagine students faced with judgments exceeding a reasonable number of pages may legitimately roll their eyes at the inclusion of yet another unnecessary reference to Socrates, St Mark or Shakespeare. A person, in this context, can't help but wonder if judges don't have rather more time on their hands than the average mortal in having recourse to such works in the very serious, and expensive, business of giving judgment.

In some ways the use of these references offers an insight into the mind of the judge – their knowledge of, and interest in, such subjects and whether they choose to display it. Certainly it is clear that knowledge of the arts is not necessary for appointment as a judge, and we should be concerned if our assessment of the quality of judgments was based on the frequency or obscurity of literary references. It is never a mark of quality work to include references that distract, obscure or alienate, especially where lives and livelihoods are at stake. Judgments should be concise, precise and accessible in the

modern legal system, where the volume of litigation and its inherent cost is so high.

However, the use of relevant and considered references to the arts in law is to be welcomed and richly enjoyed for three reasons. The first is that it allows the writer to draw on the invocations of logic and learning from sources outside the law in an earnest consideration of the matter at hand and, in doing so, offers a degree of colour and joy to the sometimes very dull world of legal analysis. Even the most exasperated student or practitioner must accept and enjoy the occasional ode in a field full of prose.

Secondly, that same student should remember that law has no earthly purpose but to facilitate the implementation of political ideas and the conduct of transactions and industry. Allusions to a world outside the strict confines of legal education is, in this sense, more than merely enriching – it reminds us that we work with the rules only to achieve a higher external goal.

But finally, and most importantly, Osborough shows that the use of literary references in judgments serves to achieve what law sometimes cannot – the clearest expression of the idea at hand. Why shouldn't it be true that the arts would offer a more eloquent elucidation of the principles that inform our conceptions of governance than can be achieved through that most rigorous, and ultimately unsatisfactory, set of expressions of norms – the law.

Jennifer Carroll, solicitor, is a lecturer in UCD's School of Politics and International Relations and legal advisor in the Fine Gael Leader's Office, Leinster House.

Practice and Procedure in the Superior Courts (second edition)

Benedict Ó Floinn. Tottel Publishing (2008), Fitzwilliam Business Centre, 26 Upper Pembroke St, Dublin 2. ISBN: 978-1-84766-058-9. Price: €225.

Knowledge of the law of practice and procedure is essential for the successful judge, practising solicitor and barrister.

The great US judge Felix Frankfurter, in *Cook v Cook* (342 US 673, 681 [1930]), observed that he was not "one of those who thinks that procedure is just folderol or noxious moss". Sadly, the law of practice and procedure is not taught in university. I do not proclaim that the law of practice and procedure is the most important aspect of legal study, but it is a fertile subject in its own right, rich in potential aspects of legal scholarship. The same Judge Frankfurter, in *McNabb v United States* (318 US 322, 348 [1943]), noted that "the history of liberty has largely been the history of

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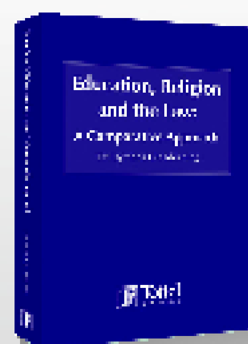

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observance of procedural safeguards".

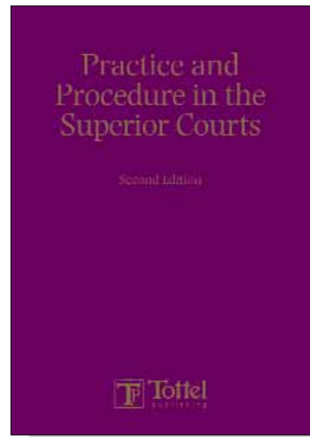
The law of practice and procedure is thus of pivotal interest for anyone who claims to be a practising lawyer.

Mr Justice Peter Kelly of the High Court referred, in his foreword to the first edition, to the Herculean task of the author, barrister Benedict Ó Floinn, in bringing this book to fruition.

Ten years have elapsed since the publication of that first edition. The author notes that the large number of amending statutory instruments reflects "exciting initiatives". There is also an increasing number of cases on procedural law.

Apparently there are approximately 100 statutory instruments amending the primary *Rules of the Superior Courts 1986*. The author, who is an Irish language enthusiast, observes that not one of the amending statutory instruments is publicly available in the Irish language, despite the declaratory judgments of a number of judges of the High and Supreme Courts.

The book contains an erudite annotation on each individual rule of the superior courts. Each rule is set out in one typeface, while the annotation is set out in another. There is a physical separation of the two by means of a line – which enhances the



overall effect of the book and leaves the reader in no doubt as to what text belongs to the rules and to the annotation.

I have been in legal practice for many years. I welcomed the publication of the first edition in 1996 and I frequently perused its pages in my search for answers to practical queries posed in legal practice. I found answers to my frequent queries in the book. Accordingly, this second edition is to be welcomed.

Benedict Ó Floinn has written an accessible, intellectually strong, perceptive and practical account of the rules of the superior courts of Ireland, which deserves to be on the shelf of every lawyer who practises in the superior courts.

Dr Eamonn G Hall is the principal of EG Hall & Co Solicitors.

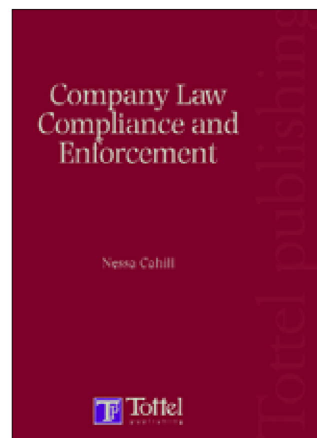
Company Law Compliance and Enforcement

Nessa Cahill. Tottel Publishing (2008), Fitzwilliam Business Centre, 26 Upper Pembroke St, Dublin 2. ISBN: 978 1 84592 105 7. Price: €175.

Company law enforcement has been getting a bit of a rough press recently. On the one hand, the regulators are assailed for alleged inactivity by those who would see corporate wickedness at every turn, and, on the other, for their 'Delphic posture' towards the blameless.

Company law – and the enforcement processes that are available to the regulators and to which companies, their officers and insolvency practitioners are subject – are complex. Dozens of enactments – primary, secondary and European – litter the legal horizon, encompassing insolvency law and securities law as well as company law.

Into this arena of complexity and controversy comes an excellent legal textbook, which is both timely and welcome, not only for being a first, but also on account of its rigour in dealing with its subject matter. Ms Cahill takes us from the



nursery slopes of filing obligations, to the Cresta Run of restriction and disqualification orders, in a most readable style.

The structure of the book starts the reader at corporate compliance – that is, compliance demanded of companies. Beginning with public filings at the Companies Registration Office, it then deals with the obligations of companies to keep registers, an obligation that is as overlooked by companies as by journalists, who rarely exercise their statutory right to inspect what are (or should be) informative records of ownership of companies.

It then deals with a company's obligation to keep what the law still quaintly calls "books of account". At the same time as I was reading Ms Cahill's book, I was rereading Barbara Ley Toffler's *Final Accounting*, which narrates the downfall of Arthur Andersen for its complicity in the preparation of false accounts by Enron, WorldCom and others. If there is one area of law where enforcement must be unbending, it is this. Technical – and more importantly, ethical – lapses in the area of accounting are at the core of many, if not most, corporate failures, and bring an accompanying corrosion of investor trust. The Law Society, in its various submissions on recent company law enactments, has urged that honest accounting be at the centre of the focus of corporate compliance, as opposed to the obsessive box-ticking of procedural compliance with legal provisions, as envisioned in the *Companies (Auditing and Accounting) Act 2003*, mercifully not commenced.

Ms Cahill concludes the section on corporate compliance with the regulation of shareholder meetings.

The book then progresses into the area of compliance demanded of individuals – directors, auditors, receivers, liquidators and examiners. In the case of directors, it includes a succinct narrative of the arcane provisions on self-dealing by directors in the *Companies Act 1990*, as well as a discourse on what is expected of directors in their report on the accounts of a company. Ms

Cahill then moves into the meaty area of fraudulent trading, which includes a detailed examination of its constituent factors. This is followed by a detailed exposition of the law relating to auditors and their obligations with respect to disclosure to the Office of the Director of Corporate Enforcement (ODCE) of breaches of the *Companies Acts*.

The duties of receivers, liquidators and examiners are dealt with in a broadly similar fashion, starting with rudimentary duties and moving into more complex areas of compliance. In the case of liquidators, this brings us into the area of 'section 56 reports' – reports required to be made by liquidators to the ODCE. As well as dealing with the statutory provisions, Ms Cahill takes us through the ODCE guidance on this law.

The book then moves into the area of enforcement and investigation, dealing with agencies of enforcement, the powers of the ODCE, and company inspections. Under the heading of 'criminal prosecutions', there is an excellent exposition of section 383 of the *Companies Act 1963*, as amended by section 100 of the *Company Law Enforcement Act 2001*. This is the section that puts a positive obligation on company directors to procure compliance of their company with the *Companies Acts*. It also provides that, where a company is in default, a director is presumed to be in default unless the director can prove otherwise.

Ms Cahill then moves into the area of restriction and disqualification of directors, which accounts for more than 200 pages and a fifth of the book. This is compulsory reading for all solicitors with a commercial practice, be it for high-street businesses or multinational groups. In brief, if a company is wound up and cannot pay its debts, all of the directors of the insolvent company are liable to be restricted and must prove that they acted "honestly and responsibly in the conduct of the affairs of the company" and that there is no other reason why it should be just and equitable to make a declaration of restriction.

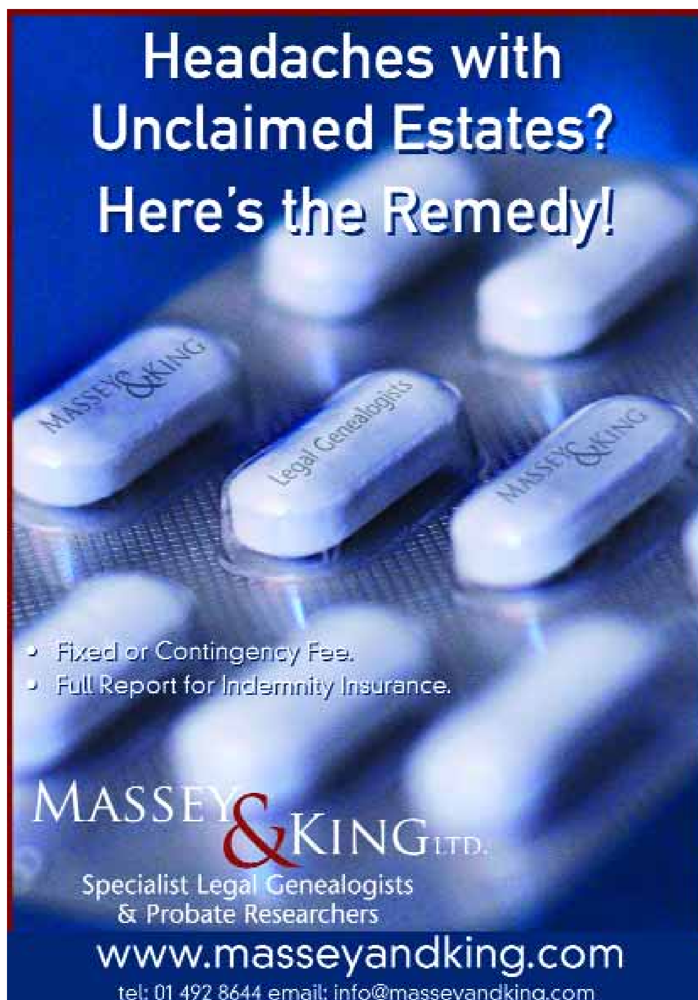
The caprices of the law on restriction of directors and attendant ODCE procedures have been the subject of a recent Supreme Court judgment in *Re Tralee Beef and Lamb Ltd* ([2008] IESC 1, 1 February 2008). Although that judgment came too late for the book, the chapters on restriction are essential reading for anyone seeking an understanding of the law and procedures.

In the chapters on restriction and also on disqualification, there is ample relevant case law, as well as a thorough explanation of procedures.

In conclusion, this is an excellent book, well researched and accessible to read. The ultimate test of a law book is this: will it be on my personal shelves and will I read it? Unquestionably, yes.

I recommend it to all solicitors with a practice in this area, which means every solicitor that has a company, a director, an auditor or an insolvency practitioner as a client. **G**

Paul Egan is chairman of the Corporate Department of Mason Hayes & Curran and a member of the Company Law Review Group.



council report

Law Society Council meeting, 11 April 2008

Appointments to other bodies

The Council approved the reappointment of Patrick Dorgan to the IAVI Disciplinary Committee, the appointment of John Costello to the National Elder Abuse Steering Committee, and the appointment of Rosemary Horgan to COSC.

Legal Services Ombudsman Bill 2008

The Council considered the contents of the newly published *Legal Services Ombudsman Bill 2008*. It was noted that there had been a number of changes to the provisions that had previously been contained in the *Civil Law (Miscellaneous Provisions) Bill*, but that the effect of the bill remained substantially the same.

Criminal Justice (Money Laundering) Bill 2008

The president noted that the Society was due to meet with the departments of justice and finance to discuss the content of the draft heads of bill.

Report of the Lay Members of the Complaints and Client Relations Committee

John P Shaw referred the Council to the *Report of the Lay Members of the Complaints and Client Relations Committee* for the year 2006/2007. He noted that the number of complaints was increasing year-on-year by approximately 10%, which matched the percentage increase in the practising profession year-on-year. He also noted that the lay members had expressed concerns in relation to the number of repeat offenders and the level of non-compliance with section 68. The Council recorded its appreciation for the work of the lay members and the work of the staff in the Society's complaints section.

Civil Law (Miscellaneous Provisions) Bill 2006

The director general reported that the bill had completed its reading in the Dáil and was under consideration by the Seanad.

Submission on *Immigration, Residence and Protection Bill 2008*

The Council noted the Society's submission on the *Immigration, Residence and Protection Bill 2008* and expressed its appreciation for the work of the Human Rights Committee in its preparation, in particular Colin Daly, Noeline Blackwell and Elaine Dewhurst.

Submission to the DPP on the discussion paper on the giving of reasons for decisions

The Council noted the Society's submission to the DPP on the discussion paper on the giving of reasons for decisions, in which the Society had expressed reservations about the proposal (see p12 of this *Gazette*).

Annual conference

Geraldine Clarke congratulated the president on a successful annual conference, which had been held in Budapest, with excellent presentations from the Deputy Director of Public Prosecutions, the EU Ambassador to the US and the Minister for Justice, Equality and Law Reform. She noted that attendance at the conference provided an interesting means of rewarding or incentivising staff.

The president paid tribute to James McCourt (chairman of the Society's Annual Conference Task Force) and to the event organisers, Ovation-MCI. He noted that the 2009 conference would be held in Bilbao, Spain, and he encouraged colleagues to participate.

CCBE

Michael Irvine reported that the EU Commission's *Report on Conveyancing* was being examined by the CCBE's Competition Committee, which was adopting a methodology approach. He noted also that a questionnaire had been issued on multi-jurisdictional practice, which was being considered by the relevant committee within the CCBE. In addition, the Financial Action Task Force was holding meetings with lawyers to discuss the 'risk-based approach' in relation to money laundering.

LawCare

Tom Murran reported that LawCare, which had been established initially in England and Wales to assist solicitors with alcohol problems, had extended its services to assist legal practitioners suffering from stress, depression and other health issues.

The Law Society of Ireland had agreed to provide the LawCare service to its members from 1 January 2008. The service operated with a freephone number and the Law Society of Ireland was represented on the board of LawCare by Mr Murran and Louise Campbell (support services executive). Two meetings of the board had been held since January and, on the previous day, interviews had been conducted for the appointment of an Irish coordinator.

Mr Murran said that the chief executive of LawCare was delighted with the level of support being provided by the Law Society of Ireland. In addition, the Society was keen not to cut across the very valuable work being done by the Southern Law Association and the Dublin Solicitors' Bar Association via their help lines. The statistics for LawCare for the first quarter of 2008 indicated that the level of uptake in Ireland was slightly ahead of the level of uptake in the first quarter for England and Wales.

Calcutta Run 2008

The president urged Council members to participate in or to support the Calcutta Run, which would be held on 17 May. On behalf of the Council, he complimented the Calcutta Run team and, in particular, the Society staff members involved: Tom Blennerhassett, Cillian MacDomhnaill, Tony Morgan, Maree Crowley and Gayle Ralph, together with the staff of the facilities and premises section of the Society for their huge effort in organising the Calcutta Run. G

SOLICITORS' HELPLINE
01 284 8484
THE SERVICE IS COMPLETELY CONFIDENTIAL AND TOTALLY INDEPENDENT OF THE LAW SOCIETY

legislation update

16 April – 20 May 2008

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

ACTS PASSED

Criminal Justice (Mutual Assistance) Act 2008
Number: 7/2008
Contents note: Gives effect to certain international agreements, or provisions of such agreements, between the state and other states relating to mutual assistance in criminal matters. The text of the agreements or provisions of agreements are set out in the schedules to the act. Repeals and re-enacts, with amendments, part VII (international cooperation) of the *Criminal Justice Act 1994*, and provides for related matters.
Date enacted: 28/4/2008
Commencement date: Commencement order(s) to be made (per s1(2) of the act)

Criminal Law (Human Trafficking) Act 2008
Number: 8/2008
Contents note: Criminalises the selling or purchasing of human beings, both children and adults, for any purpose. Creates offences criminalising trafficking in persons for the specific purposes of their sexual or labour exploitation or the removal of their organs. Gives effect to the Council Framework Decision of 19/7/2002 on combating trafficking in human beings. Gives effect, in part, to the UN protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the UN convention against transnational organised crime done at New York, 15/11/2000. Gives effect to the Council of Europe convention on action against trafficking in human beings done at Warsaw, 16/5/2005. Amends the *Child Trafficking and Pornography Act 1998* (as amended by the *Criminal Law (Sexual Offences) (Amendment) Act 2007*), the *Sex Offenders Act 2001* and the *Criminal Evidence Act 1992*, and provides for related matters.
Date enacted: 7/5/2008
Commencement date: 7/6/2008 (one month after the passing of the act – per s15(2) of the act)

Voluntary Health Insurance (Amendment) Act 2008
Number: 6/2008
Contents note: Amends the *Voluntary Health Insurance Act 1957*, the *Health Insurance Act 1994*, the *Voluntary Health Insurance (Amendment) Act 1996* and the *Health Insurance (Amendment) Act 2001* to confer additional functions on the Voluntary Health Insurance Board and to empower the board to form and establish or acquire subsidiaries to perform certain functions of the board. Specifies the borrowing powers of the board and such subsidiaries and provides for related matters.
Date enacted: 15/4/2008
Commencement date: Commencement order(s) to be made (per s22(3) of the act)

SELECTED STATUTORY INSTRUMENTS

Control of Exports Act 2008 (Commencement) Order 2008
Number: SI 126/2008
Contents note: Appoints 5/5/2008 as the commencement date for all sections of the act.

European Communities (Evidence in Civil or Commercial Matters) Regulations 2008
Number: SI 102/2008
Contents note: Specify the District Court as competent to take evidence for the purpose of article 1.1(a) of Council Regulation (EC) no 1206/2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters. Designate the Courts Service as the central body in the state for the purposes of articles 3 and 17 of the council regulation.
Commencement date: 15/4/2008

European Communities (Freedom to Provide Services) (Lawyers) (Amendment) Regulations 2008
Number: SI 97/2008
Contents note: Consequent on the accession of Bulgaria and Romania to the EU, these regulations extend the *European Communities (Freedom to Provide Services) (Lawyers) Regulations 1979-2004* to lawyers from those member states. The latter regulations gave effect to Council Directive 77/249/EEC, so as to enable lawyers from other member states to pursue activities in this state by way of provision of services.
Commencement date: 7/4/2008

European Communities (Lawyers' Establishment) (Amendment) Regulations
Number: SI 96/2008
Contents note: Consequent on the accession of Bulgaria and Romania to the EU, these regulations extend the *European Communities (Lawyers' Establishment) Regulations 2003* (SI 723/2003) and the *European Communities (Lawyers' Establishment) (Amendment) Regulations 2004* (SI 752/2004) to lawyers from those member states. SI 723/2003 brought into force in Ireland the measures necessary to comply with Directive 98/5/EC, to facilitate practice of the profession of a lawyer on a permanent basis in a member state other than that in which the qualification was obtained. SI 752/2004 extended the provisions of that directive to lawyers from the ten accession EU member states.
Commencement date: 7/4/2008

Finance Act 2008 (Commencement of Section 30(1)) Order 2008
Number: SI 104/2008
Contents note: Appoints 17/4/2008 as the commencement date for section 30(1) of the act. Section 30(1) deals with decommissioning of fishing vessels: the amendment of section 288 (balancing allowances and balancing charges) of the *Taxes Consolidation Act 1997*.

Finance Act 2008 (Commencement of Section 54(1)(a)(i)) Order 2008
Number: SI 105/2008
Contents note: Appoints 1/5/2008 as the commencement date for section 54(1)(a)(i) of the act. Section 54(1)(a)(i) deals with capital gains tax: amendment of chapter 6 (transfers of business assets) of part 19 of the

Taxes Consolidation Act 1997 in relation to compensation in respect of the decommissioning of fishing vessels.

Industrial Relations Act 1990 (Code of Practice on Information and Consultation) (Declaration) Order 2008
Number: SI 132/2008
Contents note: Declares that the code of practice set out in the schedule to this order is a code of practice for the purposes of the *Industrial Relations Act 1990*. The purpose of the code of practice is to assist employers, employees and their representatives in developing effective arrangements for communications and consultation, in accordance with the provisions of the *Employees (Provision of Information and Consultation) Act 2006*.
Commencement date: 29/4/2008

Recognition of Professional Qualifications (Directive 2005/36/EC) Regulations 2008
Number: SI 139/2008
Contents note: Give effect to Directive 2005/36/EC on the mutual recognition of professional qualifications obtained in another EU member state or, in certain cases, in a third country, as amended by Directive 2006/100 by reason of the accession of Bulgaria and Romania.
Commencement date: 6/5/2008

Return of Payments (Banks, Building Societies, Credit Unions and Savings Banks) Regulations 2008
Number: SI 136/2008
Contents note: Give partial effect to the provisions of section 891B (inserted by section 125 of the *Finance Act 2006)* of the *Taxes Consolidation Act 1997*, which allow the Revenue Commissioners to make regulations, with the consent of the Minister for Finance, requiring financial institutions, assurance companies, collective funds and state bodies to make an annual return of customers resident in the state to whom interest or other payments above a certain threshold are made. These particular regulations provide for the reporting by banks, building societies, credit unions and savings banks of interest and similar payments.
Commencement date: 6/5/2008

Safety, Health and Welfare at Work (Construction) (Amendment) Regulations 2008
Number: SI 130/2008
Contents note: Amend the *Safety, Health and Welfare at Work (Construction) Regulations 2006* (SI 504/2006) to change the operational date from 6/5/2008 to 6/7/2009 for certain regulations relating to the possession of a construction skills registration card under the construction skills certification scheme, as it applies to certain tasks – see SI for details.

Sea Pollution (Miscellaneous Provisions) Act 2006 (Part 2) (Commencement) Order 2008
Number: SI 120/2008
Contents note: Appoints 21/11/2008 as the commencement date for part 2 (ss3-18) of the act. Part 2 gives effect to the *International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (Bunkers Convention)*. G

Prepared by the Law Society Library

SITTINGS OF THE DMD FOR SUMMER HOLIDAYS 2008

REGULAR HOLIDAY SITTINGS

Court No 44 Chancery Street: Monday to Saturday (inclusive) from 10.30am to 5pm each day.
Court No 46 Chancery Street: Monday to Friday (inclusive) from 10.30am to 5pm each day (No sitting Monday 4/8/08).
The Court at Cloverhill: Tuesday to Friday (inclusive) from 10.30am each day.
Court No 41 Dolphin House: Monday to Friday (inclusive) from10.30am each day. (No sitting Monday 4/8/08)
Court No 55 Smithfield: juvenile business – each Tuesday and Thursday from 10.30am.

ADDITIONAL COURT SITTINGS

Court No 51 The Richmond Courts: hearing of summary business from Tuesday 5/8/08 to Friday 29/8/08 from 10.30am each day.
Court No 53 The Richmond Courts: hearing of summary business from Tuesday 5/8/08 to Friday 8/8/08.
Court No 53 The Richmond Courts: hearing of criminal business Monday 11/8/08 to Friday 29/8/08 from 10.30am each day.
Dun Laoghaire Court: Monday 11/8/08 to Friday 15/8/08 – hearing of summary business from 10.30am each day.

The Criminal Law Committee wishes to clarify that it has opposed vacation sittings, and continues to do so. The Committee's only involvement in relation to the vacation 2008 sittings was to seek full details of same in order that the information could be published as soon as possible. No inference should be drawn from this fact to suggest that the Committee has participated in any agreement on dates for vacation sittings.

Solicitors Disciplinary Tribunal

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

In the matter of Joseph Fahey, a solicitor of Ballygar Road, Mountbellew, Co Galway, and in the matter of the *Solicitors Acts 1954-2002* [6687/DT70/06]
Law Society of Ireland
(applicant)
Joseph Fahey
(respondent solicitor)

On 6 November 2007, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Failed to comply with an undertaking dated 7 November 2003 to ACC Bank to stamp and register the deed of charge and deed of transfer and as soon as practicable to lodge the deeds together with the certificate of title with the bank in respect of a named property in Co Galway on behalf of a named client,
b) Failed to respond to the Society's correspondence, and in particular the Society's letters of 31 March 2006, 25 April 2006, 5 May 2006 and 19 May 2006,
c) Failed to respond to the specific enquiries set out in the Society's letter of 31 March 2006.

The tribunal ordered that the respondent solicitor:

a) Do stand censured,
b) Pay a sum of €350 to the compensation fund,
c) Pay the whole of the costs of the Law Society of Ireland, as taxed by a taxing master of the High Court, in default of agreement.

In the matter of Joseph Fahey, a solicitor of Ballygar Road, Mountbellew, Co Galway, and in the matter of the *Solicitors Acts 1954-2002* [6687/DT78/06]
Law Society of Ireland
(applicant)
Joseph Fahey
(respondent solicitor)

On 6 November 2007, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Delayed in complying with his undertaking given to the Irish Nationwide Building Society and dated 9 December 2002 in respect of a named property in Co Galway by failing to complete and register the mortgage in favour of the Irish Nationwide Building Society in a timely manner, having only completed same in January 2006,
b) Failed to comply with his undertaking dated 9 December 2002 in relation to another named property in Galway,
c) Released the proceeds of the sale of the last-mentioned named property in Co Galway without obtaining the consent of the Irish Nationwide Building Society in advance,
d) Failed to reply to the Society's correspondence, and in particular the Society's letters of 11 October 2005, 28 October 2005, 17 November 2005, 20 December 2005, 10 January 2006, 6 February 2006, 14 February 2006, 16 March 2006, 29 March 2006, 6 April 2006.

The tribunal ordered that the respondent solicitor:

a) Do stand censured,
b) Pay a sum of €1,000 to the compensation fund,
c) Pay the whole of the costs of the Law Society of Ireland, as taxed by a taxing master of the High Court, in default of agreement.

In the matter of Michael T Petty, a solicitor formerly of M Petty & Company, Solicitors, Parliament Street, Ennistymon, Co Clare, and in the matter of the *Solicitors Acts 1954-2002* [3387/DT21/07 and High Court record no 3SA 2008]
Law Society of Ireland
(applicant)
Michael T Petty
(respondent solicitor)

On 27 November 2007, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Failed to comply with an undertaking given to the complainant that he would deal with outstanding Land Registry queries, which undertaking was given at the time of closing of the sale in 1994, in a timely manner or at all,
b) Failed to respond to the Society's correspondence, and in particular the Society's letters of 19 July 2006, 1 August 2006, 10 August 2006, 13 September 2006, 20 October 2006, 13 November 2006 and 11 December 2006 in a timely manner or at all,
c) Failed to respond to correspondence from the complainant to him in connection with the outstanding undertaking, which correspondence spanned a number of years.

The Solicitors Disciplinary Tribunal ordered that the Law Society of Ireland do bring such findings of the tribunal in respect of the respondent solicitor before the High Court, together with the report of the tribunal to the High Court, which report includes the opinion of the tribunal as to the fitness or otherwise of the respondent solicitor to be a member of the solicitors' profession, having regard to their findings **and** the recommendations of the tribunal as to the sanction that should be imposed, having regard to their findings in respect of the respondent solicitor.

On 10 March 2008, the President of the High Court ordered, pursuant to section 8 of the *Solicitors (Amendment) Act 1960* (as substituted by section 18 of the *Solicitors (Amendment) Act 1994* and amended by section 9 of the *Solicitors (Amendment) Act 2002*), that:

1) The respondent solicitor shall not be permitted to practise as a sole practitioner or in partnership, that he be permitted only to practise as an assistant solicitor under the direct control and supervision of another solicitor of at least ten years' standing, to be approved in advance by the Law Society of Ireland,
2) The respondent solicitor do deliver to Marian Petty, solicitor, all or any documents, files and papers in his possession or within his procurement arising from his practice as a solicitor, including all ledger cards and funds held for or on behalf of clients' files,
3) The Law Society do recover the cost of the proceedings herein and the cost of the proceedings before the Solicitors Disciplinary Tribunal.

In the matter of James P Murphy, a solicitor of Doire, Ballygaddy Road, Tuam, Co Galway, and in the matter of

the *Solicitors Acts 1954-2002* [3438/DT36/07 and High Court record no 2008 no 17SA]
Law Society of Ireland (applicant)
James P Murphy (respondent solicitor)

On 17 January 2008, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Misappropriated money received from clients when he was in the employment of a named firm of solicitors,
b) Admitted that he had received and retained €77,150, received in all but one case in cash from clients on foot of costs, which monies were retained by the respondent solicitor and never put through the books of named firms of solicitors,
c) Failed to disclose the full extent of his misappropriation when originally requested to do so, having only disclosed a misappropriation of €43,400 after his dismissal from a named firm of solicitors,
d) Took instructions in relation to a will, a power of attorney and enduring power of attorney from a named elderly man in a nursing home, who could not speak or write, in circumstances where there was evidence that the potential beneficiary had made two previous attempts to gain control over the man's money and had failed in circumstances where it was not appropriate to take such instructions,
e) The respondent solicitor, based on information obtained from clients, received and misappropriated €104,885 as of 30 May 2006, although the respondent solicitor only admitted that he had received and retained €77,150 in total.

The Solicitors Disciplinary Tribunal recommended to the High Court that the name of the respondent solicitor should be struck off the Roll of Solicitors.

On Monday 7 April 2008, the President of the High Court ordered, pursuant to the *Solicitors Acts*, that the respondent solicitor shall be suspended from practising as a solicitor until further order.

In the matter of Deirdre Nic Fhionnlaoich, a solicitor practising as MacGinley Solicitors, 3 Inns Quay, Chancery Place, Dublin 7, and in the matter of the *Solicitors Acts 1954-2002* [2828/DT29/07]
Law Society of Ireland (applicant)
Deirdre Nic Fhionnlaoich (respondent solicitor)

On 17 January 2008, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in her practice as a solicitor in that she had:

a) Failed to reply to letters from her former clients' new solicitor requesting the transfer of her former clients' files with their authority to their new solicitor,
b) Failed to furnish a bill of costs to her former clients' new solicitor, despite being requested to do so by letter dated 30 August 2005,
c) Sought an undertaking that the costs of the legal costs accountant she proposed to engage to prepare her own bill of costs would be discharged by her former clients, when in fact this was her liability and not theirs,
d) Represented to the Society in a letter to the Society, dated 13 April 2006, that she was sending the files to her former clients' new solicitor that day, but did not in fact forward the files,
e) Subsequently failed to hand over the files within ten days, as directed by the committee on 26 April 2006.

The tribunal ordered that the respondent solicitor:

a) Do stand advised and admonished,
b) Pay 50% of the costs of the Law Society of Ireland, as taxed by a taxing master of the High Court, in default of agreement.

In the matter of Michael J Murphy, a solicitor of 4 Dun Ard, Knockcroghery, Co Roscommon, and in the matter of an application by Stephen Glanville to the Solicitors Disciplinary Tribunal and in the matter of the *Solicitors Acts 1954-2002* [4803/DT57/06]
Stephen Glanville (applicant)
Michael J Murphy (respondent solicitor)

On 20 February 2008, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he deprived the applicant of his fees.

The tribunal ordered that the respondent solicitor:

a) Do stand admonished and advised,
b) Pay a sum of €100 to the compensation fund,
c) Pay the costs of the applicant in respect of the disciplinary hearings held on 19 July 2007 and 25 October 2007 as taxed by the taxing master of the High Court in default of agreement. G

PRACTICE NOTE

EXTENSION OF COMPULSORY REGISTRATION TO COUNTIES CLARE, KILKENNY, LOUTH, SLIGO, WEXFORD AND WICKLOW

Statutory Instrument no 81 of 2008 extends compulsory registration to counties Clare, Kilkenny, Louth, Sligo, Wexford and Wicklow and will come into effect on 1 October 2008. The full text of SI 81 of 2008 can be viewed on the Property Registration Authority website at www.prai.ie.

Conveyancing Committee

FOR BOOKINGS CONTACT MARY BISSETT OR PADDY CAULFIELD
TEL: 668 1806

Meet at the Four Courts LAW SOCIETY ROOMS *at the Four Courts*

firstlaw update

News from Ireland's online legal awareness service
Compiled by Flore Bouhey for FirstLaw

CONSTITUTIONAL LAW

Garda Síochána

Whether direction given by gardaí directing bank not to deal with plaintiff's account contravened plaintiff's constitutional rights – presumption of constitutionality – whether gardaí acted ultra vires *–* Criminal Justice Act 1994, *section 31 –* Criminal Justice (Theft and Fraud Offences) Act 2001, *section 21.*

The plaintiff successfully contested a US extradition warrant. He had received a cheque for US$95,890.07 through a US bank and lodged it to an account in the Bank of Ireland. The bank made a report, under section 57 of the *Criminal Justice Act 1994*, to the gardaí, who issued a direction pursuant to section 31(8) of the *Criminal Justice Act 1994*, as substituted by section 21 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*, to the bank not to deal in any way with the proceeds of the account. When the plaintiff sought payment out of the monies, the bank refused and the plaintiff issued proceedings. The plaintiff alleged that the direction given by the gardaí under section 31 contravened his constitutional and convention rights. The plaintiff alleged that the statute made no provision for a reasonable time limit within which the direction should remain operative.

Gilligan J held that the failure of the impugned section to provide for a time limit in relation to the direction to the bank was not, of itself, enough to displace the presumption that the section was constitutional. It was hard to see how any liability could attach to the bank in circumstances where it complied with a lawfully issued direction by a member of An Garda Síochána. The garda authorities, in not lifting the direction at a time when they knew there was not going to be any prosecution of the plaintiff in respect of the funds held by the direction, acted in a manner that was *ultra vires* their powers as provided for by section 31(8) of the act of 1994 and as substituted by section 21 of the act of 2001.

***Burns (plaintiff) v Bank of Ireland (defendant)*, High Court, Mr Justice Gilligan, 4/5/2007, 2005 no 2898P** [FL15099]

Habeas corpus

Lawfulness of detention – District Court warrant – default of payment of penalty – unpaid fine – public order offences – article 40.4 of the Constitution.

The applicant initiated *habeas corpus* proceedings to inquire into the legality of his detention pursuant to a warrant of execution. The applicant was convicted of public order offences and did not pay a fine imposed, resulting in the warrant of execution. The applicant alleged a conspiracy to incarcerate him.

Edwards J refused the application, holding that no basis was presented for an inquiry pursuant to article 40.4. There was no evidence of a conspiracy to incarcerate him.

***Riney (applicant) v Governor of Loughnan House Prison (respondent)*, High Court, Mr Justice Edwards, 21/3/2008, 2008 no 423 SS** [FL15029]

CRIMINAL LAW

Delay

Sexual offences – prosecutorial delay – leaking of information by gardaí – stress and anxiety – imprisonment – whether real risk of unfair trial.

This was an appeal from a High Court judgment refusing to prohibit the trial of the applicant in the Circuit Criminal Court on 104 charges of indecent assault on a number of pupils in a national school. The applicant raised issues of prosecutorial delay. He also emphasised that there had been leaking of information by the gardaí that led to vilification in the media. He submitted that the publicity had a detrimental effect and had caused pretrial stress and anxiety. The applicant also submitted that important witnesses had died or could not be traced and there was an absence of necessary documentation. The applicant also relied on his inability to remember persons and circumstances.

The Supreme Court dismissed the appeal and affirmed the order of the High Court refusing the application to injunct the trial, holding that the applicant had failed to establish matters so as to invoke the exceptional jurisdiction of the court. The applicant did not meet the required test for intervention and prohibition of a trial. In the circumstances as a whole, there was no real risk of an unfair trial. The trial would proceed under the control of a judge, who had a duty to ensure that the trial was fair.

***T(J) (applicant/appellant) v DPP (respondent)*, Supreme Court, 17/4/2008, SC no 270 of 2007** [FL15101]

Fair procedures

Jury trial – amendment of indictment after close of prosecution case – appeal from jury verdict – jury deliberating until late – risk of error on part of jury – whether jury verdict unsafe as a result of tiredness.

A jury convicted the applicant on counts of indecent assault. The applicant alleged that the trial judge had erred in law in amending the indictment after the close of the prosecution case and in allowing the jury to deliberate until 10pm, when they had been sitting all day and deliberating since 5pm. The applicant alleged that a real risk of an unfair verdict existed.

The Court of Criminal Appeal held that it was clear from the transcript that the day had been hot, oppressive, clammy and draining. There was a real danger that the jury were extremely tired and that a real risk of error on their part arose. It would not be safe to allow the verdict to stand.

***Director of Public Prosecutions (respondent) v (M)J (applicant)*, Court of Criminal Appeal, 14/3/2008, 236/06** [FL15014]

Practice and procedure

Validity of search warrant – district judge not sitting with jurisdiction when warrant obtained – extraordinary excusing circumstances – whether evidence obtained pursuant to warrant was admissible.

The applicant appealed his conviction for keeping prohibited goods, contrary to the *Finance Act 1999*, on the grounds, among other things, that the search warrant used was invalid, in that the district

judge who issued the warrant was not sitting in the district he was assigned to. The applicant further alleged that the trial judge erred in law in permitting the prosecution to reopen its case after completion of the evidence. The issue arose as to whether the evidence obtained was inadmissible and whether any extraordinary excusing circumstances existed to render the evidence admissible.

The Court of Criminal Appeal held that the warrant used was issued without jurisdiction and could not thus be relied upon. The conviction would thus be quashed.

***DPP (respondent) v Joyce (applicant)*, Court of Criminal Appeal, 21/4/2008, 105/07** [FL15149]

Road traffic

Case stated – hardship from fine and disqualification order – discretion of District Court – whether enactment of section 7 of the Road Traffic Act 2006 *deprives District Court of jurisdiction to remove disqualification order under section 29 of the* Road Traffic Act 1961 – Interpretation Act 2005.

A district judge posed a case stated to the High Court as to whether the jurisdiction to remove disqualifications imposed for a road traffic offence, as contained in section 29 of the *Road Traffic Act 1961*, was affected by section 7 of the *Road Traffic Act 2006*, so as to remove the court of its discretion. The applicant alleged that he had a legitimate expectation that he would be entitled to make an application for restoration of a driving licence. The respondent contended that the wording of the act of 2006 was clear and undisputed. An issue arose as to the application of the *Interpretation Act 2005*.

Dunne J held that the effect of the provisions of the new act was to remove the provision permitting an individual to apply to court to remove an imposed disqualification. The narrow interpretation asserted for by the respondent could not be adopted. The right to bring the application was 'acquired' within the meaning of section 27 of the *Interpretation Act 2005*. The applicants had acquired the right to apply for a restoration of their application.

***O'Sullivan (appellant) v Superintendent in charge of Togher Garda Station (respondent)*, High Court, Ms Justice Dunne, 1/4/2008, 2008 no 57 SS** [FL15145]

FAMILY LAW

Child abduction

Hague Convention *– removal to Ireland from Australia – order to return – jurisdiction of Australia – whether child settled in jurisdiction – whether there was grave risk to welfare of child.*

The High Court made an order in a *Hague Convention* case that a child be returned to its place of habitual residence, Australia. The issue arose, among other things, as to whether there was a grave risk as to the welfare of the child if returned to Australia. Allegations were made as to sexual contact between the respondent and the child. The parties had separated in Australia. Statements made by an Australian judge in proceedings were raised so as to demonstrate that grave risk existed as to the child if they had stayed in Australia.

The Supreme Court dismissed the appeal and affirmed the order of the High Court. If the appellant was dissatisfied with the decision of the Australian court, she could appeal the decision. The appellant could not make out a grave risk. There was no credible evidence that the Australian courts were unable or unwilling to protect the interests and welfare of the child. An undertaking would be required from the respondent.

***L(P) (applicant) v C(E) (respondent)*, Supreme Court, 11/4/2008, 065/2008** [FL1 5071]

PRACTICE AND PROCEDURE

Solicitors' law

Disciplinary procedures – appeal – Solicitors Disciplinary Tribunal – no prima facie *case for inquiry – Appeal* de novo – Solicitors Acts 1954-2002.

The appellant appealed a decision of the High Court, in turn on appeal from the Solicitors Disciplinary Tribunal, rejecting his complaint against the respondent solicitor. The appellant alleged, among other things, that the High Court had erred in law in its application of *Rondel v Worsley* and that the court had failed to address matters in the appeal.

The Supreme Court allowed the appeal, holding that the appeal to the High Court from the Solicitors Disciplinary Tribunal was an appeal *de novo*. The categorisation by the High Court of the complaints as procedural was correct. The appellant had not established a *prima facie* case and the case law as invoked by the High Court was correct.

***O'Reilly (appellant) v Lee (respondent)*, Supreme Court, 23/4/2008, 333/06** [FL1 5148] **G**

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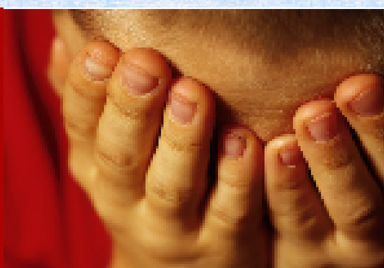

eurlegal

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

Public procurement and the ECJ: appropriate tender award procedures

The decision of the European Court of Justice in Case C-337/05, *Commission v Italian Republic (Agusta)*, 8 April 2008, provides guidance as to the circumstances in which the negotiated procedure, in the context of public supply contracts falling with the scope of Directive 93/36/EEC of 14 June 1993, are permitted.

The European Commission applied to the ECJ for a declaration that Italy had failed to fulfil its obligations under Council Directive 93/36/EEC (coordinating procedures for the award of public supply contracts, as subsequently amended by Directive 97/52/EC of 13 October 1997) by adopting a procedure of directly awarding contracts to Agusta SpA for the purchase of helicopters without any competitive tendering procedure and, in particular, without complying with the procedures provided for under those directives.

The commission submitted that it had established the existence of a general practice of directly awarding contracts for the purchase of Agusta and Agusta Bell helicopters to cover the requirements of various military and civilian corps of the Italian state. It referred to several contracts concluded in the period 2000 to 2003 with various state agencies. In relation to the period prior to the year 2000, the Italian authorities admitted having purchased helicopters without any competitive tendering procedure. The commission further observed that the fleets of the state corps concerned were formed exclusively of such helicopters, none of which was purchased following a competitive tendering procedure at community level. As those contracts satisfied the conditions specified by Directive 93/36, the commission submitted that they should have been the subject of an open or a restricted procedure, in compliance with article 6 of that directive, but not of a negotiated procedure.

Italy submitted that the supplies intended for the military corps of the Italian state are covered by articles 296 EC and 2(1)(b) of Directive 93/36. Those provisions were applicable, it submitted, because the helicopters in question are 'dual-use' items, that is, they may serve both military and civilian purposes. It further contended that, because of the technical specificity of the helicopters and of the additional dual nature of the supplies in question, it could, pursuant to article 6(3)(c) and (e) of Directive 93/36, use the negotiated procedure. More generally, it stated that its practice did not differ from that implemented in the majority of the member states that produce helicopters. It argued finally, that, until the end of the 1990s, the relations of the Italian state with Agusta could be analysed as 'in-house' relations, as referred to in Case C-107/98, *Teckal* [1999] ECR I-8121.

'In-house' relationship

The court averred that it was settled case law that a call for tenders under the directives relating to public procurement is not compulsory, even if the contracting party is an entity legally distinct from the contracting authority, where two conditions are met. First, the public authority, which is a contracting authority, must exercise over the distinct entity in question a control that is similar to that which it exercises over its own departments and, second, that entity must carry out the essential part of its activities with the local authority or authorities that control it (Case C-107/98, *Teckal*, para 50; Case C-26/03, *Stadt Halle and RPL Lochau* [2005] ECR I-1, para 49; Case C-84/03, *Commission v Spain* [2005] ECR I-139, para 38; Case C-29/04, *Commission v Austria* [2005] ECR I-9705, para 34; Case C-340/04, *Carbotermo and Consorzio Alisei* [2006] ECR I-4137, para 33; and Case C-295/05, *Asemfo* [2007] ECR I-2999, para 55).

It therefore fell to be examined whether the conditions required by that case law were met in the case under consideration.

In relation to the first condition, which concerned the public authority's control, the court stated that it was important to note that the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority in question is also a participant excludes in any event the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments (see *Stadt Halle and RPL Lochau*, para 49).

In that regard, the court stated that it had been shown by the study, annexed to the defence, of the Italian state's shareholdings in EFIM, Finmeccanica and Agusta that the latter had, since its formation, been a company governed by private law and that it had, since 1974, always been a private company with government participation – that is, a company whose capital is held in part by that state and in part by private shareholders. It followed that, since Agusta is a company in part open to private capital, the Italian state cannot exercise over that company a control similar to that which it exercises over its own departments.

The court averred that, in those circumstances and without the necessity of examining whether Agusta carries out the essential part of its activities with the concession-granting public authority, the Italian republic's argument that there was an 'in-house' relationship between that company and the Italian state must be rejected.

In relation to measures adopted by member states in connection with the legitimate requirements of national interest, the court noted that such measures are not excluded in their entirety from the application of community law solely because they are taken in the interests of public security or national defence (see Case-186/01, *Dory* [2003] ECR I-2479, para 30). As the court had already held, the treaty provides for derogations applicable in situations that may involve public safety, in particular, in articles 30, 39, 46, 58, 64, 296 and 297 EC, which deal with exceptional and clearly defined cases. The court stated that it could not be inferred from those articles "that the treaty contains an inherent general exception excluding all measures taken for reasons of public security from the scope of community law". The recognition of the existence of such an exception would be liable to impair the binding nature of community law and its uniform application (see Case C-222/84, *Johnson* [1986] ECR 1651, para 26; Case C-273/97, *Sirdar* [1999] ECR I-7403, para 16; Case C-285/98, *Kreil* [2000] ECR I-69, para 16; and *Dory*, para 31).

In that regard, the court stated that it is for the member state that seeks to rely on those exceptions to furnish evidence that the exceptions in question do not go beyond the limits of such exceptional cases (see Case C-414/97, *Commission v Spain* [1999] ECR I-5585, para 22).

The court referred to the Italian state's contention that the purchase of Agusta and Agusta Bell helicopters met the legitimate requirements of national interest foreseen in articles 296 EC and 2(1)(b) of Directive 93/36 on the ground that those helicopters are dual-use items. Article 2(1)(b) provides that the directive is not to apply to "supply contracts which are declared secret or the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the member states concerned or when the protection of the basic interests of the member state's security so requires".

The court stated that it was important to point out that, under article 296(1)(b) EC, any member state may take such measures as it considers necessary for the protection of the essential interests of its security and which are connected with the production of or trade in arms, munitions and war materials – provided, however, "that such measures do not alter the conditions of competition in the common market regarding products which are not intended for specifically military purposes".

Italy takes a direct hit for failure to engage in competitive tendering

It was clear from the wording of that provision that the products in question must be intended for specifically military purposes. It followed that the purchase of equipment, the use of which for military purposes is hardly certain, must necessarily comply with the rules governing the award of public contracts. The supply of helicopters to military corps for the purpose of civilian use must comply with those same rules. As it had been established that the helicopters in question, as Italy had admitted, were certainly for civilian use and possibly for military use, the court stated that article 296(1)(b) EC, to which article 3 of Directive 93/36 refers, could not properly be invoked to justify recourse to the negotiated procedure for the purchase of those helicopters.

As regards the fact that Italy had not stated the reasons for which it submitted that the confidentiality of the information submitted for the production of the helicopters manufactured by Agusta would be less well guaranteed were such production entrusted to other companies, be they established in Italy or other member states, the court stated that the requirement to impose an obligation of confidentiality "in no way prevents the use of a competitive tendering procedure for the award of a contract".

Therefore, the court found that resort to article 2(1)(b) of Directive 93/36 to justify the purchase of the helicopters in question by the negotiated procedure seemed to be disproportionate as regards the objective of preventing the disclosure of sensitive information relating to their production. Italy had not shown that such an objective was unattainable within a competitive tendering procedure such as that specified by the same directive. It followed that article 2(1)(b) could not properly be invoked to justify the use of the negotiated procedure for the purchase of those helicopters.

Homogeneity of the fleet

The court then addressed the Italian state's attempt to justify use of the negotiated procedure by reference to article 6(3)(c) and (e) of Directive 93/36. Article 6(1) to (3) of the directive provides, in the relevant part:

1) In awarding public supply contracts, the contracting authorities shall apply the procedures defined in article 1(d), (e) and (f) in the cases set out below.
2) The contracting authorities may award their supply contracts by negotiated procedure in the case of irregular tenders in response to an open or restricted procedure or in the case of tenders that are unacceptable under national provisions that are in accordance with provisions of title IV, insofar as the original terms for the contract are not substantially altered. The contracting authorities shall in these cases publish a tender notice unless they include in such negotiated procedures all the enterprises satisfying the criteria of articles 20 to 24, which, during the prior open or restricted procedure, have submitted tenders in accordance with the formal requirements of the tendering procedure.
3) The contracting authorities may award their supply contracts by negotiated procedure without prior publication of a tender notice, in the following cases:
   - When, for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the products supplied may be manufactured or delivered only by a particular supplier,
   - For additional deliveries

by the original supplier that are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire material having different technical characteristics, which would result in incompatibility or disproportionate technical difficulties in operation and maintenance. The length of such contracts as well as that of recurrent contracts may, as a general rule, not exceed three years.

The Italian state submitted that, first, having regard to their technical specificity, the manufacture of the helicopters in question could be entrusted only to Agusta and, second, that it was necessary to ensure the interoperability of its fleet of helicopters, in order, particularly, to reduce the logistic, operational and pilot-training costs.

The court, referring in particular to the 12th recital in the preamble to Directive 93/36, stated that it was clear that the negotiated procedure is exceptional and may be applied only in cases that are set out in an exhaustive list. It is to that end that article 6(2) and (3) of the directive exhaustively and expressly lists the only exceptions for which recourse to the negotiated procedure is allowed (see *Teckal*, para 43, and Case C-84/03, *Commission v Spain*, para 47). According to settled case law, the derogations from the rules intended to ensure the effectiveness of the rights conferred by the treaty in connection with public contracts must be interpreted strictly (see Case C-57/94, *Commission v Italy* [1995] ECR I-1249, para 23; Case C-318/94, *Commission v Germany* [1996] ECR I-1949, para 13; and Case C-394/02, *Commission v Greece* [2005] ECR I-4713, para 33).

To prevent Directive 93/36 being deprived of its effectiveness, the member states could not, therefore, provide for the use of the negotiated procedure in cases not provided for by that directive, or add new conditions to the cases expressly provided for by that directive that make that procedure easier to use (see, to that effect, Case C-84/03 *Commission v Spain*, para 48).

The court averred that, in addition, the burden of proving the existence of exceptional circumstances justifying the derogation from those rules lies on the person seeking to rely on those circumstances (see Case C-199/85, *Commission v Italy* [1987] ECR 1039, para 14, and *Commission v Greece*, para 33). In the case under consideration, the Italian state had not discharged the burden of proof as regards the reason for which only helicopters produced by Agusta would be endowed with the requisite technical specificities.

Further, the Italian state had confined itself to pointing out the advantages of the interoperability of the helicopters used by its various corps – it had not, however, demonstrated in what respect a change of supplier would have constrained it to acquire material manufactured according to a different technique and likely to result in incompatibility or disproportionate technical difficulties in operation and maintenance. The court, having regard to all the above, gave a declaration in the terms as sought by the commission. **G**

James Kinch is a senior executive solicitor in the law department of Dublin City Council.

Recent developments in European law

DESIGNATION OF ORIGIN

Case C-132/05, *Commission of the European Communities v Federal Republic of Germany*, 26 February 2008. Regulation 2081/92 protects designations of origin registered with the EC against "any misuse, imitation or evocation". Generic names may not be registered. The commission brought proceedings against Germany on the basis that it did not protect the designation 'Parmigiano Reggiano' sufficiently. It called on Germany to take action to stop the marketing of products sold under the name 'parmesan' that do not comply with the specification for the designation of 'Parmigiano Reggiano. The ECJ held that it is not only the exact form in which a designation has been registered that is protected under EC law. 'Parmesan' is phonetically and visually similar to 'Parmigiano'. For this reason, use of the name 'parmesan' must be regarded as an evocation of 'Parmigiano Reggiano'. Germany had failed to show that the name 'parmesan' is generic. Member states have a duty to take national measures to ensure full application of the regulation. The German legal system provides instruments that are capable of guaranteeing protection of the interests of producers and consumers alike. A member state is not obliged to take, on its own initiative, measures in order to penalise the infringement on its territory of designations from another member state.

EMPLOYMENT

Case C-506/06, *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG*, 26 February 2008. Ms Mayr was employed as a waitress by the respondent in Salzburg from 3 January 2005. She was undergoing *in vitro* fertilisation treatment. She was certified sick by her doctor from 8-13 March 2005. On 10 March, she was informed by telephone that she was dismissed from 26 March. By letter of the same date, she informed her employer that, in the course of her treatment, the transfer of the fertilised ova was planned for 13 March. On the date when she was dismissed, her ova had been fertilised and thus *in vitro* fertilised ova already existed. Three days after she was informed of the dismissal, two fertilised ova were transferred into her uterus. She argued that, from the date on which *in vitro* fertilisation of her ova took place, she was entitled to the protection against dismissal provided by Austrian legislation. She claimed payment of her salary and *pro rata* annual remuneration. The Austrian court asked for guidance on whether, under the directive on the safety and health at work of pregnant workers (92/85/EEC), a woman is pregnant before her fertilized ova have been transferred into her uterus. The ECJ held that the protection of the directive cannot be extended to a worker where the *in vitro* fertilised ova have not yet been transferred into her uterus. The court reached this decision on the basis of the principle of legal certainty. Otherwise, the benefit of the protection could be granted even where the transfer of the fertilised ova is postponed, for whatever reason, for a number of years, or even where such a transfer is

definitively abandoned. A worker who is undergoing *in vitro* fertilisation treatment can rely on the protection against discrimination on grounds of sex that is granted by the directive on equal treatment for men and women (76/207). This sort of treatment directly affects only women. The dismissal of a worker essentially because she is undergoing such treatment constitutes direct discrimination on grounds of sex. Such a dismissal would be contrary to the objective of protection pursued by the directive. It is up to the referring court to decide whether the dismissal was essentially based on the fact that she was undergoing *in vitro* fertilisation treatment.

ENVIRONMENTAL

Case C-188/07, *Commune de Mesquer v Total France SA and Total International Ltd*, 13 March 2008, opinion of Advocate General Kokott. The Commune of Mesquer in Brittany brought an action against the Total Group seeking repayment of the costs it incurred in respect of its clean-up of oil pollution from a tanker sinking in 1999. The French Cour de Cassation made a reference to the ECJ for an interpretation of provisions of Directive 75/442 on waste. The French court asked whether discharged heavy fuel-oil discharge falls within the meaning of waste for the purposes of EC law and whether those involved in producing, selling or carrying the heavy fuel oil, without actually transporting it, are also liable for disposing of the pollution damage caused. Advocate General Kokott concluded that heavy fuel oil is to be treated as waste for the purposes of EC law if it is discharged in a tanker accident and is mixed with water and sediment. In accordance with the *Waste Framework Directive*, the financial burden of the disposal operations should be on the persons who cause the waste. This applies whether these are the holders or former holders of the waste or even producers of the product from which the waste came. The Total companies are the producers of the heavy fuel oil and/or the seller and the carrier. If responsibility for costs were to be assessed solely on the basis of the *Waste Framework Directive*, they would have to be ordered to bear the cost of disposing of the oil waste following the tanker accident, insofar as they can be accused of contributing personally to causing the leak of the heavy fuel oil. The advocate general went on to analyse the effects that international agreements binding on France might have on liability under the *EC Waste Directive*. The *International Convention on Civil Liability for Oil Pollution Damage* precludes any claim for compensation in France against anyone other than the owner of the ship, unless the damage was caused intentionally or recklessly. That exclusion from liability is a permissible way of making full use of the scope granted to the member states in relation to the implementation of the polluter-pays principle. She then looked at the 1971 *Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*. She found the limitation on the liability of both the ship's owner and the international fund to be compatible with the polluter-pays principle. It is justified to apportion to the general public a causal contribution for oil accidents and some of the risk, since the contracting states to that convention – which include almost all of the EU member states – permit risky maritime oil transportation and accept the risk of having to bear further costs. Thus, it is compatible with the polluter-pays principle to limit the liability of the producer of heavy fuel oil and/or the seller and carrier in accordance with the liability and the fund conventions.

STATE AID

Case C-419/06, *Commission of the European Communities v Hellenic Republic*, 14 February 2008. The Greek national airline, Olympic Airlines, encountered severe financial difficulties. The company was restructured but eventually a new company was set up in late 2003. The new company received the assets of the 'flights' division of Olympic, while the old company retained substantial liabilities. The commission considered the restructuring of the company to be state aid. The new company had also received other financial assistance and support, as well as various forms of subsidies. These included rental payments for the subleasing of aircraft, overvaluation of assets when the new company was created, payment by the Greek state instead of the airline of certain bank loans and leases, and the Greek state's forbearance with regard to taxes and social security contributions. The commission rules that these forms of support were state aid and that Greece was under an obligation to recover the various aids without delay. The Greek state was also to immediately suspend the granting of any additional aid. Greece challenged the validity of the commission decision and also submitted that the commission had failed to provide a reliable method of calculation to make possible a determination of the aid amounts to be recovered. The ECJ upheld the validity of the commission decisions and found that Greece had not fulfilled its obligations on foot of these decisions. The court held that, in the context of an action for failure to fulfil obligations, a member state to which a state-aid decision has been addressed cannot validly justify failure to implement that decision on the basis of its alleged illegality. **G**

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Registration of Deeds and Title Acts 1964 and 2006

An application has been received from the registered owners mentioned in the schedule hereto for an order dispensing with the land certificate issued in respect of the lands specified in the schedule, which original land certificate is stated to have been lost or inadvertently destroyed. The land certificate will be dispensed with 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.

Property Registration Authority, Chancery Street, Dublin 7 (published 6 June 2008)

Regd owner: Patrick and Sheila O'Byrne; folio: 496F; lands: Tinriland and barony of Carlow; **Co Carlow**

Regd owner: Patrick Kennedy; folio: 936F; lands: Ardnehue and barony of Carlow; **Co Carlow**

Regd owner: Patrick Keogh (deceased); folio: 1726F; lands: Aclare and Myshall and barony of Forth; **Co Carlow**

Regd owner: William Rowntree Vogan; Drutamon, Canningstown, Cootehill, Co Cavan; folio: 11349; lands: Drutamon, Legland, Dooreagh and Turfad; **Co Cavan**

Regd owner: John McAuliffe; folio: 44441; lands: plot of ground situate in the townland of Cummery Connell South and barony of Duhallow in the county of Cork; **Co Cork**

Regd owner: Frank Croston and Catherine Croston; folio: 23631F; lands: plot of ground situate in the townland of Gortnamucklagh and barony of Carbery West (East Division), in the county of Cork; **Co Cork**

Regd owner: Finbar Power: folio: 522F; lands: plot of ground situate in the townland of Rodeen and barony of Bear in the county of Cork; **Co Cork**

Regd owner: Geraldine Browne, Porthall, Lifford, Co Donegal; folio: 6525F; lands: Coneyburrow; **Co Donegal**

Regd owner: John Burke and Margaret Burke, folio: DN5286F; lands: property situate in the townland of Cornelscourt and barony of Rathdown; **Co Dublin**

Regd owner: James Corr; folio: DN6099L; lands: property situate in the townland of Santry and barony of Coolock; **Co Dublin**

Regd owner: William Cummins (one undivided half share) and Maura Cummins (one undivided half share); folio: DN92923L; lands: property known as apartment 69, Fourth Floor, Spencer House, Custom House Square, in the parish of St Thomas and in the district of North Central and in the county borough of Dublin; **Co Dublin**

Regd owner: Patrick Duffy and Eva Duffy; folio: DN9839F; lands: property situate in the townland of Huntstown and barony of Castleknock; **Co Dublin**

Regd owner: Christopher Daly and Frances Daly; folio: 31601L; lands: property situate on the south side of Walnut Rise in the parish of Clonturk, district of Drumcondra; area: approximately 0.66 hectares; **Co Dublin**

Regd owner: Paul Howard; folio: DN48114L; lands: property situated to the east of the Belgard Road in the town of Tallaght; **Co Dublin**

Regd owner: James Kenny; folio: DN39997F; lands: property known as 12 St Enda's Road, situate in the parish of Rathfarnham and district of Rathmines; **Co Dublin**

Regd owner: James and Margaret Kennedy; folio: DN30695L; lands: property situate to the east side of Ballymun Road in the parish and district of Santry; **Co Dublin**

Regd owner: David Harold John and Rose Ellen Maria John; folio: DN8526L; lands: property situate in the townland of Sheepmoor and barony of Castleknock; **Co Dublin**

Regd owner: Francis McGrath; folio: DN 6124; lands: property situate in the townland of Killakee and property situate in the townland of Woodtown and barony of Uppercross; **Co Dublin**

Regd owner: Maire Ni Uaiteir; folio: DN3557F; lands: a plot of ground shown as 10 Huntstown Lawn, being part of the townland of Blakestown and barony of Castleknock; **Co Dublin**

Regd owner: Christopher J Toal; folio: DN29751F; lands: a plot of ground known as 1 Clarence Mangan Road, situate in the parish of St Catherine's and district of South Central; **Co Dublin**

Regd owner: Ethel Dora Murdock; folio: DN74370L; lands: the property known as 31 Achill Road Upper, Drumcondra, situate in the parish of Clonturk and district of Drumcondra; **Co Dublin**

Regd owner: Martin Coppinger and Pauline Coppinger; folio: 4313; lands: townland of Glennamucka and barony of Tiaquin; area: 7 acres, 1 rood; **Co Galway**

Regd owner: William J Kennedy; folio: 34009F; lands: townland of Pollagh and barony of Galway; area: 1.445 hectares; **Co Galway**

Regd owner: Seamus Lynch and Julia Lynch; folio: 19127F; lands: townland of Loughglass South, Fairfield and Leaha, and barony of Ballymoe and Leaha; **Co Galway**

Regd owner: Liam McGloinn; folio: 76135F; lands: townland of Tirneevin and Gortnasteal and barony of Kiltartan; **Co Galway**

Regd owner: Joseph Patrick O'Shaughnessy; folio: 36403; lands: townland of Knockogonnell and barony of Ballymoe; area: 0.4550 hectares; **Co Galway**

Regd owner: Donal Hickey and Margaret Hickey; folio: 35499F; lands: townland of Knocknacarragh and barony of Galway; area: 0.02 hectares approximately; **Co Galway**

Regd owner: Christopher Houlihan; folio: 14252F; lands: townland of Knoppoge and barony of Clanmaurice; **Co Kerry**

Regd owner: Thomas Lynch; folio: 35356; lands: townland of Glanfahan and barony of Corkaguiny; **Co Kerry**

Regd owner: Dermot and Ann Sullivan; folio: 10914F; lands: townland of Claddanure West and Dunkerron and barony of Dunkerron South; **Co Kerry**

Regd owner: Martin Brassil and Deirdre Brassil, 738 Rowanville, Kildare, Co Kildare; folio: 12071F; lands: townlands of Dunmurry West, known as Dunmurry West, Dunmurry, Kildare, in the barony of Offaly East, in the electoral division of Dunmurry; **Co Kildare**

Regd owner: Michael Duffey and Therese Duffey of Ballymount, Colinstown, Co Kildare; folio: 351; lands: townland of Ballymount and barony of Narragh and Reban East; **Co Kildare**

Regd owner: Thomas O'Connell, deceased; folio: 3698; lands: Rathduff, known as Killarney Cross, Rathduff, Thomastown, and barony of Philipstown Lower; **Co Kilkenny**

Regd owner: Noeleen Phelan; folio: 11644; lands: Ballyhale and barony of Knocktopher; **Co Kilkenny**

Regd owner: Eamon Gibbons; folio: 10678; lands: Killoshaulan and barony of Crannagh; **Co Kilkenny**

Regd owner: James and Susan Hanly; folio: 4120F; lands: Springhill, known as Killeshin Road, and barony of Slievemargy, Carlow; **Co Laois**

Regd owner: Harry Mercier, Lily Mercier, John Burgess Lawson; folio: 18547; lands: Durrow Townparks and barony of Clarmallagh; **Co Laois**

Regd owner: Liam Hickey; folio: 18959; lands: townland of Ballysimon and barony of Clanwilliam; **Co Limerick**

Regd owner: Catherine Ryan; folio: 10470; lands: townland of Feloree and barony of Clanwilliam; **Co Limerick**

Regd owner: Cornelius and Margaret Kelleher; folio: 13070F and 11639F; lands: townland of Newcastle and barony of Clanwilliam; **Co Limerick**

Regd owner: Dalach Carey; folio: 5302F; lands: townland of Routagh and barony of Clanwilliam; **Co Limerick**

Regd owner: Denis Collins; folio: 11730; lands: townland of Glenquin and barony of Glenquin; **Co Limerick**

Regd owner: Timothy Coughlan; folio: 21930; lands: townland of Kilbreed and barony of Coshma; **Co Limerick**

Regd owner: Martin Griffin; folio: 3190; lands: townland of Knockanes and barony of Coshma; **Co Limerick**

Regd owner: James Coburn and Georgina Conlon, 16 St Mary's Road, Dundalk, Co Louth; folio: 826L; lands: Marshes Upper; **Co Louth**

Regd owner: Thomas Cawley; folio: 38368 and 38369; lands: townland of Massbrook South and barony of Tirawley; **Co Mayo**

Regd owner: James Doherty; folio: 39976; lands: townland of Rockfield and barony of Carra; area: 26 acres, 2 roods, 16 perches; **Co Mayo**

Regd owner: Patrick Naughton; folio: 44918; lands: townland of Belgarrow and barony of Gallen; **Co Mayo**

Regd owner: Margaret Taylor Doyle and Frances Taylor Knauss (as tenants-in-common); folio: 8265; lands: townland of Clooncah and barony of Costello; area: 14.9733 hectares; **Co Mayo**

Regd owner: Patrick Birt, Site 1 Ennistown, Fairyhouse Road, Ratoath, Co Meath; folio: 10544; lands: Ennistown; **Co Meath**

Regd owner: Rose Grehan, Toor, Ballinabrackey, Co Meath; folio: 16594; lands: Toor; **Co Meath**

Regd owner: Christopher Crowe, Junior; Drumbarragh, Newbliss, Co Monaghan; folio: 2551F; lands: Drumbarragh and Cormoy; **Co Monaghan**

Regd owner: Kevin Daly; folio: 2139F; lands: Barnan and barony of Philipstown Lower, **Co Offaly**

Regd owner: Seamus Houlihan; folio: 12593; lands: Shinrone and barony

of Clonlisk; **Co Offaly**

Regd owner: Patrick Seery; folio: 10368; lands: Ballindown and barony of Eglish; **Co Offaly**

Regd owner: Denis and Natalyia Shiel; folio: 6950F; lands: Kilcruttin, in the barony of Ballycowan; **Co Offaly**

Regd owner: John Healy; folio: 32754; lands: townland of Bunnamucka, Cloonsreane, Mongagh, Drinagh and Falsk, in the barony of Roscommon; **Co Roscommon**

Regd owner: Oliver Trimble and Ruth Malone; folio: 22329F; lands: townland of Cloonaddra and barony of Ballintober South; area: 0.3237 hectares; **Co Roscommon**

Regd owner: Eileen T McLoughlin; folio: 35908; lands: townland of Derriniskey and barony of Boyle; **Co Roscommon**

Regd owner: Frank McGowan; folio: 10688; lands: townland of Tunnagh and barony of Corran; area: 7.3122 hectares; **Co Sligo**

Regd owner: Noel and Nuala Coffey; 14171F; lands: townland of Shower and Foxhall and barony of Owney and Arra; **Co Tipperary**

Regd owner: Martin Egan; folio: 2659F; lands: townland of Monroe East and barony of Iffa and Offa West; **Co Tipperary**

Regd owner: Thomas Larkin; folio: 7469F; lands: the property being certain lands at Kilsheehan, Clonmel, in the county of Tipperary; **Co Tipperary**

Regd owner: James Phelan; folio: 26842; lands: townland of Cappaghnagarrane and barony of Slievardagh; **Co Tipperary**

Regd owner: Pat and Sheila Lee; folio: 2910F; lands: townland of Regaile and barony of Middlethird; **Co Tipperary**

Regd owner: Mary Tobin; folio: 14393F; lands: townland of Bowling Green and barony of Eliogarty; **Co Tipperary**

Regd owner: Michael Halley; folio: 13688F; lands: plot of ground situate in the townland of Ballyshonock and barony of Decies without Drum in the county of Waterford; **Co Waterford**

Regd owner: Block Drug Dungarvan Ltd (formerly Stafford-Miller (Ireland) Limited); folio: 3785L; lands: plot of ground situate in the townland of Clogherane and barony of Decies without Drum in the county of Waterford; **Co Waterford**

Regd owner: Esther Cleary and Michael Cleary; folio: 8866F; lands: plot of ground in the parish of Trinity Without, Division C, and barony of Waterford; **Co Waterford**

LAW SOCIETY **Gazette**

PROFESSIONAL NOTICE RATES

RATES IN THE PROFESSIONAL NOTICE SECTION ARE AS FOLLOWS:

- **Lost land certificates** – €138.50 (incl VAT at 21%)
- **Wills** – €138.50 (incl VAT at 21%)
- **Title deeds** – €138.50 per deed (incl VAT at 21%)
- **Employment/miscellaneous** – €138.50 (incl VAT at 21%)

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Regd owner: Brendan Gallagher and Noeleen Gallagher; folio: 11449F and 3630; lands: Dunmore and barony of Gaultiere; **Co Waterford**

Regd owner: Philip and Margaret McGuire; folio: 937L; lands: Whiterock South and barony of Forth; **Co Wexford**

Regd owner: James and Ingrid O'Connor; folio: 16915; lands: Ballinesker and barony of Ballaghkeen; **Co Wexford**

Regd owner: John McDonagh; folio: 9988F; lands: Enniscorthy and barony of Scarawalsh; **Co Wexford**

Regd owner: Marita Ryan, Beech Loose, Beech Road, Arklow, Co Wicklow; folio: 7826; lands: townland of Shelton and barony of Arklow; **Co Wicklow**

Regd owner: Frederick Arthur Fennell (deceased) of Park House, Clonegal, Co Carlow; folio: 777; lands: townland of Park (ED Ballingate), known as Park, Clonegall, Enniscorthy, in the barony of Shillelagh, in the electoral division of Ballingate; **Co Wicklow**

Regd owner: Margaret Kavanagh (spinster) (deceased) of Sraghmore Hill, Sraghmore, Roundwood, Co Wicklow; folio: 4021; townland of Sraghmore, in the barony of Ballinacor North in the electoral division of Togher; **Co Wicklow**

Regd owner: Brid Heinl (schoolteacher), c/o 29 Wicklow Street, Dublin, is full owner of property number(s) 1 and 2; folio: 3280F; lands: townland of Tinode and barony of Talbotstown Lower; **Co Wicklow**

Regd owner: Joseph Kelly (farmer) of Lisheens, Brittas, Co Dublin; folio: 4606F; lands: townland of Lisheens and barony of Talbotstown Lower; **Co Wicklow**

WILLS

Brady, Daniel Frank (deceased), late of 5 Calderwood Avenue, Glasnevin, Dublin 9, who died on 23 February 2007 at Hampstead Private Hospital, Glasnevin. Would any person having knowledge of a will made by the above-named deceased please contact Gerrard L McGowan, Solicitors, The Square, Balbriggan, Co Dublin; tel: 01 841 2115, fax: 01 841 2037, email: info@glmcgowan.ie

Conroy, James (deceased) (otherwise and/or also known as Jimmy), late of Urney House, Cloneygowan, Co Offaly, who died on 14 August 2007. Would any person having knowledge of a will being made by the above-named deceased please contact Rollestons, Solicitors, Church Street, Portlaoise, Co Laois, tel: 057 862 1329, fax: 057 862 0737, email: info@rollestons.ie – ref: CON0004 12 59 62

Coghlan, Michael (deceased), late of 11 Orchardstown Drive, Templeogue, Dublin 14. Would any person having knowledge of a will made by the above-named deceased, who died on 17 November 2006, please contact Killeen, Solicitors, 14 Mountjoy Square, Dublin 1; tel: 01 855 5587, fax: 01 855 4091, email: info@killeensolrs.ie

Donnelly, Kathleen (deceased), late of 80 Kilgobbin Road, Sandyford, in the county of Dublin. Would any person having any knowledge of a will made by the above-named deceased, who died on 6 June 2007, please contact Messrs Cullen & O'Beirne, Suite 338B, The Capel Building, Mary's Abbey, Dublin 7; tel: 01 888 0855, fax: 01 888 0820, email: info@cullenobeirne.ie

Faherty, Ann (deceased), late of 54 The Green, College Road, Galway; date of death: 10 January 2008. Would any person with any knowledge of a will executed by the above-named deceased, who died on 10 January 2008, please contact Messrs Padhraic Harris & Company, Solicitors, Merchants Gate, Merchants Road, Galway; tel: 091 562 062, fax: 091 566 653, email: cirwin@harrissolrs.ie

Gunning, Angela (deceased), late of 27 Martin Street, Portobello, Dublin 8. Would any person having knowledge of the whereabouts of a will executed by the above deceased on 3 October 2001, who died on 14 March 2007, please contact John C Walsh & Company, Solicitors, 24 Ely Place, Dublin 2; tel: 01 676 6211, fax 01 661 1420

Horan, James (Jim) (deceased), late of St Julien, Clash Road, Little Island, Cork, who died on 9 February 2007. Would any person having any knowledge of a will made by the above-named deceased please contact Eoin C Daly Mallon, Solicitors, 38 South Mall, Cork; tel: 021 427 5244, fax: 021 427 5243

Lacey, Ellen (deceased), late of 17 St Patrick's Crescent, Monkstown Farm, Dun Laoghaire, Co Dublin, who died on 19 February 2008. Would any person having any knowledge of a will made by the above-named deceased please contact Margaret Lacey; tel: 01 282 0424

McArdle, Noel (deceased), late of 192 Larkhill Road, Whitehall, Dublin 9. Would any person having knowledge of the whereabouts of the original will, dated 31 July 1990, executed by Noel McArdle, who died on 6 July 1995, please contact McKeever Taylor, Solicitors, 31 Laurence Street, Drogheda. Co Louth; tel: 041 983 8639, fax: 041 983 9762

McGurgan, Maureen (deceased), late of Cedarville Bough, Rathvilly, Co Carlow. Would any person having knowledge of a will made by the above-named deceased, who died on 6 March 2008, please contact Francis B Taaffe & Co, Solicitors, Edmund Rice Square, Athy, Co Kildare; tel: 059 863 8181, email: fbtaaffe@indigo.ie

O'Beirne, John Anthony (otherwise Tony) (deceased), late of 27 Greentrees Road, Dublin 12, retired garda, who died on 26 September 2007. Would any person having knowledge of a will by the above-mentioned deceased after 6 October 1988 please contact Thomas Montgomery & Son, Solicitors, 5 Anglesea Buildings, Upper Georges St, Dun Laoghaire, Co Dublin; tel: 01 280 8632, fax: 01 284 3845, email: info@montgomerysolicitors.ie

MISCELLANEOUS

Missing person: Cullen, Christopher Patrick, born on 25 August 1938 at 11 Loreto Road, Maryland, Dublin 8. Would any person having knowledge of the whereabouts of the aforementioned Christopher Cullen, who it is believed moved to North Hampton, England, circa 1956 and may also have lived in either Devon or Portsmouth in England. Christopher last returned to Ireland in 1982 for a number of months, following which it is believed he returned to England and has not been heard of since. Would any person having any knowledge of his whereabouts please contact John Gaynor & Co, Solicitors, 42/46 Thomas Street, Dublin 8; tel: 01 454 0068 or 01 453 7375, email: info@jgaynorsolicitors.ie

London solicitors will be pleased to advise on UK matters and undertake agency work. We handle probate, litigation, property and company/commercial. Parfitt Cresswell, 567/569 Fulham Road, London SW6 1EU; DX 83800 Fulham Broadway; tel: 0044 2073 818311, fax: 0044 2073 814044, email: arobbins@parfitts. co.uk

TITLE DEEDS

Estate of Patrick Farrell – any solicitor holding/having knowledge of an original deed of transfer made 4 July 1957 between Michael Hynes and Patrick Hynes of the one part and Andrew Farrell and/or Patrick Farrell of the other part, relating to lands in folio 45451, Co Galway, please contact TA O'Donoghue & Son, Solicitors, Dublin Road, Tuam, Co Galway; tel: 093 24751, email: taodonoghue@eircom.net

Notice of intention to acquire the fee simple (section 4). In the matter of the *Landlord and Tenant Acts 1967-1994* and in the matter of an arbitration: an application by Michael Bourke and Maureen Bourke, Kilbrennal, Killenaule, Co Tipperary. Notice dated 14 February 2008

To: the personal representatives, trustees and persons beneficially entitled in the estate of TWN Quinn, which estate formerly held lands and premises adjoining the town of Killenaule and houses and premises in the town of Killenaule containing 219 acres and 20 perches statute measure or thereabouts, in the barony of Slievardagh and county of Tipperary, under a lease of lives renewable forever.

And to: the personal representatives, trustees and persons beneficially entitled in the estate of PV Waldron, which estate formerly held lands and premises adjoining the town of Killenaule and houses and premises in the town of Killenaule containing 219 acres and 20 perches statute measure or thereabouts, in the barony of Slievardagh and county of Tipperary in fee simple.

1. This notice refers to all that and those the premises comprising the dwellinghouse, garage and out offices situate at Bailey Street, Killenaule, in the barony of Slievardagh and county of Tipperary, more particularly delineated on the map annexed hereto.

2. The applicants, of Kilbrennal, Killenaule, county of Tipperary, are yearly tenants of the aforesaid premises, pursuant to deed of assignment dated 16 July 1973 made between Richard Davey of the one part and Michael Bourke and Maureen Bourke of the other part, in which the yearly tenancy made between the estate of TWN Quinn and John McCormack was ultimately assigned to the said applicants yielding and paying the yearly rent of 0.88c (£0.69p) but indemnified against payment thereof.

Take notice that Michael Bourke and Maureen Bourke, being the persons entitled to acquire the fee simple in the land described above under part 11 of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978*, propose to purchase the fee simple in the land described above.

And further take notice that, on 9 June 2008 at 10 o'clock in the forenoon or at the first available opportunity thereafter, this application to purchase the fee simple in the lands described above shall be determined before the county registrar sitting at the courthouse, Clonmel, in the county of Tipperary.

Date: 6 June 2008

Signed: Anne Fitzpatrick & Co (solicitors for the applicants), Slievenamon Road, Thurles, Co Tipperary

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by Thomas O'Donnell and Martina O'Donnell

Take notice that any person having any interest in the freehold estate of, or any superior interest in, the property situate in the parish of St George in the county and city of Dublin but now known as 86 Summerhill, Dublin 1, and held under an indenture of lease dated 22 November 1894 made between Fanny Mooney and Maria Cleary of the one part and William Gardner Snowdon of the other part for a term of 132 years from 1 August 1894 and subject to a yearly rent of £4 and to the covenants and conditions therein.

Take notice that Thomas O'Donnell and Martina O'Donnell intend to submit an application to the county registrar for the county/city of Dublin for the acquisition of the freehold and any intermediate interest in the aforesaid property, and any party or parties asserting that they hold a superior interest in the aforesaid property are called upon to furnish evidence of title in the aforementioned property to the solicitors for the applicants, named below, within 21 days of this notice.

In default of any such notice being received, the applicants, Thomas O'Donnell and Martina O'Donnell, intend to proceed with the application before the county registrar for the city of Dublin at the end of 21 days from the date of this notice and shall apply to the county registrar for the city of Dublin for directions, as may be appropriate, on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the aforesaid premises are unknown or unascertained.

Date: 6 June 2008

Signed: Daniel J Byrne & Co (solicitors for the applicant), 11/11a Ormond Court, Ormond Quay, Dublin 1

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

Take notice that any person having any interest in the freehold estate of the following property: rear 67 and 69 Upper Rathmines Road, Dublin 6, being portion of the premises known as numbers 67 and 69 Upper Rathmines Road in the city of Dublin, more particularly described in an indenture of lease dated 15 February 1975 made between Michael Devlin, Michael Campbell, Heather Hewson and Patrick Campbell of the one part and Simon Curley Limited of the other part for the term of 678 years from 1 May 1974 at the yearly rent of

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

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

Date: 6 June 2008

Signed: Brian Matthews & Company (solicitors for the applicant), 7 Main Street, Dundrum, Dublin 14

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978*: an application by Francis Gilmer and Louise Gilmer

Take notice that any person having an interest in the freehold interest or any superior interest of the following property: all that and those the dwellinghouse and premises known as 'Buena Vista', previously known as 'Bella Vista', Tower Hill, Killiney, in the county of Dublin, held along with other property under an indenture of lease dated 25 January 1861 made between Charles Henry Chaytor and Mary Chaytor of the first part, the said Charles Henry Chaytor of the second part and Edward Courtnay of the third part, subject to a yearly rent of £21 and to the covenants and conditions therein contained for the term of 500 years from the first day of January 1861.

The above-named applicants intend to submit an application to the county registrar for the county of the city of Dublin to acquire the freehold interest in the aforesaid property, and any party asserting that they hold a superior interest, including the freehold reversion of the aforesaid property, is called upon to furnish evidence of title to the applicants' below-named solicitors within 21 days of this notice.

And take notice that, in default of any such notice being received, the applicants intend to proceed with the application before the county registrar, on the expiry of the 21 days from the date hereof, and will apply to the said county registrar for such directions as may be appropriate on the basis that the person or persons beneficially entitled to any such superior interest up to and including the fee simple in the aforesaid property is unknown and unascertained.

Date: 6 June 2008

Signed: Alfred Thornton & Company (solicitors for the applicants), Shankill House, Ferndale Road, Rathmichael, Co Dublin

In the matter of the *Landlord and Tenant Acts 1968-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of applicants Eamon Keating, Alan Tracey, Dermot Clarke, Terence Ruane, Brian Foran, John Walsh, Seamus O'Brien and Hugh Paul Ward and unknown respondent

Take notice that any person having any interest in the freehold estate of the following property: all that piece of land being part of the land of Artane North barony and county of Dublin, with the messuage or dwellinghouse, shop or building erected thereon, now known as 4 Kilmore Road, Artane, in the city of Dublin, held under lease dated 31 December 1949 between Bernard Hannon of the one part and Patrick J Mahon of the other part.

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

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

Date: 6 June 2008

Signed: Marcus Lynch (solicitors for the applicant), 12 Lower Ormond Quay, Dublin 1

In the matter of the *Landlord and Tenant (Ground Rents) Acts 1967-2005* and in the matter of the premises known as Belturbet Post Office, Co Cavan: an application by An Post

Take notice that any person having an interest in the freehold estate or any intermediary interest in the premises known as Belturbet Post Office, situate in the townland of Corporation Lands on the south side of the Diamond, Butler Street, in the town of Belturbet, barony of Loughtee and county of Cavan, being the property demised by an indenture of lease dated 30 August 1680 and made between William Copland and John Pearson for the term of 999 years from 1 November 1680 at the yearly rent of £4.12.4.

Take notice that An Post intends to submit an application to the county registrar for the county of Cavan for the acquisition of the freehold interest and any intermediate leasehold interests in the aforesaid premises and that any party asserting that they hold a superior interest in the aforesaid premises is called upon to furnish evidence of the title to the below named within 21 days from the date of this notice.

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

Date: 6 June 2008

Signed: Hugh O'Reilly, solicitor, An Post, GPO, Dublin 1

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act* and in the matter of the purchase of the freehold estate of property situate at Millstreet and Warrenmount, Dublin 8: an application by Allied Bath Investment Company Limited

Take note that any person having an interest in the freehold estate of the property at Millstreet and Warrenmount, Dublin 8, being property held under the following fee farm grants:

1) Indenture of fee farm grant dated 22 May 1851 made between the Honourable William Earl of Meath of the one part and John Busby of the other part, subject to the payment of the perpetual yearly fee farm rent of £78.16.6d (since adjusted to £75.11.1d) and subject to the covenants on the part of the grantee and conditions therein contained,
2) Indenture of fee farm grant dated 11 September 1855 made between Teresa Watson, Katherine Rorke and Eleanor McGrane of the one part and John Busby of the other part, subject to the payment of a perpetual yearly fee farm rent of £46.3.1d (since adjusted to £46) and subject to the covenants on the part of the grantee and conditions therein contained,
3) Indenture of fee farm grant dated 2 November 1850 and made between John Chambre, Earl of Meath, of the one part and James Edkins of the other part, subject to the payment of the yearly rent of £4.13.3½d thereby reserved (now adjusted to £4.9.4d) and subject to the covenants on the part of the grantee and conditions therein contained,
4) Indenture of fee farm grant dated 25 November 1853 and made between John Busby of the first part, Edward Sharkey of the second part and the Reverend John Cotton Walker of the third part, subject to the payment of the yearly fee farm rent of £44.6.0d thereby reserved and subject to the covenants on the part of the grantee and conditions therein contained.

Take note that Allied Bath Investment Company Limited intends to submit an application to the county registrar for the county of the city of Dublin at Áras Uí Dhálaigh, Inns Quay, Dublin 7, for the acquisition of the freehold interest in the aforesaid property and that any party asserting that they hold a superior interest in the aforesaid property is called upon to furnish evidence of title to the below named within 21days from the date of this notice.

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

Date: 6 June 2008

Signed: Arthur Cox (solicitors for the applicant), Earlsfort Centre, Earlsfort Terrace, Dublin 2

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In the matter of the *Landlord and Tenant (Ground Rents) Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978*: an application by Thomas Kennedy

Take notice that any person having an interest in the freehold estate of the following property: 30 Mitchell St, Clonmel, Co Tipperary, more particularly described in an indenture of lease dated 19 August 1930 between Guilford Dudley and Robert Ambrose Dudley of the one part and Patrick Joseph Condon of the other part from 1 July 1930 for the term of 99 years, subject to the yearly rent of £14 and to the covenants on the lessee's part and conditions therein contained.

Take notice that Thomas Kennedy, the party currently entitled to the lessee's interest in the said lease, intends to submit an application to the county registrar for the county of Tipperary for the acquisition of the freehold interest in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid property is called upon to furnish evidence of title to the aforementioned property to the below-named solicitors within 21 days of the date of this notice.

In default of any such notice being received, the applicant intends to proceed with the application before the county registrar for Co Tipperary at the Court House, Nelson Street, Clonmel, Co Tipperary, for such directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the property aforesaid are unknown or are unascertained.

Date: 6 June 2008

Signed: Lynch and Partners (solicitors for the applicants), Jervis House, Parnell St, Clonmel, Co Tipperary

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978*: an application by Colin Doyle

Take notice that any person having interest in the freehold estate or any immediate interest in the following property: all that the premises known as number 2 South Main Street, in the town of Youghal, parish of Saint Mary, barony of Imokilly and county of Cork, held under a lease dated 10 March 1868 and made between Cornelius O'Brien of the one part and James Troy of the other part for a term of 200 years from 25 March 1868, subject to the yearly rent of £10 sterling.

Take notice that Colin Doyle intends to submit an application to the county registrar for the county of Cork for the acquisition of the freehold interest in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid premises is called upon to furnish evidence of the title to the aforementioned premises to the below named within 21 days from the date of this notice.

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

Date: 6 June 2008

Signed: J Hodnett & Son, Solicitors (solicitors for the applicant), Nelson House, Emmet Place, Youghal, Co Cork

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by Olwyn Byrne and Tony McGovern

Any person having a freehold estate or any intermediate interest in all that and those that plot of ground with the house and premises erected thereon known as no 7 Gilford Avenue, Sandymount (formerly known as no 4 Alexandra Avenue), situate in the parish of St Mary's, Donnybrook, formerly in the county but now in the city of Dublin, being a portion of the premises comprised in and demised by indenture of sublease dated 13 September 1904 made between Samuel Worthington of the one part and Maude Worthington of the other part for a term of 147 years from 1 September 1904 at a rent of £24 per annum, apportioned to £6 per annum in respect of the property the subject of this application.

Take notice that Olwyn Byrne and Tony McGovern, being the persons currently entitled to the lessees' interest under the said lease, intend to apply to the Registrar of Titles, pursuant to section 21(1) of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978*, for the acquisition of the freehold interest and all intermediate interests in the aforesaid properties, and any party asserting that they hold a superior interest in the aforesaid property is called upon to furnish evidence of their title to same to the below named within 21 days from the date of this notice.

In default of any such notice being received, the said Olwyn Byrne and Tony McGovern intend to proceed with the application before the Registrar of Titles at the end of the 21 days from the date of this notice and will apply for such directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interests including the freehold reversion in the aforesaid premises are unknown and unascertained.

Date: 6 June 2008

Signed: Hughes & Liddy (solicitors for the applicant), 2 Upper Fitzwilliam Street, Dublin 2

In the matter of the *Landlord and Tenant (Ground Rents) Acts 1967-1987* and in the matter of an application by Irish Nationwide Building Society: notice of intention to acquire the fee simple

Take notice that the applicants, being

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the persons entitled under the above-mentioned acts, propose to purchase the fee simple in the lands described at no 1.

1. Description of land to which this notice refers: all that and those the premises now known as 276/278 Lower Rathmines Road, Rathmines, in the county and city of Dublin, one portion of which forms part of the lands and premises originally described in the schedule to an indenture of lease dated 23 November 1964 made between the Reverend Rupert Lennon and Sheila Lennon as lessors of the one part and Hamilton Long and Company Limited as lessee, of the other part, and a further portion of which forms part of the premises originally described in an indenture of fee farm grant dated 29 February 1872, made between James McEvoy of the one part and John Holmes of the other part and all of which premises are more particularly described in the two indentures of 3 December 1984 set out below and delineated on the maps attached thereto.

2. Particulars of applicant's lease: the applicant holds the lessee's interest in the first portion of the said lands under the said lease dated 23 November 1964 made between the Reverend Rupert Lennon and Sheila Lennon as lessors of the one part and Hamilton Long and Company Limited as lessee, of the other part, whereby the lands and hereditaments as therein described (of which the applicant's premises form portion) were demised to the lessee therein for a term of 99 years from 25 June 1964, subject to a yearly rent of £650 sterling, in respect of which the applicant herein is principally liable for a moiety of £325.

The applicant holds the fee farm grantee's interest in the second portion of the said lands under the said indenture of fee farm grant dated 29 February 1872 made between James McEvoy of the one part and John Holmes of the other part, whereby the lands and hereditaments as therein described (of which the applicant's premises form portion) were granted to the said John Holmes forever, subject to the yearly fee farm rent of £45, against payment of which the applicant herein is indemnified.

The applicant holds its interest in the said lands under and by virtue of an indenture of assignment dated 3 December 1984 made between Edward Lee and Company (1974) Limited of the first part, Florizel Limited of the second part and Irish Nationwide Building Society of the third part and under a second indenture of assignment dated 3 December 1984 made between Florizel Limited of the one part and Irish Nationwide Building Society of the other part.

3. Parts of land excluded: excluding the lands comprised in the 1964 lease, which were not contained in the two indentures of assignment set out at paragraph 2 herein.

Date: 6 June 2008

Signed: Sharon van Sinderen (solicitor for the applicant), Irish Nationwide Building Society, Nationwide House, Grand Parade, Dublin 6

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Please note that, as and from the August/September 2006 issue of the *Law Society Gazette*, **NO recruitment advertisements will be published that include references to years of post-qualification experience (PQE)**.

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