

The Bar Review

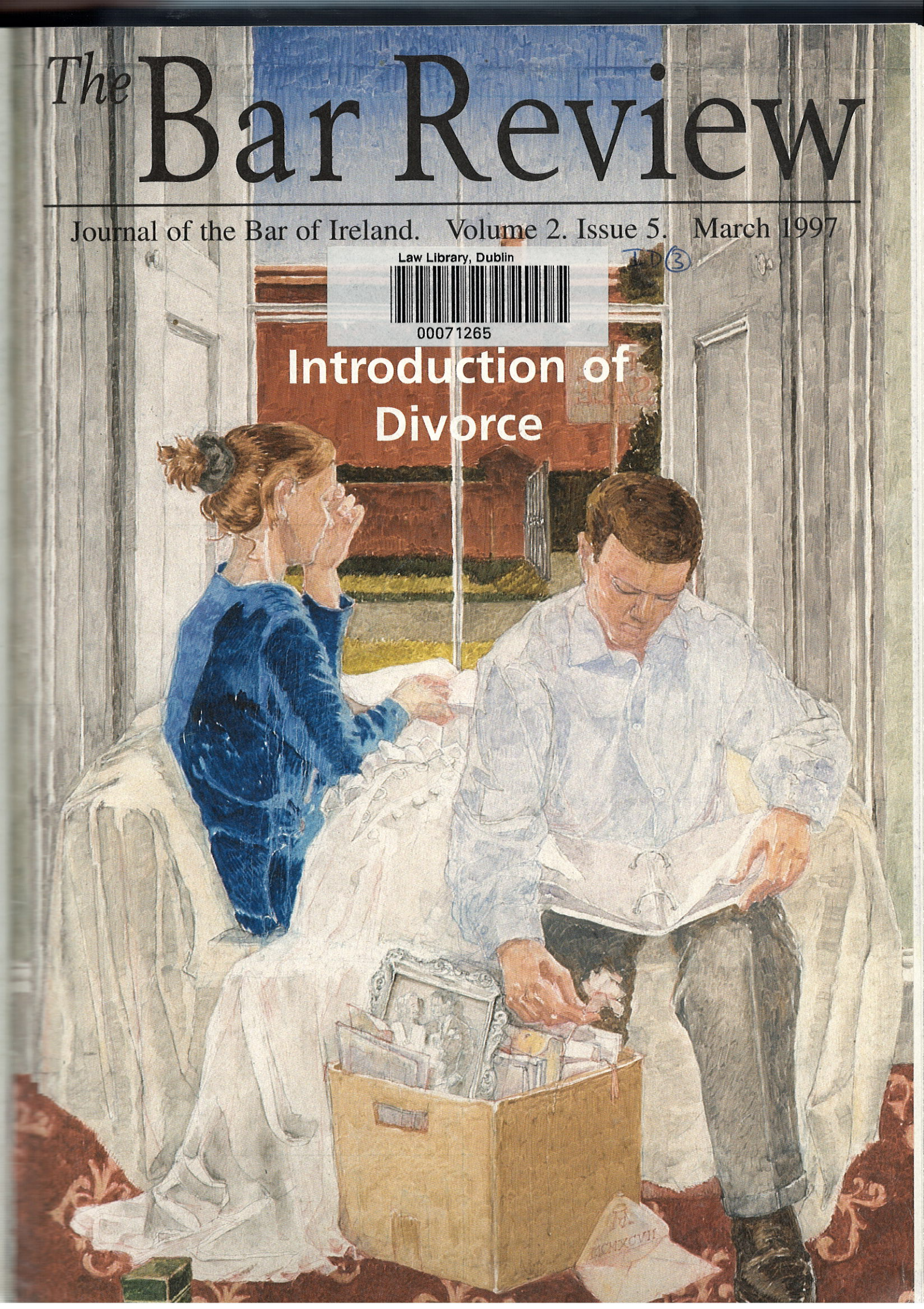
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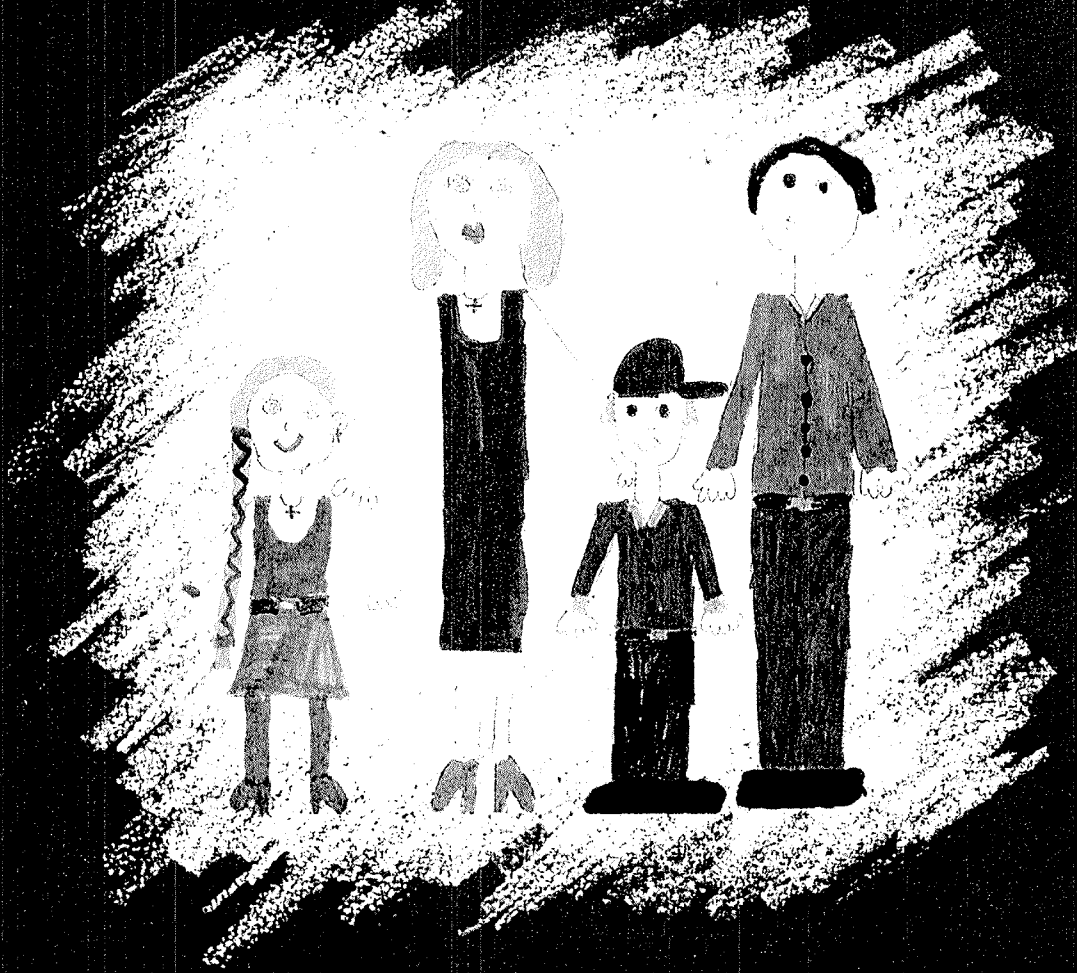
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Introduction of Divorce



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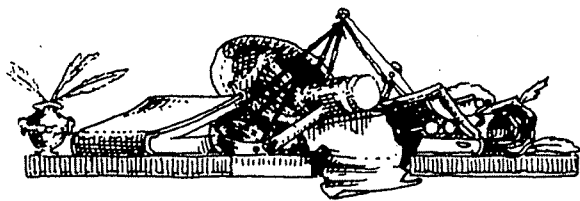
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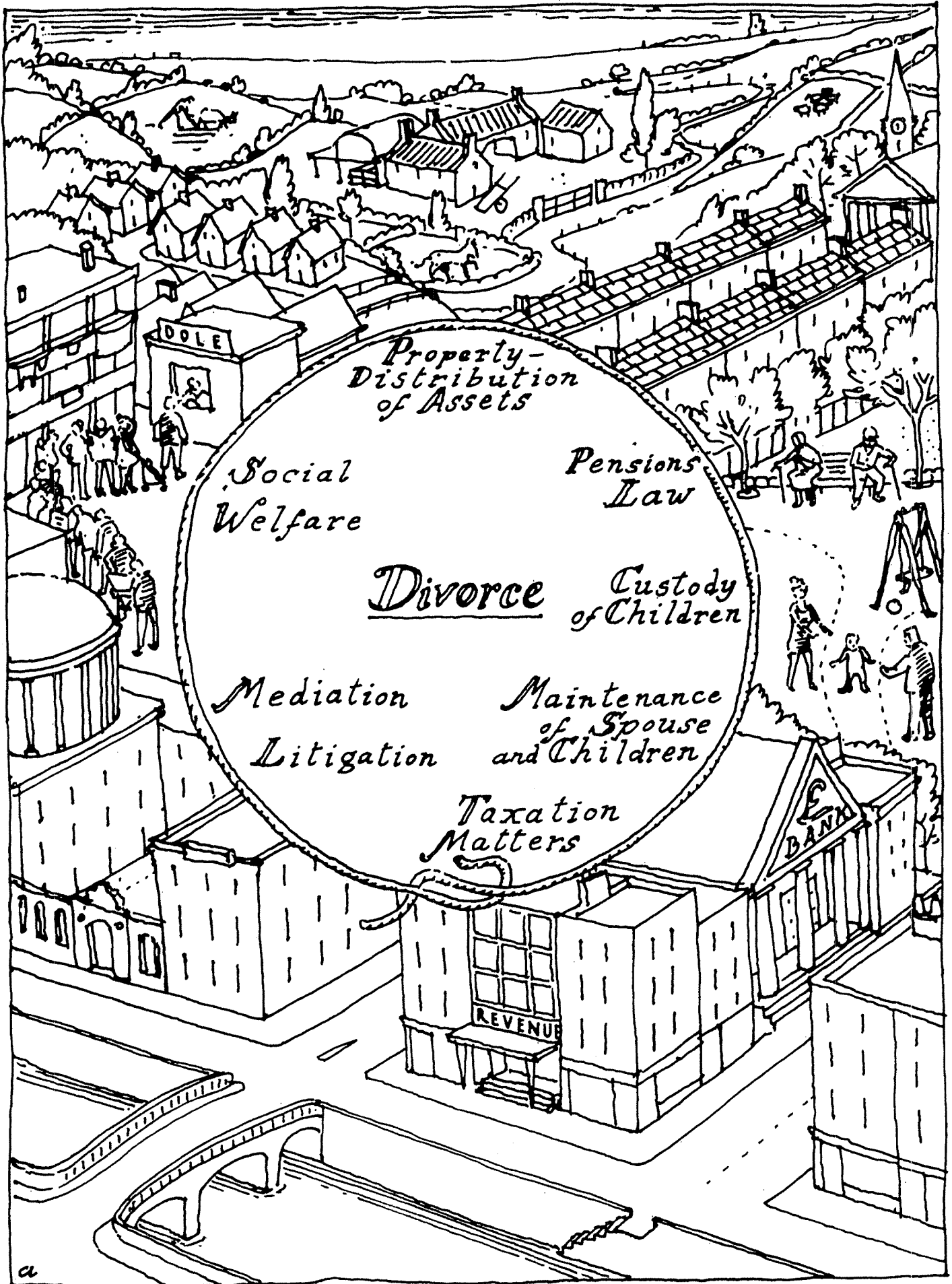
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Introduction of Divorce

The introduction of divorce in Ireland represents one of the most significant social and legal developments in recent times. Judicial divorce entitling the marital partners to remarry has not been available in Ireland since the time of Brehon Law and it is likely that this new legal remedy will have significant social and economic as well as legal consequences. The institution of marriage, being heretofore indissoluble, enjoyed a special status in Irish law and this status was constitutionally recognised. Marriage was traditionally viewed as a life-long commitment and something that most people would do only once. However, Irish society must now attune itself to the possibility of multiple marriages and, in consequence, multiple branches of the same family.

Where a new remedy of this magnitude is introduced, there will undoubtedly be considerable demand initially. In the last decade, very considerable changes have been made in Irish family law relating to the remedies which spouses may seek after the breakdown of a marriage. This comprehensive range of ancillary reliefs was initially introduced in the Judicial Separation and Family Law Reform Act, 1989 and was extended by the Family Law Act, 1995. The range of reliefs which may be sought ancillary to divorce is very similar to those already in place so that the most significant change brought about by the Family Law (Divorce) Act, 1996 was the right to re-marry. However, regard must be had to the impact which the right to re-marry has on ancillary remedies. Although where ancillary reliefs are sought at the same time as the granting of the decree there will not be another spouse, there may well be a second family with obligations existing towards the children of that second family. Where a former spouse wishes to avail of additional or alternative remedies at a date subsequent to the divorce, the financial and familial structures may be

found to have been very substantially altered. Thus, in approaching divorce cases, lawyers must be mindful of the future changes which may arise and their likely financial and emotional consequences.

The introduction of divorce has evoked and is likely to continue to evoke for some period of time considerable interest among the public. The categories of persons affected will not be finite; as each family circumstance varies, so will the legal position vis-a-vis divorce. Generally, there will be persons who have been separated for a considerable period and who have significantly arranged their lives separately and apart from each other. There will be those whose marriages have recently broken down and those whose marriages are breaking down at present. However, lawyers must be equipped to advise all these people both as to their entitlement to a decree and as to the availability of ancillary reliefs. The Bar Council and the Family Lawyers Association, in an effort to assist members of the legal profession in familiarising themselves with the legal position relating to divorce, held a recent conference on this topic at The Honorable Society of the King's Inns. Participants at the conference were agreed that this area of law is an extremely complex one. A further conference will be held in October 1997 to review the early months of the operation of the Family Law (Divorce) Act, 1996.



Marketing Directory for the Irish Bar

Members will have received a form indicating areas of expertise which they are urged to complete and return to the Bar Council. These forms will be published in the form of a directory for the Bar to facilitate consumers of the Bar's services to identify and contact members with expertise in the areas identified. Everyone is urged to complete the form when circulated as members will not be listed under specific categories of expertise if they do not return the form.



9th International Marine Cargo Claims Seminar

The Chelsea Hotel, London
7th - 9th May, 1997

Would you know exactly what procedure to take if you were involved in a case concerning damage of good whilst being transported at sea?

This is a practical training seminar which will provide a thorough background to general trading conditions and the circumstances under which cargo claims are made. A workshop will examine the practicalities of establishing cargo claims and the specialist roles played by cargo and stowage surveyors.

Contact 00 44 171 553 1111 to register.

Revised dates for end of term

Please note that Hilary Term will end on Friday, 21st March. Easter Term will commence on Monday, 7th April and will end on Thursday, 15th May. Trinity Term begins on Wednesday, 28th May and will end on Friday, 31st July.

Three New Senior Counsel Appointed

Congratulations and Best Wishes to Eileen Lydon, SC, Aidan Walsh, SC and Turlough O'Donnell SC who took silk recently.

European Institute of Public Administration

"Who's afraid of European
Documentation"

28 -30 May, 1997. Maastricht.

Contact: Joyce Groneschild, Programme Assistant, at 00 31 43 96 222

The aim of this seminar is to provide those working daily or occasionally in the field of European affairs, both within or outside the Community institutions, with the ability to trace and use European documents, by offering them a complete survey of the main European documents and methods of gaining access to them. The seminar will be conducted in English and is open to all persons working in European affairs, Community officials, legal experts, librarians and documentalists from the Member States of the EU.

Bar Council / Butterworths National Moot Court Competition

The final of this competition was held in the Supreme Court on Friday, 7th March. The winning team came from UCG. The prize for best memorial went to King's Inns and the Advocate of the Year was Sinead McMullen of the King's Inns team.

UCG Law Graduates Association

Anyone wishing to join the UCG Law Graduates Association should contact James Healy, 1A Rockmount Road, Highfield Park, Galway.

Papers from the Divorce Conference

Those wishing to obtain a copy of the papers given at the recent highly successful Bar Council / Family Lawyers Association Conference on divorce, please contact Karen at ext. 4186.

Open Day for display of Computer Hardware and Technology 18th April, in Room A, Church Street.

An open day for the display of hardware and software and electronic information services will be held on Friday, 18th April in Room A for all members interested. Digital Computer equipment will be on display from Moss Technology. Voice IT will also be there and there will be a demonstration on email services by Lawlink.

Please contact Greg Kennedy or Cian Ferriter for further details.

Criminal Law Conference

Human Rights and the Criminal Process: Is the right of an accused to a fair trial being eroded?"

Strasbourg, 15/16 May, 1997.

Contact: Rock Tansey, Q.C. at 00 44 171 404 4939

Circuit Court Procedures for Divorce

Nuala E. Jackson, Barrister

Introduction

The Family Law (Divorce) Act, 1996 vests concurrent jurisdiction in the High Court and the Circuit Court so far as applications for divorce are concerned. However, it is to be predicted that the majority of applications will be brought in the Circuit Court. This is so for a number of reasons:

- (a) the legal costs involved in Circuit Court proceedings will be considerably less than the costs attaching to the High Court jurisdiction;
- (b) the appointment of additional Circuit Court judges within the past 12 months has significantly reduced waiting lists for cases coming on for hearing before the Circuit Court, particularly in Dublin;
- (c) attendance at the Circuit Court, which will usually be located more proximate to the homes of the parties, is more convenient for the parties and their witnesses and,
- (d) in cases where legal aid is available to the applicant, the terms of the legal aid scheme will dictate that the proceedings be commenced in the Circuit Court, being the first level of court having jurisdiction to determine divorce cases.

It is for these reasons that the procedural rules of the Circuit Court are extremely important, particularly so as the High Court procedures are not yet available, although such rules are due to be published imminently.

Circuit Court Rules

In practical terms, little change has been introduced in the new procedures. The Rules of the Circuit Court (No. 1) of

1997 (S.I. No. 84 of 1997) became operational on the 27th February, 1997, the same date as the Family Law (Divorce) Act, 1996. These new rules deal not only with divorce applications but also with judicial separation applications under the Judicial Separation and Family Law Reform Act, 1989 as amended by the Family Law Act, 1995 as well as other matrimonial applications under the 1995 Act. The most evident change introduced by the new procedures is the introduction of the new categories of civil bill under the heading of "family law civil bills". This replaces the previous procedure whereby matrimonial proceedings were commenced by way of application. The practical implications of the change are:

- it means that similar, although not identical, initiating documents are used in the matrimonial as in other areas of civil law;
- it enables motions for judgment in default of appearance or defence to be brought by an applicant where the respondent either delays in the filing of pleadings or does not intend to take any part in the proceedings at all and,
- in providing for the service of a notice of trial or notice to fix a date for trial, the new regime aims to have the pleadings closed before a hearing date is allocated. A major problem currently being experienced at Circuit Court level is the extremely late filing of Answers to proceedings giving rise to constant applications for adjournments as the applicant has not had sufficient time to consider and prepare a response to a counterclaim being put forward. The new procedures seek to force the earlier filing of

Defences and Counterclaims as the Notice of Trial is not served until this has happened.

Family Law Civil Bill

The new rules detail seven different types of family law civil bills. Briefly, these are:

1. a family law civil bill for a decree of divorce (which is appropriate for all applications being made for divorce and reliefs ancillary thereto under the terms of the Family Law (Divorce) Act, 1996);
2. a family law civil bill for a decree of judicial separation (which should be used for applications for judicial separation and reliefs ancillary thereto under the terms of the Judicial Separation and Family Law Reform Act, 1989 as amended by the Family Law Act, 1995);
3. a family law civil bill for relief after a foreign divorce or separation outside the State (the availability of certain ancillary reliefs in such circumstances was introduced by section 23 of the Family Law Act, 1995. It is important to note that the availability only relates to foreign decrees granted after the date of coming into operation of the 1995 Act, being the 1st August, 1996);
4. a family law civil bill for nullity (jurisdiction to determine applications for a decree of nullity has traditionally been vested in the High Court. The extension of jurisdiction to the Circuit Court was introduced by section 38(2) of the Family Law Act, 1995);
5. a family law civil bill for a declaration of marital status (this relief was introduced by section 29 of the

Family Law Act, 1995 and is closely allied to the nullity jurisdiction and the recognition of a foreign divorce. The remedy is based on the entirely reasonable premise that a person is entitled to know whether or not they were validly married at a particular date. The types of declaration which may be sought are listed in the statute);

6. a family law civil bill for the determination of property issues between spouses or formerly engaged couples (the Family Law Act, 1995 repealed section 12 of the Married Women's Status Act, 1957 which was the statutory authority for the determination by the court of the respective beneficial interests of married couples in property. Section 12 was extended to property disputes between engaged couples in the Family Law Act, 1981. The replacement of section 12 with the somewhat broader section 36 of the Family Law Act, 1995 did not make reference to section 36 being available in the determination of disputes between engaged couples but an amendment contained in section 44 of the Family Law (Divorce) Act, 1996 extended the provisions to apply to such disputes);
7. a family law civil bill for relief from the estate of a deceased spouse (there are a number of circumstances in which a claim may be made against the estate of a deceased spouse. Pursuant to the provisions of section 15A of the Family Law Act, 1995, such a claim may be made where the spouses have been judicially separated, section 25 of the 1995 Act envisages the possibility of such a claim following the granting of a foreign divorce decree which is recognised in this jurisdiction and section 18 of the 1996 Act provides for such a claim where a decree of divorce has been granted. There are strict statutory time limits for the making of such claims and the reliefs themselves are available only in limited circumstances. However, it is these reliefs more than any others which illustrate the

lack of a "clean break" principle in the Irish law relating to marriage breakdown).

The information to be contained in the indorsement of claim is set out in general terms in the new rules and, obviously, the information required to be pleaded is dependent upon the reliefs being sought. So far as divorce or judicial separation is concerned, these details do not differ greatly from those which the Circuit Court Rules (No. 1) of 1994 required to be included in the application for judicial separation. The family law civil bill for divorce requires details to be given relevant to the proofs required for the granting of a decree and those also relevant to ancillary reliefs being sought.

Time Limits

From the date of service of the civil bill, a ten day period is permitted for the entry of an Appearance and a further ten day period is allowed for the filing of a Defence and Counterclaim, if desired. When these periods have elapsed, together with the sending of a fourteen day letter warning that a default motion will issue in the event that the respondent continues to fail to act, a motion for judgment in default may be brought. The judgment in default of Appearance or Defence mechanism is considered below.

Supporting Documents

Supporting documentation required with the family law civil bill includes some familiar documents and some not-so-familiar.

(a) Certificate relating to alternative remedies.

The filing of a certificate by the applicant's solicitor alongside the writ, relating to advices having been given to a client regarding alternative remedies is well known. Such requirement has been in place since the Judicial Separation and Family Law Reform Act, 1989 (section 5) and rules were provided for this under the Circuit Court Rules (No. 1) of 1989 (S.I. No. 289 of 1989). These 1989 rules have now been revoked and certificates

in similar format are provided for under the present rules. Slight variation has been necessary due to the differences in the requirements of section 5 of the 1989 Act and section 6 of the 1996 Act. The most significant difference is that section 6 requires advice relating to the availability of judicial separation where such relief has not previously been obtained. The certificate under section 6 arguably serves a wider purpose than its predecessor. It is a necessary proof for the granting of a decree of divorce, under section 5 of the Family Law (Divorce) Act, 1996, that the court must be satisfied that there is no prospect of reconciliation between the parties. This objective is supported by section 6 and the certificate ensures that section 6 is complied with. However, in practical terms, in view of the requirement of four years living apart, the prospect of reconciliation would appear remote. A similar certificate must be filed with the Defence by the respondent's solicitor in accordance with the requirements of section 7 of the Family Law (Divorce) Act, 1996.

(b) The Affidavit of Means

The Affidavit of Means is likewise a familiar document and the format thereof has changed very slightly from the form envisaged in the Circuit Court Rules (No. 1) of 1994. It is envisaged that pension details would be included where known but, arguably, as a pension is often a major family asset, such details should in any event have been included formerly under the "Assets" schedule. The aim of the Affidavit of Means is to give a pencil-sketch of the financial position and thereby, hopefully, to reduce the need for discovery. Present practice does not support this with much unnecessary duplication regularly taking place. The fault for this probably lies with inadequate Affidavits of Means being sworn and with a failure to demand proper vouching of the figures stated therein. There are some important differences between the information to be gleaned from the Affidavit of Means and the information obtained on discovery. The latter gives a more historical picture which may be particularly relevant if efforts have been made to alter the appearance of the financial position for the purposes of the proceedings.

However, full value is regularly not obtained from the Affidavit of Means and this is often because it becomes available too late. The alteration in the time for filing thereof, allying it to the service of pleadings, together with the default mechanism should improve this.

(c) The Affidavit of Welfare

The Affidavit of Welfare is a new document and it appears, on first reading, to require a daunting amount of information. In fact, it is merely a questionnaire asking a series of very practical questions concerning the dependent children. The Family Law (Divorce) Act, 1996 states that it is an essential proof for divorce that the court be satisfied that proper provision is in place for any dependent members of the family. Additionally, specific reference is made to the court's jurisdiction to make orders under section 11 of the Guardianship of Infants Act, 1964 which it considers proper for the welfare of the children. Therefore, ensuring that the children are properly taken care of takes centre-stage in the 1996 Act and the information in the Affidavit of Welfare will assist a court in reaching determinations on this point. It is not uncommon, in cases in which disputes arise concerning children, that the parents will be unable to agree on even the simplest factual matters. The Affidavit of Welfare will highlight the areas of agreement and disagreement and, hopefully, will identify the area of dispute, if any.

Evidence

The new Rules contain some interesting provisions concerning evidence. The general principle, set out in Rule 22, is that primary emphasis will be placed upon oral evidence at the hearing of the action. This does not represent a change from the previous position. However, there are exceptions to this general rule:

- (i) in the case of interim and interlocutory applications, evidence is to be by way of Affidavit unless the court otherwise directs (Rule 26). The special provision which has been made for *ex parte* applications is noteworthy. Where an *ex parte* application is made, oral evidence may sometimes be heard,

usually additional to the affidavit grounding the application. This oral evidence can seriously prejudice the respondent who must come before the court at the date upon which the Notice of Motion has been made returnable without a full picture of the case which he/she must make as, although the contents of the grounding affidavit are known, obviously, the tenor of the oral evidence is not. Rule 26 tries to remedy this potential injustice by stating that where oral evidence is given in *ex parte* applications, a note of the evidence so given must be prepared by or on behalf of the applicant and approved by the judge for service upon the respondent alongside any order made by the court;

- (ii) Rule 23 seeks to avoid the very considerable expense which would be involved in bringing an actuary to court to prove the value of a benefit under a pension scheme. It provides that such evidence may be given by way of affidavit, subject to the right to cross-examine thereon;
- (iii) Rule 17 attempts to reduce the costs which would be incurred by trustees of a pension scheme attending for the hearing of the action in order to make representations as they are entitled to do under the pension adjustment provisions of the 1995 and 1996 Acts. The rule provides for an Affidavit of Representation to be filed setting out such representations. The rule is facilitative only and is not mandatory as it is subject to the contrary directions of the court. Hence, it is open to the trustees, if they require an oral hearing, to apply to the court for this. That the trustees of the scheme would make their representations to the court in the least expensive manner possible is imperative to the parties to the dispute bearing in mind that the trustees' costs must be borne by the parties. The Rules make provision for notifying the trustees of a pension scheme where reliefs relating to pensions are sought. This notification is required by

statute. Similar provision is made for an Affidavit of Representation by third parties claiming a beneficial entitlement in property in relation to applications for the sale of property and applications for provision out of the estate of a deceased spouse.

Upon filing and serving the Defence, and Counterclaim, if any, the respondent must likewise serve a certificate indicating that he/she has been advised by his/her solicitor of other remedies available (in this case a certificate under section 6 of the 1989 Act in the case of judicial separation and under section 7 of the 1996 Act in the case of divorce), an Affidavit of Means (in appropriate circumstances) and an Affidavit of Welfare (in appropriate circumstances). It should be noted that even where no Defence is being filed, an obligation to provide an Affidavit of Means nevertheless arises. The permitted time period is 20 days from the service of the civil bill.

Motions for Judgement

As referred to previously, the rules provide for a motion to be brought for judgment in default of appearance or defence in appropriate cases. In such circumstances, the respondent is likely to be given an extension of time for filing if such extension is sought. However, this mechanism is perhaps of greatest use in determining, at an early stage in the proceedings, cases in which the respondent does not wish to play any part, thereby enabling undefended applications to proceed in a timely fashion. The rules applicable to such default motions are in similar form to those applying in other areas of civil law, including the 14-day warning letter. The pressure to file the defence and in consequence to close the pleadings will be assisted by the financial consequences of a motion being brought, for which, in accordance with usual practice, the respondent should be liable in costs.

Provision is also made for a motion for judgment to be brought where the parties are in agreement as to the terms of their separation and merely wish to have this ruled upon by the court. This

is a limited provision which simply provides a mechanism whereby such non-contentious cases may be brought before the court quickly and will not be queuing behind highly contentious matters. It is important to realise that the court will not be bound to accept the terms agreed by the parties and must, in all cases, be satisfied that proper provision has been made for the spouses and the dependent children of the marriage regardless of whether the parties themselves are so satisfied. The granting of a decree of divorce is discretionary under the 1996 Act, the court may do so, provided it is satisfied that the required proofs are in place. However, provided the agreement reached between the parties is a reason-

able one in all of the circumstances and the court is satisfied that the purported agreement is real, the court will be unlikely to interfere with the wishes of the parties.

Conclusion

The introduction of a major new remedy into Irish family law together with the introduction of a comprehensive range of ancillary reliefs to be available in cases of marriage breakdown has very significantly changed the face of Irish family law. It will, undoubtedly, take a period of time to adjust to the divorce culture and, in particular, to the reality that divorced persons may re-marry, giving rise to sec-

ond families with rights to be provided for. This is substantially different to the previous position whereby marriages would break down but the spousal relationship would continue into the future and there was an impossibility of any other spousal relationship arising. In determining divorce proceedings, it must be borne in mind that, although a right to return to the court for further reliefs exists in the 1996 Act, the availability of assets at the later date may be severely diminished. There is a psychological readjustment which is required of Irish society and, in particular, of family lawyers. ●

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The Taxation Provisions of the Family Law (Divorce) Act, 1996

Grainne Clohessy, Barrister

Introduction

- 1.1 This article reviews only the tax provisions and implications of the Family Law (Divorce) Act, 1996 and it should be remembered that provisions generally prevailing in the taxation code may have an effect on individual cases. In particular, this review does not deal with the tax consequences relating to the Family Law Act, 1995.
- 1.2 The Family Law (Divorce) Act, 1996 provides for taxation of divorced persons and the apparent intention of these provisions appears to be to preserve the assets of the marriage allowing for their distribution without undue taxation hardship. The aim appears to be to treat those who divorce equally (from a taxation point of view) with a married couple when dealing with the distribution of the joint assets of the former unit.
- 1.3 The Family Law (Divorce) Act, 1996 Part IV provides specifically for:
 - (a) Income Tax (Sections 31 and 32)
 - (b) Stamp Duty (Section 33).
 - (c) Capital Acquisitions Tax (Section 34).
 - (d) Capital Gains Tax (Section 35)
 - (e) Probate Tax (Section 36).

Income Tax

- 2.1 Income Tax Act, 1967 Sections 192-198 deal with the taxation treatment of married couples and allow for three separate methods of assessment. These are joint assessment, separate assessment and single assessment. Joint assessment arises when one of the parties is responsible for the payment of the tax due on the combined income of both parties. Couples are deemed to have automati-

ically elected for joint assessment.

- 2.2 Alternatively, couples can choose to be separately assessed and if this is done the husband and wife will submit separate tax returns with allowances being divided between them. The husband and wife are then responsible for their own tax in accordance with their tax assessments. Allowances or tax rate bands unused by one party can be transferred to the other with the net effect that the tax will be no higher than a couple who are jointly assessed.
- 2.3 Single assessment arises where each husband and wife files separate tax returns and neither can transfer unused allowances, reliefs or tax rate bands to the other which could, of course, result in higher tax being paid than under joint or separate assessment.
- 2.4 Sections 194-196 of the Income Tax Act, 1967 were most recently considered by Mr. Justice Morris in the case of *Gilligan -v- The Criminal Assets Bureau*. While the case is of no particular importance to The Family Law (Divorce) Act, 1996 it does reaffirm that joint assessment is automatic in the tax year following marriage.

Maintenance

- 3.1 The Family Law (Divorce) Act, 1996 provides that payments of money made by one spouse to another (other than Pension Adjustment Orders) are made without any deduction of income tax. Also, it is provided that where both spouses are resident in the State for tax purposes for the particular year of assessment and neither spouse has entered into another marriage then if the payment would

fall within Section 3 of the Finance Act, 1983 the provisions of Section 4 of the Finance Act, 1993 have effect as if the marriage had not been dissolved.

- 3.2 The Finance Act, 1983 provides for joint assessment for the former husband and wife in respect of maintenance payments. The reason why this section will not apply where a spouse has remarried is because that spouse in his or her new marriage will automatically be deemed to have opted for joint assessment under the provisions of Section 194, Income Tax Act, 1967.

- 3.3 The main treatment for tax purposes of maintenance payments is still detailed in Finance Act, 1983. The most important thing to be aware of is that a tax deduction can only be claimed for a maintenance payment if that maintenance payment is made for the support of the other party to the marriage. A deduction for tax purposes is never allowed in respect of payments made for the support of children of that marriage. Payments made for children are always paid gross, out of after tax income. In order for a payment to fall within Section 3 of the 1983 Act it is necessary that the couple are living apart at the time the payment is made and also that the payments are periodical or annual in nature and that the maintenance arrangement is a legally enforceable obligation whether that enforceability arises out of a court order, deed of separation or other legal arrangement.
- 3.4 If joint assessment is to apply (up until the Family Law Act, 1995 this could not be opted for if the marriage had been annulled or if a foreign divorce had been obtained) then each of the parties is charged to tax based on his/her own income, his/her share of

the married allowances and his/her tax bands and reliefs. Maintenance payments made by one party to the other are made gross. No deduction is given for maintenance payments. The advantage of joint assessment is that if one party has unused allowances, tax bands or reliefs available then they can be transferred to the other party thereby reducing the income tax liability of that other part.

- 3.5 Usually the party paying maintenance will prefer to have taxation treatment under Finance Act, 1993 Section 3 because that party can obtain a tax deduction for the maintenance payments made for the benefit of the other party (not the children) and thereby reduce the party making the maintenance payment's taxable income.
- 3.6 Usually the party who is receiving the maintenance payments prefers to have them treated under Finance Act, 1993 Section 4 because once received they are ignored for tax purposes and therefore no tax will be payable on them.

Stamp Duty

- 4.1 The Family Law (Divorce) Act, 1996 Section 33 provides that stamp duty is not to be chargeable on an instrument by which property is transferred pursuant to an order granted under the Act by either or both of the spouses who were parties to the marriage. This exemption applies to orders under Part III of the Family Law (Divorce) Act, 1996 but does not apply to any instrument by which property is transferred to a person other than the spouses concerned.
- 4.2 It is also provided that adjudication by the Revenue Commissioners of a conveyance or transfer operating as a voluntary disposition (gift) does not apply.
- 4.3 It is important to note that the stamp duty exemption applies only to transfers of property made under Part III of the Family Law (Divorce) Act, 1996 and then only where that transfer is

between those who were formerly spouses.

Capital Acquisitions Tax

- 5.1 Family Law (Divorce) Act, 1996 Section 34 provides that a gift or inheritance taken by virtue, or in consequence, of an order under Part III of the Act by a spouse who was a party to the marriage is exempt from capital acquisitions tax and is not to be taken into account in computing capital acquisitions tax.
- 5.2 Again, it is important to note that this applies only to orders made under Part III of the Family Law (Divorce) Act, 1996. Therefore, there appears to be no capital acquisitions tax for gifts or inheritances which are the result of the terms of a foreign court order. Again, as with stamp duty, the exemption applies only to the former spouses of the marriage and any benefit for any other person is not so exempt.

Capital Gains Tax

- 6.1. Family Law (Divorce) Act, 1996 Section 35 deals with capital gains tax treatment of certain disposals by divorced persons and provides that yet again once an order is made under Part III of the Act disposals of assets are to be treated as if the asset was acquired from the spouse making the disposal for a consideration of such amount as would secure that on the disposal neither a gain nor a loss accrued to the spouse making the disposal.
- 6.2 There is an exception where the asset disposed of formed part of the trading stock of a trade carried on by the spouse making the disposal or was acquired as trading stock for the purpose of the trade carried on by the spouse acquiring the asset. A similar exception applies to married couples. Again, there is no exemption provided in respect of transfers of assets made consequent on a foreign divorce.
- 6.3 The capital gains tax provisions also apply where there is a transfer of assets following the granting of a Decree of Divorce.

Probate Tax

- 7.1 Family Law (Divorce) Act, 1996 Section 36 extends the provision of Finance Act, 1993 Section 115 (s) to divorced spouses. The effect of this provision is that it provides for the abatement or postponement of probate tax payable by a surviving spouse. It would apply to a spouse where an order has been made under Section 18 of the Act which section allows for orders for provision for a spouse out of the estate of the other spouse.
- 7.2 The provisions apply only to benefits taken by the surviving spouse and again do not apply to any order in respect of a former spouse's estate made in consequence to a foreign divorce.

Summary

- 8.1 The Family Law (Divorce) Act, 1996 brings in specific legislation regarding income tax, stamp duty, capital acquisitions tax, capital gains tax and probate tax. There are not major reforms and in fact the legislation is very scant. The effect of these provisions is to attempt to ensure that persons who become former spouses consequent on a Decree of Divorce do not suffer by the pool of assets being dissipated by a harsher tax regime than that applicable to married couples who transfer assets during the course of their marriage. The provisions that are brought into being are really a repeat of those already in existence under the Family Law Act, 1995 and therefore there are to a large extent no new tax twists in the 1996 Act. The failure to refer to foreign divorces that are legally enforceable in this jurisdiction may cause some complications but in general the intention of that legislature to ensure that those who divorce are treated equitably in comparison to those who remain married appears to have been achieved. ●

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For further detail please call, Gareth Madden at Moss Technology on 01-6792211.

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Contractual Barriers to the Existence of a Duty of Care

Peter Somers, Barrister

The recent decision of the Supreme Court in *McCann and Cummins -v- Brinks Allied Limited and Ulster Bank Limited*¹ suggests that in appropriate circumstances the answer to the question as to whether or not a duty of care exists may be found by examining the contractual relationship between the parties involved in the negligence suit. In that case the Court held that the contract which existed between the co-defendants was a circumstance which prevented any duty of care arising on the part of the second defendant vis-a-vis the plaintiffs, who were the employees of the first defendant.

The facts of the case were as follows. The plaintiffs were security men employed by Brinks and had sued both defendants in negligence in respect of injuries sustained when they were set upon by raiders while delivering cash to a branch of the Ulster Bank. Due to the layout of the particular bank branch the nearest point which the security van could get to the bank door was 42 feet and because there was an intervening car on the day of the raid the plaintiffs were obliged to park the security van some 47 feet from the bank door. The armed raid occurred while traversing that distance.

There had been three previous robbery incidents at the bank branch, and Brinks personnel were involved on two of those occasions. The facts were such that O'Flaherty J. stated in his judgment that it was apparent to both Brinks and the bank that there existed a risk that security people might be attacked and robbed in the vicinity of the bank branch. Moreover, the bank had in fact been requested by Brinks to

provide a better and simpler access to the bank premises and had also been advised by an inspector in the Garda Síochána to provide better access.

In the High Court, Morris J., in awarding damages to the plaintiff, had held that there was a failure on the part of Brinks to provide the plaintiffs with a safe system of work and to take all proper and reasonable precautions for their safety. No liability was imposed on the bank.

Brinks appealed to the Supreme Court and sought an indemnity or contribution in relation to the damages on the grounds that the bank should have been held to have been a concurrent wrongdoer. The issue to be decided was whether, in the particular circumstances of the case, the bank owed a duty of care to Brinks' employees.

The Supreme Court referred in detail to the terms of the standard commercial agreement which existed between Brinks and the bank. Notably, the agreement did not contain a clause providing that Brinks would agree to assume the risk of any damage or injury to its employees. Brinks had, however, expressly "reserved to itself the absolute discretion as to the means, route and procedure to be followed in the storage, guarding and transportation" of the cash. O'Flaherty J. stated that it was "clear that the bank by engaging Brinks were also avoiding a risk of injury or damage to their own employees to which they might otherwise be exposed if they had the task of transporting the cash". Brinks, his Lordship noted had presumably exacted an appropriate commercial price. Given that the bank had engaged Brinks to carry out a hazardous activity, and one for which they would be responsible for the safety of their own

staff, it would be wrong to infer that the relationship between the parties was such as to hold the bank as being in a position of owing a duty of care to the Brinks employees.

The Court held that the legal solution to the problem posed is to say that the parties reached an agreement that the risk would lie with Brinks to make sure that the cash was delivered safely and that was the extent of the bank's interest. In this case the contract between Brinks and the bank was a circumstance which prevented any duty of care arising on the part of the bank vis-a-vis the Brinks' employees. The appeal, therefore, was dismissed.

The finding would suggest that, in appropriate circumstances, a bank does owe a duty of care to security men delivering or collecting cash from its branches. If, for example, the cash was being delivered by a security firm on behalf of a bank customer then the absence of any contractual relationship between the bank and the security firm would remove the contractual barrier to the existence of a duty of care.

There are two possible ways to analyse this decision. The most simple is to say that this is a case which is restricted to its own facts and that the matter was decided by determining the true contractual arrangement which existed between the co-defendants and by implying a relevant term into that contract. Effectively, the second defendant was deemed to have contracted out of liability.

Alternatively, there may be wider 'duty of care' issues implicit in the decision. Where there is a contractu-

al nexus between all or any of the parties to an action in negligence which touches upon the activity which gave rise to the injury, should one look to the contractual relationship between the parties when deciding as to whether or not a duty of care was owed to an injured party by a potential defendant?

Some support for that approach may be found in the very recent Supreme Court decision in *Madden v- The Irish Turf Club, The Irish National Hunt Steeple Chase Committee and Others*². The first and second named defendants respectively manage flat and national hunt horse racing in Ireland and were sued in negligence by the plaintiff for permitting a horse called Dell of Gold to enter and win a race at Punchestown, on the 12th January 1989, when that horse was not in fact qualified under the defendants' rules to enter the race in question. The plaintiff had placed a jackpot bet, which is a pool bet on four consecutive races, and having chosen the winner of the first three jackpot races was deprived of his prize by Dell of Gold's victory in the fourth jackpot race in which the plaintiff's selection, Lucky Bucket, had

finished second. The jackpot bet was placed with the Tote which is controlled by the Racing Board and which, quite rightly, was not a party to the action.

Dell of Gold was subsequently, on 27th January, disqualified and the race was awarded to Lucky Bucket, but alas, the jackpot had already been paid out in accordance with the Tote regulations, on the actual day of the race meeting as soon as the "winner-all-right" declaration was made. The plaintiff succeeded in the High Court³ and was awarded damages which represented an amount equivalent to the jackpot payout on the day.

The Supreme Court allowed the defendants' appeal on the grounds that no duty of care was owed by the defendants to the plaintiff in the circumstances of the case. In the judgment, delivered by O'Flaherty J., it was stated, *inter alia*, that the plaintiff's contractual relationship was with the Tote management and "that erected a barrier so as to prevent such close and direct relations to occur as is necessary to give rise to a duty of care between the plaintiff and the defendants".

The common thread between these two Supreme Court decisions is the notion that in certain situations the existence, or non-existence, of a contractual relationship between parties will provide a focus for the court in deciding whether or not a contractual barrier will be deemed to exist which would prevent a duty of care from coming into existence in circumstances where, certainly at a cursory glance, one would have thought that such a duty of care might exist.

The principles enunciated in these cases however do not, I believe, bring us any closer to the elusive all-embracing formula which might serve as a general test of liability. ●

(1) Unreported Supreme Court
4th November 1996

(2) Unreported Supreme Court
17th February 1997

(3) The Irish Times Law Report
26th July 1993

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Counselling Victims - Is it Always A Good Idea?

Carroll Moran, Barrister

Two new psychiatric studies have concluded that it is possible that, following a traumatic event, counselling by way of "talking therapy" does more harm than good. The studies challenge the general perception that counselling helps victim recover and lessens the effects of the trauma suffered. One was conducted at the Whitchurch Hospital in Cardiff¹, the other at the John Radcliffe Hospital in Oxford².

Some members of the Bar will have an interest in this field through their frequent contact, in criminal or personal injuries cases in particular, with persons who have had recent traumatic experiences. While the barrister's task is directed to the resolution of legal matters, this also includes a consideration of the effect of the incident on the victim and the nature and level of trauma suffered. Indeed, in any event, understanding more about that trauma and how it may be lessened should be of personal and professional interest to all lawyers working with victims.

The Cardiff study assessed one hundred and ten victims, who had suffered fire burns in a variety of incidents. One half of the volunteers underwent counselling, or psychological debriefing sessions lasting between 30 and 120 minutes in a period spanning two to nineteen days after the burns were inflicted. The members of the other half were left to cope by themselves. The division of the group into the two halves was made on a random basis.

All one hundred and ten subjects were interviewed after three months and again after thirteen months, (thirteen months being chosen to avoid anniversary phenomena affecting the result). The study assessed the number of volunteers who went on to develop

post-traumatic stress disorder.

Of the one hundred and ten, the research found that twenty-six per cent of the volunteers who had talked to therapists subsequently developed a post-traumatic stress disorder. By comparison, only nine per cent of those who had not been given any counselling suffered later from the same disorder.

From this it appears that post-traumatic stress disorder happened to almost three times as many persons who had undergone counselling as compared to those who had had no counselling. As this report says in its conclusion:

"There is a good theoretical basis as to why psychological debriefing could make some individuals worse. It involves intense imaginal exposure to a traumatic incident within a short time of it happening. It may be that in some individuals all this serves to do is to traumatise them further, exacerbating their symptoms and not helping them emotionally to process their traumatic experience."

The same report has a salutary recommendation.

"The possibility of psychological debriefing producing a detrimental effect is extremely important because if this is the case, then the routine use of psychological debriefing should be discontinued. Indeed, even if psychological debriefing has no effect, which this and the other studies seem to suggest as a best possible scenario, its routine use should be discontinued."

The Oxford study assessed one hundred and six victims of road traffic accidents, with fifty-four undergoing psychological debriefing and fifty-two being left to themselves. Again, this research made similar findings of indi-

cations that such therapy may have been disadvantageous.

The Oxford report gives several possible explanations. With early intervention, some patients may still be too numbed or distressed to be receptive; the intervention may not seem relevant to subjects expecting an uneventful recovery; a single intervention may be inadequate for major emotional problems; and early interventions may disturb natural psychological "defences" against fear and distress.

Of course proper sustained therapy at the right time may help individuals in certain instances after a tragedy, where such individuals show symptoms which require attention.

On the other hand, if the message from these two reports is true, it must induce a note of caution to those advising counselling to victims of crime or of other traumatic events. ●

1. A randomised controlled trial of psychological debriefing for victims of acute burn trauma: study by Dr. Jonathan Bisson, consultant psychiatrist, et al., University of Wales, College of Medicine; approved for reporting in an edition, shortly to be published, of the British Journal of Psychiatry.
2. A randomised controlled trial of psychological debriefing for victims of road traffic accidents: study by Dr. Michael Hobbs, consultant psychotherapist, et al., John Radcliffe Hospital, Oxford; reported in the British Medical Journal, vol.313. (7th December 1996).



Legal

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Update

A directory of legislation, articles and written judgments received from 3rd February to 5th March 1997.
Judgment summaries compiled by the Legal Researchers, Judges Library.
Edited by Desmond Mulhere, Law Library, Four Courts, Dublin 7

Administrative Law

Statutory Instruments

Ethics in public office (prescribed public body, designated directorships and designated positions in public bodies) regulations, 1997
S.I.32/1997
Date signed: 15.1.97

Marine (delegation of ministerial functions) order, 1997
S.I.68/1997
Date signed: 4.2.97

Admiralty

The "Von Rocks"; Targe Towing Ltd. & Scheldt Towage Co. N.V. v. The Owners & All Persons Claiming an Interest in the Vessel "Von Rocks"

High Court: **Barr J.**
17/01/1997

Ship arrest; whether backhoe dredger a "ship" for purpose of s.13(2) of Jurisdiction of Courts (Maritime Conventions) Act, 1989
Held: Backhoe dredger not a ship; not amenable to arrest

Agency

Statutory Instrument

European Communities (commercial agents) regulations, 1997
S.I.31/1997
Date signed: 7.1.97

Agriculture

Agriculture, food and forestry (delegation of ministerial functions) order, 1997
S.I.65/1997
Date signed: 4.2.97

European Communities (beet seed) (amendment) regulations, 1997
S.I.55/1997
Commencement date: 3.2.97

European Communities (seed of fodder plants) (amendment) regulations, 1997
S.I.53/1997
Commencement date: 3.2.97

European Communities (seed of oil plants and fibre plants) (amendment) regulations, 1997
S.I.54/1997
Commencement date: 3.2.97

European Communities (vegetable seeds) (amendment) regulations, 1997
S.I.56/1997
Commencement date: 3.2.97

Livestock marts (date of test and name and address of owner) regulations, 1997
S.I.33/1997
Commencement date: 3.2.97

Milk (regulation of supply) (establishment of interim board) (amendment) order, 1996
S.I.427/1996
Date signed: 30.12.96

Bankruptcy

Article

The voluntary transaction and the possible insolvency of the settlor
Dwyer, James
1 (1996) CPLJ 21

Children

Library Acquisition

Denyer, Roderick L
Children and personal injury litigation
London Butterworths 1993

N38.1.Q11

Commercial Law

Statutory Instrument

European Communities (undertakings for collective investment in transferable securities) (amendment) regulations, 1996
S.I.357/1996
Commencement date: 1.1.97

Library Acquisitions

Burgess, Robert
Law of loans and borrowing
London S & M 1996
N305.2

Herzfeld, Edgar
Joint ventures 3rd ed
Bristol Jordans 1996
N269

Lavery, Paul
Commercial secrets: the action for breach of confidence in Ireland
Dublin Round Hall S & M 1996
N250.C5

Worthington, Sarah
Proprietary interests in commercial transactions
Oxford Clarendon Press 1996
N250

Article

The bill of sale: the forgotten relation?
Maguire, Barbara
1997 CLP 3

Company Law

In Re Greendale Developments Ltd (In Liquidation) and the Companies Acts 1963-1990
Supreme Court: Blayney J., Keane J., Murphy J.
20/02/1997

Directors; liquidation; s.298 Companies Act, 1963; whether impugned payments *intra vires*; unanimous shareholder assent; whether payments reasonably incidental to company's business; whether misfeasance proceedings appropriate; whether set-off possible; whether "new evidence" should be adduced; refusal of adjournment; remittal for rehearing; whether appellants prejudiced.

Held: Payments *ultra vires* when not to company's benefit; no right of set-off where no mutuality of debts; "new evidence" which merely goes to credibility of witness only admissible where must have led to a different conclusion; rehearing refused.

O'Keeffe v. Ferris & Ors.

Supreme Court: Hamilton C.J., O'Flaherty J., Denham J., Barrington J., Keane J.
19/02/1997

Winding up process; challenge to validity of statute; s.297(1) Companies Act, 1963; s.21 Interpretation Act, 1937; whether proceedings in substance criminal in nature; whether inconsistent with Article 38(1); due course of law; indicia of a criminal offence; whether punitive element of sanction permitted by legislation.

Held: Sanctions available do not encroach on Constitution; appeal dismissed.

In Re Motor Racing Circuits Ltd. and the Companies Act, 1963

Supreme Court: O'Flaherty J., Blayney J.*, Keane J.
*ex tempore
31/01/1997

Winding Up; liquidation; whether appointment of receiver subsequent to service of winding up petition contrary to ss.218, 222, Companies Act, 1963; whether validity of debenture affected by its being stamped up subsequent to presentation of petition or by apparent irregularity in its execution; whether proper notice to company of appointment of receiver.

Held: Receiver validly appointed; debenture valid; appeal dismissed.

Horgan v. Murray & Milton

High Court: Barron J.
31/01/1997

Application to strike out or stay proceedings under s.205 Companies Act, 1963; petitioner seeking to be bought out; whether petitioner abusing processes of court by refusing to accept respondent's offer to value shares according to procedure contained in articles of association.

Held: Application dismissed; no abuse of

process.

In the Matter of Outdoor Advertising Services Ltd. (In liquidation)

High Court: Costello P.
28/01/1997

Winding up; Application for restriction order under s.150, Companies Act, 1990; whether directors acted honestly and responsibly; payments made to non-creditor companies controlled by certain directors.

Held: Application granted.

Statutory Instrument

European Communities (public limited companies subsidiaries) regulations, 1997
S.I.67/1997

Commencement date: 1.3.97

Articles

The beef on the EU Convention on insolvency proceedings

Barrett, Gavin
1997 CLP 12

Share identification rules

McCleane, Jim
1997 ITR 35

Competition

Blemings & Ors. v. David Patton Ltd. & Ors

High Court: Shanley J.
15/01/1997

Chicken growing in Monaghan; whether dominant position; geographic market; whether infringements of s.4/s.5, Competition Act, 1991; obligation on plaintiffs to buy meal through defendants; price discrimination; whether unfair prices; whether breach of contract due to failure by defendants to account for dead and useless birds.

Held: Defendant in dominant position but no abuse; breach of contract due to failure to account.

Constitution

Comerford v. Minister for Education, Ireland & Attorney-General

High Court: McGuinness J.
20/12/1996

Education of disruptive minor; child suffering from attention deficit disorder; whether respondents had failed in constitutional duty to provide for suitable primary education for

child.

Held: Respondents had failed in constitutional duty; suitable education now being provided.

Comptroller & Auditor General v. Ireland & Attorney General

High Court: Laffoy J.
20/12/1996

Functions of Comptroller; confidentiality of tax amnesty; whether Comptroller restricted under s.7(5), Waiver of Certain Tax, Interest and Penalties Act, 1993 to carrying out audit of special collections functions under Act or entitled to carry out more general audit under statutory powers; whether s.7(5) invalid under Art.33 of Constitution.

Held: Comptroller restricted to carrying out audit of discharge of special collections functions under Act; s.7(5) not invalid under Article 33.

Library Acquisitions

Farry, Michael
Education and the constitution
Dublin Round Hall S & M 1996
N184.C5

Lane, Patrick Harding

A digest of Australian constitutional cases
5th ed
Sydney LBC Information Services 1996
M31.K1

Consumer Law

Library Acquisition

Lockett, Nicholas
Unfair terms in consumer agreements : the new rules explained
Chichester Wiley 1995
W112

Contract Law

S. Smyth & Co. Ltd. v. Aer Turas Teo.

Supreme Court: O'Flaherty J., Blayney J., Keane J.
03/02/1997

Contract; breach; livestock export; fraudulent replacement of documents on arrival; whether transporter negligent or in breach of duty in handling customs arrangements at airport; whether transporter vicariously liable for negligence of ground service provider.

Held: No negligence or breach of duty by transporter or ground service provider.

Sweeney v. Duggan

Supreme Court: Hamilton C.J., Barrington J., **Murphy J.**
14/02/1997

Contract; implied term; plaintiff injured in quarrying accident; employer not insured for accident liability; whether implied term in contract of employment obliging employer to insure; whether duty on managing director to ensure that company insure.

Held: No implied term; no duty on managing director.

McCarron v. McCarron

Supreme Court: Hamilton C.J., Keane J., **Murphy J.**
13/02/1997

Contract; specific performance; farmer died intestate; cousin's son worked on farm for sixteen years without reward; whether agreement to remunerate him by devising lands to him; whether proprietary estoppel.
Held: Contract to devise lands; possibility of proprietary estoppel.

Bula Ltd. (In Receivership) & Ors. v. Tara Mines Ltd. & Ors.

High Court: **Lynch J.**
06/02/1997

Mining lease; whether conspiracy by defendants against plaintiffs; whether Minister for Energy obliged to have supported mine project by plaintiffs; whether Minister wrongfully induced not to support project but instead to support take-over of first-named plaintiff by first-named defendant.
Held: Minister not obliged to support project; take-over proposals bona fide; no wrongful induction of Minister; action dismissed.

Atherton Services Ltd. v. Killeen & Killeen

Atherton Services Ltd. v. Killeen & Killeen
High Court: **Barron J.**
28/01/1997

Surrender of equipment under settlement agreement; dispute as to extent of loss defendant should bear if equipment failed to obtain estimated value at sale.

Held: Claim dismissed; no evidence of any shortfall.

Statutory Instruments

Public Procurement, the public services

contracts regulations 1993

S.I. 3228/1993 (UK)

This is an English regulation File under procurement (Basement)

Public procurement, the public supply contracts regulations 1995

S.I. 201/1995 (UK)

This is an English regulation File under procurement (Basement)

Public procurement, the utilities supply and works contracts regulations

1992

S.I. 3279/1992 (UK)

This is an English regulation File under works (Basement)

Public procurement, the public works contracts regulations 1991

S.I. 2680/1991 (UK)

This is an English regulation File under Works (Basement)

Library Acquisitions

Bright, Christopher

Public procurement handbook
Chichester Chancery Law 1994
W109.6

Lockett, Nicholas

Unfair terms in consumer agreements : the new rules explained
Chichester Wiley 1995
W112

Articles

International contractual disputes: the conundrum of options

Mills, Oliver
1997 CLP 9

The bill of sale : the forgotten relation?

Maguire, Barbara
1997 CLP 3

Copyright, Patents & Designs

Symonds Cider & English Wine Co. Ltd. v. Showerings (Ireland) Ltd.

High Court: **Laffoy J.**
10/01/1997

Passing off and trade mark infringement proceedings concerning cider cans; damages not adequate remedy for either side; balance of convenience; new can being introduced by plaintiffs; whether s.24, Trade Marks Act, 1996 applicable.

Held: Injunction refused due to introduction of new can; s.24 inapplicable to proceedings already initiated.

Article

Patents : tax advantages and the individual
Bollard, Joe
1997 ITR 64

Criminal

B v. DPP

Supreme Court: Hamilton C.J., O'Flaherty J., **Denham J.**, Barrington J., Keane J.
19/02/1997

Appeal; dismissal of judicial review; whether breach of applicant's right to trial with reasonable expedition; inordinate lapse of time; Articles 38.1 & 40.3; whether accused's defence prejudiced; whether real risk due to delay that applicant would not obtain a fair trial; special category of allegations of sexual abuse of children and young children; whether applicant responsible for delay; relationship of parties; dominion; nature of offence.

Held: Failure to discharge onus of establishing real risk; appeal dismissed.

O'Brien v. Governor of Limerick Prison

Supreme Court: Hamilton C.J., O'Flaherty J., **Denham J.**, Barrington J., **Murphy J.**
13/02/1997

Sentence; inquiry pursuant to Article 40.4; suspension of latter part of sentence ordered by court of trial; whether applicant entitled to remission on custodial part of sentence under Prisons Act, 1907.

Held: Suspension of part of sentence cannot be reconciled with 1907 Act; remission to be calculated in respect of period of imprisonment.

Hegarty & Ors. v. D.P.P.

High Court: **Kelly J.**
29/11/1996

Bail sought in habeas corpus inquiries; whether applicants entitled to bail; whether court has jurisdiction to grant bail in such inquiries; whether special criteria applicable.

Held: bail refused; jurisdiction and special criteria issues not decided.

Kwok Ming Wan v. Conroy

High Court: **Smyth J.**
17/12/1996

Extradition proceedings; release sought pursuant to s.50, Extradition Act, 1965; whether oppressive to extradite due to lapse of time since commission of offence and other exceptional circumstances.

Held: Plaintiff released; oppressive to extradite due to exceptional changes in circumstances since conviction.

Byrne v. Conroy
High Court: **Kelly J.**
22/01/1997

Extradition proceedings; alleged conspiracy to subvert functioning of scheme of monetary compensation amounts imposed on agricultural produce crossing E.U. member states' borders; whether offence a revenue offence within meaning of s.50(2)(a)(iii), Extradition Act, 1965; whether monetary compensation amounts a tax; whether literal approach to construction of Extradition Act appropriate in case with E.U. dimension

Held: Monetary compensation amounts not a tax; offence not a revenue one; construction of provisions consistent with State's obligations to E.U. more appropriate than literal approach

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Criminal evidence act, 1992 (sections 14 and 19) (commencement) order, 1997
S.I.66/1997
Commencement date: 3.3.97

Criminal justice act, 1984 (electronic recording of interviews) regulations, 1997
S.I.74/1997
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Commencement date: 3.3.97

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Defamation

Dawson & Dawson v. Irish Brokers Association
Supreme Court: Hamilton C.J., O'Flaherty J., Barrington J.
27/02/1997

Libel; expulsion of plaintiffs from membership of defendant association by prima facie defamatory letter; whether qualified privilege; whether damages excessive.

Held: No qualified privilege due to breach of association's rules in expulsion; damages excessive.

Education

Statutory Instrument

Vocational education (grants for annual schemes of committees) regulations, 1996
S.I.428/1996
Date signed: 31.12.96

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Employment

Corcoran & Ors v. E.S.B.
Supreme Court: **Blayney J.**, Barrington J., Keane J.
06/02/1997

Termination of employment for misconduct during strike; whether termination precluded by agreement to settle strike; whether breach of right to fair procedures.

Held: Termination not precluded by agreement; no breach of right to fair procedures.

Carney v. Balkan Tours Ltd.
Supreme Court: **Blayney J.**, Barrington J.,

Murphy J.
20/01/1997

Termination of employment; case stated; summary dismissal; reasons for dismissal not adduced; proceedings brought before the Employment Appeals Tribunal; decision of tribunal appealed to Circuit Court; case stated from Circuit Court; s.16 Courts of Justice Act, 1947; net point of law; interpretation of s.7 of Unfair Dismissals Act, 1977; whether Employment Appeals Tribunal in determining payment by way of redress for unfair dismissal entitled to have regard to employee's contribution to dismissal; whether regard must be had to all the circumstances; whether tribunal can take into account pre-dismissal conduct of employee; whether conduct of employee material in determining right of redress; s.6 Unfair Dismissals (Amendments) Act, 1993.

Held: Employment Appeals Tribunal entitled to have regard to employee's contribution to dismissal.

Statutory Instruments

Industrial training (chemical and allied products committee) (amendment) order, 1997
S.I.47/1997
Date signed: 30.1.97

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S.I.46/1997
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S.I.50/1997
Date signed: 30.1.97

Industrial training (food, drink and tobacco committee) (amendment) order, 1997
S.I.49/1997
Date signed: 30.1.97

Industrial training (printing and paper committee) (amendment) order, 1997
S.I.51/1997
Date signed: 30.1.97 Date received: 14.2.97

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note on case C-13/94 P. v.S. and Cornwall
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report by the Minister for Transport, Ener-
gy and Communications for the six months
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an overview of the issues in the context of
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the last green bottle
Meehan, David
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Agency in waste management
Butler, Anne Crowe, Matthew F
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to planning and environmental law
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European Law**Statutory Instruments**

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Commencement date: 5.2.97

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(amendment) regulations, 1997
S.I.55/1997
Commencement date: 3.2.97

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agents) regulations, 1997
S.I.31/1997
Date signed: 7.1.97

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companies subsidiaries) regulations, 1997
S.I.67/1997
Commencement date: 1.3.97

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for non-economically active persons) regu-
lations, 1997
S.I.57/1997
Date signed: 30.1.97

European Communities (seed of fodder
plants) (amendment) regulations, 1997
S.I.53/1997
Commencement date: 3.2.97

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and fibre plants) (amendment) regulations,
1997
S.I.54/1997
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tions terminal equipment) regulations, 1997
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Date signed: 4.2.97

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collective investment in transferable securi-
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Conlan Smyth, David
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Cullen v. Judge Fitzpatrick & DPP

Supreme Court: Blayney J., Keane J., Murphy J.
26/02/1997

Appeal; applicant charged under Misuse of Drugs Act, 1977-1984 and regulations; arrested pursuant to s.4 Criminal Justice Act, 1984; leave to apply for judicial review granted; certiorari sought quashing conviction; fair procedures; whether District judge failed to have regard to applicant's natural and constitutional rights; absence of witness in court; adjournment refused; no opportunity to cross examine; order of certiorari granted; decision appealed by respondent; whether evidence of missing witness relevant in determining guilt or innocence of accused; evidence not relied upon by prosecution; violation of constitutional rights not raised at trial.

Held: Appeal allowed; failure to allege violation of constitutional rights at trial; evidence irrelevant.

Whitehead v. Commissioner of an Garda Siochana & Ors.

Supreme Court: Hamilton C.J., Barrington J., Murphy J.
27/02/1997

Appeal; monies detained by first defendant; return sought by appellant; whether property of plaintiff; whether trial judge erred in holding that plaintiff was not lawful owner of property; whether judge entitled to refuse plaintiff's claim where no other claim of ownership; onus of proof on plaintiff; balance of probabilities; conflict of evidence; assessment of evidence a matter for trial judge; whether court entitled to interfere with finding of evidence by trial judge.

Held: Appeal dismissed; assessment of evidence matter for trial judge; failure to discharge onus.

Family Law

Z.S.A. v. S.T. In the matter of T.A. and K.A. (infants)

High Court: Laffoy J.
26/08/1996

Child custody; husband sought return of child to England; Child Abduction and Enforcement of Orders Act, 1991; parents of child divorced; wife brought child to Ireland with alleged consent of husband; intention of residing in jurisdiction; whether husband agreed to removal of child; conflict over agreement; Articles 3 and 12 of Hague Convention; whether child wrongfully removed or wrongfully retained; meaning of wrongful removal or retention; requirement that child be habitually resident in jurisdiction before commencement of wrongful retention; meaning of habitual residence; place of habitual residence; joint parental responsibility.

Held: Application dismissed; child not habitually resident in England before removal.

R.C. v. C.C.

High Court: Barron J.
17/01/1997

Decree of dissolution of marriage sought pursuant to Art. 41.3.2; Family Law (Divorce) Act, 1996 not yet in force; whether court has jurisdiction to grant decree pursuant to constitution; whether provisions between parties proper; whether collusion.

Held: Court has jurisdiction; provisions between parties proper; no collusion; order for dissolution of marriage granted.

J.S. v. C.S. (otherwise C.T.)

High Court: Budd J.
14/10/1996

Nullity suit; whether Master has jurisdiction to appoint psychiatrist as medical inspector pursuant to Ord.36, r.4 and Ord.70, r.32 RSC 1986; whether incapacity to enter into and sustain relationship includes psychological incapacity; whether Master exercised discretion properly; whether appointment violated right to privacy.

Held: Master has jurisdiction to appoint psychiatrist; discretion exercised properly; no violation of constitutional rights.

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Commencement date: 1.2.97 to 31.3.97

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Marine (delegation of ministerial functions) order, 1997
S.I.68/1997
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Monkfish (restriction on fishing) order, 1997
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Commencement date: 1.2.97 to 31.3.97

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Salmon (restriction of fishing at sea) (amendment) order, 1997
S.I.30/1997
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Food & Drugs**Statutory Instrument**

Industrial training (food, drink and tobacco committee) (amendment) order, 1997
S.I.49/1997
Date signed: 30.1.97

Garda Síochána

O'Leary & Ors. v. Commissioner of An Garda Síochána
High Court: **Smyth J.**
31/07/1996

Garda Síochána allowances; work arrangements; duties; garda telecommunications network based in Dublin Castle; garda stationed in Harcourt Square Station also carrying out duties in Dublin Castle; whether plaintiffs entitled to travelling expenses between two places of work; interpretation of garda regulations; meaning of working "away" from station.
Held: Claim dismissed.

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FitzGerald, Kyran
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Injunctions

Connolly v. Byrne & Anor.
Supreme Court: **O'Flaherty J., Murphy J., Lynch J.**
23/01/1997

Appeal; refusal of application for interlocutory injunction; appellant seeking to prevent certain proposed changes to Cathedral by trustees; whether fair question to be determined at trial; whether court has jurisdiction over question of property rights of religious denomination; Article 44.5 Constitution considered; whether balance of convenience lies with appellant.
Held: Fair question; balance of convenience lies with defendants; appeal dismissed.

Connolly v. Byrne & Anor.
High Court: **Barron J.**
13/01/1997

Interlocutory injunction to restrain proposed alterations to cathedral sanctuary; whether arguable case that alterations would breach trust under which cathedral held; whether arguable case that powers given to trustees can be overset by beneficiaries of public charitable trust; whether consent of A-G to proceedings required under s.51(1), Charities Act, 1961; balance of convenience.
Held: Injunction refused.

Vogel v. Cheeverstown House Ltd.
High Court: **Shanley J.**
30/04/1996

Application for interlocutory injunction; order sought restraining disciplinary proceedings; allegations of sexual abuse; mentally handicapped complainant; committee established to investigate complaint; procedures adopted by committee; complainant not to appear as a witness; appearance as witness inappropriate on medical grounds; distress; proposal to adduce hearsay evidence; admissibility of hearsay evidence in circumstances of alleged sexual abuse; interests of parties; requirements of natural justice; whether ordinary principles of

injunctions applicable.
Held: Injunction refused; not in the interests of complainant.

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Judicial Review

Radio Limerick One Ltd. v. I.R.T.C.
Supreme Court: **Hamilton C.J., Barrington J., Keane J.**
16/01/1997

Certiorari; termination of local radio contract under s.14(4) Radio and Television Act, 1988; whether evidence of serious or repeated breaches of statutory or contractual obligations; whether termination disproportionate having regard to nature of

breach; bias.

Held: Certiorari refused; appeal dismissed.

Coughlan v. Judge King

Supreme Court: **Hamilton C.J.***, Blayney J., Murphy J.

*ex tempore

24/01/1997

Certiorari; appeal against refusal to grant leave to apply for judicial review; whether District Judge acted in excess of or without jurisdiction; whether litter warden required to provide evidence of identification in proceedings pursuant to s.7 Litter Act, 1982.

Held: Appeal dismissed; no requirement on litter warden.

Farrell v. Attorney General

High Court: **Smyth J.**

30/01/1997

Powers of Attorney General; s.24(1) Coroners Act, 1962; inquest; verdict of jury; disagreement over medical evidence during inquest; non-disclosure of evidence at inquest; Attorney General of view that "new", "fresh" or "further" inquest should be held pursuant to s.24(1) of 1962 Act; whether Attorney general has power to order a new inquest after final verdict returned; whether Attorney General acting ultra vires; whether decision unreasonable; limited discretionary power; verdict of original inquest not quashed; inquest conducted in accordance with law; fair procedures.

Held: Section 24 of 1962 Act does not empower Attorney General to hold a new inquest where verdict from a lawfully conducted inquest was returned.

McCormack v. Garda Siochana Complaints Board & Ors.

High Court: **Costello P.**

28/01/1997

Certiorari proceedings; challenge to decision of Board to take no further action in relation to complaint made against garda; whether decision irrational; whether duty on Board to give reasons for decision; whether applicants entitled to amend statement grounding application for judicial review.

Held: Decision not irrational; no duty to give reasons; amendment allowed.

An Blascaod Mor Teo. & Ors. v. Commissioners for Public Works & Ors.

High Court: **Kelly J.**

18/12/1996

Delegation; vires of An Blascaod Mor National Historic Park Act, 1989 (Forms)

Regulations, 1990; whether Minister entitled to make Regulations without express power under Act; whether Regulations within terms of Act; whether compulsory acquisition notices under Regulations valid.

Held: Regulations valid.

Fitzpatrick v. Commissioner of An Garda Síochána

High Court: **Kelly J.**

16/10/1996

Injunction; garda serving in UN in Cyprus; reception for garda UN forces with Minister for Defence; garda insulted Minister at reception; decision by respondent to repatriate applicant; decision appealed; rejected; interlocutory injunction sought on application for judicial review; principles applicable for grant of injunction; serious issue to be tried; whether repatriation part of disciplinary proceedings; adequacy of damages; whether applicant would suffer loss of earnings as a result of repatriation; whether applicant could be compensated in respect of loss of reputation; balance of convenience.

Held: Injunction refused.

Healy v. Fingal County Council

High Court: **Barr J.**

17/01/1997

Scope of judicial review; deduction of councillor's expenses by way of set off against debt to council; whether issue properly the subject matter of judicial review; delay.

Held: Judicial review not available as private law matter; excessive delay in any event.

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Judicial review of planning decisions: and subsection (3B), Local government (planning & development) act, 1963

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Local Government

Statutory Instrument

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S.I.43/1997
Commencement date: 15.2.97

Medical Law

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Negligence

Madden v. The Irish Turf Club & Ors.
Supreme Court: **O'Flaherty J.**, Blayney J.,
Murphy J.
17/02/1997

Appeal; horse races; betting; winner of horserace not qualified to run in race; horse disqualified; plaintiff lost bet; defendant's function to ensure horses qualified for race; regulation and control of horse races; whether duty of care owed; contractual relationship with tote; proximity of parties; rules; public policy considerations.

Held: Appeal allowed; betting aspect separate from defendant's essential function; contractual relationship with third party prevents duty of care arising with defendant; policy argument not necessary for decision.

Flynn v. McGoldrick & Anor.

High Court: **Flood J.**
25/10/1996

Personal injuries; plaintiff tripped on kerbstone on defendant's premises; conflict concerning date of accident; whether defendant liable; whether area was a danger to users and was within defendant's knowledge; contributory negligence; damages.

Held: Defendant liable; no finding of contributory negligence; special and general damages awarded.

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Irish insurance costs and damages
Pierse, Robert
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S.I.32/1997
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Planning

Roughan & Ors. v. Clare County Council
High Court: **Barron J.**
18/12/1996

Development Plan; application to restrain development of land; proposed development of land as a temporary halting site; development plan; whether proposed development constitutes material contravention of development plan; whether proposed development falls within exceptions of plan; statutory obligation of planning authority to provide housing for those in need of it; whether proposed development comes within objectives of plan; pre-conditions of development plan; consultation process with local population; whether material development involves change of use; factors to be taken into account in determining material change; location; objectives of plan; grounds of opposition; statutory proceedings; consultation process.
Held: Order granted restraining development; no express provision in plan for development of land as halting site.

Keane v. An Bord Pleanala & Ors.
High Court: **Carroll J.**
06/12/1996

Judicial review; planning permission granted for construction of Loran C mast in County Clare by Board; review of Board's decision; whether the Board acted ultra vires; whether Board entitled to take into account the international agreement ratified by the Dail; the common good; the extra-territorial effect of the Loran C mast;

whether irrelevant and inappropriate considerations relied upon; s.26 Local Government (Planning & Development) Act, 1963; whether planning authority confined to its planning area or entitled to have regard to effects on an area outside its remit; ss. 5 and 24 of Local Government (Planning & Development) Act, 1976; broader meaning to be given to area; whether sea areas included; extra-territorial effect of development.

Held: Order of certiorari refused.

Statutory Instrument

Local government (planning and development) regulations, 1997
S.I.78/1997
Commencement date: 13.2.97

Urban renewal act, 1986 (designated areas) (Ballinasloe) order, 1994 (retification of area) order, 1997
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Practice & Procedure

Harrington & Ors. v. J.V.C. (U.K.) Limited & Ors.
Supreme Court: **O'Flaherty J.**, Blayney J.,
Murphy J.
21/02/1997

Appeal; procedural matters; claim of damages against defendant for negligence; breach of contract; unlawful interference with plaintiff's business; conspiracy; sought

to set aside orders of High Court judge relating to service, striking out third defendant and security for costs; service outside jurisdiction; defects in service; whether service should be set aside; Order 124 rule 2 RSC 1986; whether undue delay in bringing application to set aside service; whether third defendants should be struck out; inherent jurisdiction to dismiss in addition to Order 19 rule 28 RSC 1986; security for costs; s.390 Companies Act, 1963; discretion of court; special circumstances; whether prima facie case established.
Held: Appeal dismissed.

Pat O'Donnell & Co. Ltd. v. Truck & Machinery Sales Ltd.

Supreme Court: Hamilton C.J., Blayney J., Murphy J.
18/02/1997

Appeal; whether defendant entitled to leave to adduce additional evidence relating to appeal pursuant to Ord.58, r.8, R.S.C. and/or inherent jurisdiction of the court.
Held: Application refused; evidence available to defendant at date of initial hearing.

Dunphy v. Judge Crowley & D.P.P.

Supreme Court: Blayney J., Barrington J., Murphy J.
17/02/1997

Summons; failure by defendant to appear personally in district court in obedience to summonses; appearance by solicitor; whether judge had jurisdiction to issue warrant for arrest.
Held: Summons requires personal appearance; judge had jurisdiction to issue warrant.

O'C v. Judge Smith & Anor.

Supreme Court: O'Flaherty J., Barrington J., Keane J.
24/01/1997

Appeal from refusal of prohibition; whether any excessive delay with regard to reporting of alleged sexual abuses and processing of case; if any delay whether such as to result in prejudice to the accused.
Held: No undue delay.

McBride v. Mayor, Aldermen & Burgesses of the City Borough of Galway

High Court: Laffoy J.
04/02/1997

Discovery; application for non-party discovery under Ord.31, r.29, R.S.C.; extent of discovery to be directed.
Held: Discovery as sought too onerous; more limited discovery ordered.
Fagan v. Burgess & Ors

High Court: **Barron J.**
28/01/1997

Notices for particulars; whether replies to notices inconsistent; whether claims should be struck out.

Held: Notices not replied to adequately; claims not struck out; matter for trial judge.

Duncan v. Governor of Portlaoise Prison

High Court: **Kelly J.**
23/01/1997

Discovery in habeas corpus application; legal professional privilege and executive privilege claimed in respect of certain documents; application to cross-examine on affidavits of discovery; whether documents in respect of which legal professional privilege claimed should be produced so court could extract factual matter; whether court should examine documents in respect of which executive privilege claimed.

Held: Applications dismissed; claim to legal professional privilege upheld.

O'Neill v. Governor of Mountjoy Prison

High Court: **Kelly J.**
23/01/97

Discovery in habeas corpus application; issues as in Duncan's case (above); further argued that executive privilege claimed in respect of a class of documents; documents individually identified.

Held: Submissions not considered as claim to legal professional privilege not disturbed.

Quinlivan v Governor of Mountjoy Prison

High Court: **Kelly J.**
23/01/97

Discovery in habeas corpus application; same reliefs sought and arguments adopted as in Duncan's case (above). Further argued that the legal professional privilege claimed would not extend to documents used in furtherance of an alleged conspiracy.

Held: No evidence of conspiracy adduced; applications refused.

Carroll Shipping Ltd. & Anor. v. Mulcahy & Anor.

High Court: **McGuinness J.**
18/12/1996

Three notices of motion; amend statement of claim; strike out proceedings; reinstatement of proceedings; claim for breach of contract and negligence arising out of shipping accident; substantial delay by plain-

tiffs in filing original statement of claim; amended claim; lapse of eight years between issue of original statement of claim and service of amended claim; particulars then raised and discovery sought; whether inordinate and inexcusable delay in dealing with proceedings on part of plaintiff and defendant; whether proceedings should be struck out for delay; fair procedures; whether after such delay a just and equitable trial may be had; whether defendants' delay amounted to acquiescence to plaintiffs' delay.

Held: Proceedings dismissed; defendants' case precluded by delay.

Kelly v. Judge Hamill & DPP

High Court: **McCracken J.**
21/01/1997

District court; issuing of summons; offences pursuant to Licensing Acts; validity of summons; application for summons made by District court clerk; whether clerk within jurisdiction; whether garda must physically make application or has power to delegate; whether administrative function; summons procedure governed by s.1(4) Courts (No.3) Act, 1986; S.I. 23/87; jurisdiction of District judge to determine matter; refusal by District judge to state a consultative case for opinion of High court.

Held: Application for summons is an administrative act; delegation permissible; within jurisdiction of District court clerk.

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Derham, Rory S
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Oxford Clarendon Press 1996
N384.9

Professional Negligence

Bolton v. Blackrock Clinic Ltd & Ors

Supreme Court: **Hamilton C.J.**, Barrington J., Murphy J.
23/01/1997

Professional negligence; medical practitioner; two operations; restenosis occurred after first operation resulting in second operation being performed; whether plaintiff gave fully informed consent to second operation; whether doctor gave adequate explanation of results and effects of operation; negligence; whether doctor negligent in failing to fully investigate plaintiffs condition prior to operation; whether sufficient

tests carried out to ascertain condition of plaintiff; whether adequate information given to plaintiff for informed consent; obligation on doctor to inform plaintiff; whether operation necessary.

Held: Negligence not established; appeal dismissed.

McCullagh v. PB Gunne plc

High Court: **Carroll J.**

17/01/1997

Auctioneer; plaintiffs purchased commercial property on the advice of auctioneer; business failed; whether defendant owed duty of care to plaintiff or whether voluntary assumption of responsibility by plaintiffs; heavy reliance on auctioneer to advise plaintiffs and to act on their behalf; role of auctioneer.

Held: Duty of care recognised by court and plaintiffs claim upheld, damages awarded.

Records & Statistics

Statutory Instrument

Registration of births act, 1996 (commencement) order, 1997

S.I.45/1997

Commencement date: 1.10.97

Road Traffic

D.P.P. v. Lynch

Supreme Court: O'Flaherty J., **Barrington J.**, Keane J.

05/02/1997

Case stated; accused only willing to have blood sample taken from toe; whether doctor had made requirement in relation to taking of blood specimen within meaning of s.13(3), Road Traffic (Amendment) Act, 1978; whether accused informed of his obligation to comply with requirement.

Held: Requirement made by doctor; accused informed of obligation.

Sea & Seashore

Statutory Instrument

Fenit Harbour works order, 1997

S.I.19/1997

Date signed: 8.1.97

Library Acquisition

Marine Institute

Marine Institute annual report

Dublin Marine Institute 1995

Social Welfare

Library Acquisition

Bradley, John A

PRSI and levy contributions : Social welfare act

1996 3rd ed

Dublin Institute of Taxation 1996

M336.93.C5

Solicitors

Mackie v. Wilde & Ors

Supreme Court: Hamilton C.J., **Barrington J.**, Keane J.

15/01/1997

Civil proceedings; solicitor acting for defendant; whether solicitor had authority to act for third party; whether third party consented to being joined; whether evidence of client on retainer should be preferred to that of solicitor in absence of written retainer; constitutional duty of fair procedures.

Held: Appeal dismissed; solicitor had authority to act; not necessary to consider practice of preferring one party's evidence to another's.

Taxation

Action Aid Ltd. v. Revenue Commissioners

High Court: **Costello P.**

15/01/1997

Deeds of covenant in favour of named children in third world countries; payments made into fund benefitting group; whether payments applied for the benefit of named children under s.439, Income Tax Act, 1967; whether low income exemption under s.1, Finance Act, 1980 applicable to non-residents.

Held: Payments for benefit of named children; low income exemption applicable.

O'Rourke v. Revenue Commissioners

High Court: Keane J.

18/12/1996

Interest; Revenue assessment; plaintiff had paid tax on incorrect basis over nine year period; repayment made by Revenue Commissioners; assessing measure of plaintiffs loss; whether interest payable on such sum and rate of interest applicable; case stated to

Supreme Court as to whether plaintiff entitled to interest pursuant to s.30 Finance Act, 1976; held s.30 not applicable; trial judge considered basis upon which repayment made; doctrine of unjust enrichment considered; whether interest on interest payable.

Held: Rate of interest applicable is rate ruling under s.22 Courts Act, 1981 or s.26 Debtors (Ireland) Act, 1840.

Waterford Crystal Ltd. v. Commissioner of Valuation

High Court: **Costello P.**

10/12/1996

Valuation; case stated by Valuation Tribunal; valuation of premises under Valuation (Ireland) Act, 1852; whether reduction should be made for over capacity in manufacturing areas of premises; definition of hypothetical tenant.

Held: Reduction should not be made.

Taxback Ltd. v. Revenue Commissioners

High Court: **McCracken J.**

21/01/1997

Value Added Tax; VAT refunding agency; investigation by respondent into applicant agency's business; whether respondent entitled to withhold refund payments while investigation ongoing.

Held: Respondent not entitled to withhold payments.

D.H. Burke & Son Ltd. v. Revenue Commissioners, Ireland & Attorney General

High Court: **McCracken J.**

04/02/1997

Value Added Tax; application of Revenue VAT scheme for retailers in relation to alcoholic drinks bought in bond; whether amount of excise duty paid should be included in purchase price for purposes of scheme at zero rate or top rate of tax.

Held: Duty should be included in purchase price at top rate of tax.

Statutory Instruments

Finance act, 1993 (section 60) regulations, 1996

S.I.338/1996

Date signed: 21.11.96 Date received: 24.1.97

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The taxation of capital gains :

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Capital acquisitions tax :
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Donegan, David Friel, Raymond J
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Corbett, Tom
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O'Brien, Dermot Fay, John
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S.I.75/1997
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N38.1.Q11

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Article

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Pierse, Robert
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Minerals development acts, 1940-1995 :
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Transport

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European Communities (beet seed) (amendment) regulations, 1997

S.I.55/199

(DIR 96/72) Amends SI 37/1981

Commencement date: 3.2.97

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S.I.31/1997

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Date signed: 7.1.97

European Communities (public limited companies subsidiaries) regulations, 1997

S.I.67/1997

(DIR 92/101)

Commencement date: 1.3.97

European Communities (right of residence for non-economically active persons) regulations, 1997

S.I.57/1997

(DIR 90/364, 90/365, 93/96) Revokes SI 109/1993

Date signed: 30.1.97

European Communities (seed of fodder plants) (amendment) regulations, 1997

S.I.53/1997

(DIR 96/18, 96/72) Amends SI 112/1981

Commencement date: 3.2.97

European Communities (seed of oil plants and fibre plants) (amendment) regulations, 1997

S.I.54/1997

(DIR 96/18, 96/72) Amends SI 38/1981

Commencement date: 3.2.97

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S.I.73/1997

(DIR 91/263, 93/68) Amends SI 45/1992

Date signed: 4.2.97 Date received: 18.2.97

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S.I.357/1996

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S.I.36/1997

Commencement date: 16.1.97

District court districts and areas (section 26) (no 12) order, 1997

S.I.37/1997

Commencement date: 16.1.97

District court districts and areas (section 26) (no 13) order, 1997

S.I.38/1997

Commencement date: 16.1.97

District court districts and areas (section 26) (no 14) order, 1997

S.I.39/1997

Commencement date: 16.1.97

District court districts and areas (section 26) (no 15) order, 1997

S.I.40/1997

Commencement date: 16.1.97

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S.I.41/1997

Commencement date: 16.1.97

District court districts and areas (section 26) (no 17) order, 1997

S.I.42/1997

Commencement date: 20.1.97

District court districts and areas (section 26) (no 2) order, 1997

S.I.22/1997

Commencement date: 13.1.97

District court districts and areas (section 26) (no 3) order, 1997

S.I.23/1997

Commencement date: 13.1.97

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S.I.24/1997

Commencement date: 13.1.97

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S.I.25/1997

Commencement date: 13.1.97

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S.I.26/1997

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S.I.28/1997

Commencement date: 14.1.97

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S.I.27/1997

Commencement date: 14.1.97

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S.I.34/1997

Commencement date: 16.1.97

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S.I.84/1997

Commencement date: 27.2.97

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Social Welfare (Charter of Rights) Bill, 1995
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Social Welfare (Means Testing) Bill, 1996 -
2nd Stage - Dail

Social Welfare (Supplementary Welfare
Allowance Appeals) Bill, 1995 - 2nd Stage -
Dail

Abbreviations

BR - Bar Review

CLP - Conveyancer & Property Law
Journal

DULJ - Dublin University Law Journal

GILSI - Gazette Incorporated Law
Society of Ireland

ICLR - Irish Competition Law Reports

ICLJ - Irish Criminal Law Journal

IFLR - Irish Family Law Reports

ILT - Irish Law Times

IPELJ - Irish Planning & Environmental
Law Journal

ITR - Irish Tax Review

JISLL - Journal Irish Society Labour
Law

MLJI - Medico Legal Journal of Ireland

P & P - Practice & Procedure

Investment and Tax Breaks

Contact AIB Investment Managers

It is close to that time of year again - the end of the tax year. As part of their tax planning, many taxpayers seek investments which carry tax breaks. In this article Noel Minogue, Head of Sales and Marketing, AIB Investment Managers summarises the most popular tax based investments and highlights some of the factors which should be considered prior to undertaking such investments.

BUSINESS EXPANSION SCHEMES

The Business Expansion Scheme (BES) has been one of the most popular tax based investment opportunities since it was introduced in 1984. Over the intervening 13 years there has been substantial changes to the terms and conditions applying to BES with product providers trying to minimise the risk element for investors and governments trying to ensure that investors carry an appropriate amount of risk in exchange for tax relief.

Currently the key features of BES are as follows:-

- Maximum investment of £25,000 by an individual.
- 100% tax relief once funds have been invested in qualifying projects.
- Investment has to be for a minimum period of five years.
- Qualifying companies generally have to be manufacturing and approved by Forbairt from an employment creation view point.

A BES investment can be undertaken in an individual project or through a designated fund. Designated Funds take the vast majority of the investment under BES due to the advantages of professional management and diversification of risk as funds will invest in a range of projects. The returns from BES Funds have generally ranged in the region of 10% to 15% per annum (tax free) on the net of tax relief investment. AIB Investment Managers have just launched their 8th BES Fund and, if previous experience is anything to go by, it is likely to be fully subscribed well in advance of the official closing date of 5th April.

SECTION 35 - FILM FINANCE

In recent years Film Finance has become another popular tax related investment. In principle it is similar to BES i.e. tax relief provided in order to encourage investors to invest in risk areas, in this case the pro-

duction of films in Ireland. Again the scheme has gone through a number of changes and the current key features are:

- Maximum investment of £25,000 in any year,
- Tax relief of 80% of the amount invested,
- Minimum investment period of 1 year.

After tax returns range from 13% to 17% on a one year investment (depending on the basis of calculation).

AIB Investment Managers have just completed the fundraising for a film and expect to have other opportunities available later in the year, although this is unlikely to be prior to 5th April.

PROPERTY INVESTMENT

Another major tax based investment area is property. The range of tax reliefs available in relation to property investment include both capital allowances of up to 100%, depending on location and rent allowances of up to 200%. Due to the nature of property, and particularly those properties to which the more attractive tax reliefs apply, investment amounts tend to be substantially greater than those that apply to either BES or Section 35. The conditions and requirements surrounding tax based property investment are too complex to go into in detail in an article such as this and professional advice should be obtained prior to any such investment.

Currently AIB Investment Managers is progressing a number of potential property investments.

RISK

A key point to remember is that most investment opportunities carry an element of risk. In general tax based investment schemes carry a higher element of risk and it is for this reason that tax breaks are given to investors. While professional managers can help to reduce risk, in general, they are not in a position to eliminate it. Accordingly a tax based investment opportunity should first and foremost be considered on its investment merits with the tax relief being an element of the potential return. Tax relief on its own is of little benefit if the underlying investment is lost.

AIB Investment Managers provides a wide range of investment options, both tax based and non tax based. They can be contacted at AIB Investment House, Percy Place, Dublin 2. Telephone (01) 6617077.

Pre-Nuptial Contracts

An overview of the law relating to prenuptial contracts in the context of the future separation of the parties.

Ragnal O'Riordan, Barrister

This article deals only with executed, pre-nuptial agreement agreed prior to a marriage with a view to regulating the contingency of a future separation. In principle, such agreements are void on the grounds of public policy, since there should be no inducement to leave a marriage. In fact, they have not been tested in modern times in our courts. Couples here are now seeking to enter into such agreements and that is a reflection of the development of the law elsewhere, particularly in the US.

In this article, I will deal with the law which has held such pre-nuptial contracts to be void, the effect of the 1937 Constitution, the effect of the constitutional amendment permitting divorce and the legal effect, if any, of such contracts in the light of present law and in particular Family Law Act 1995 and Family Law(D) Act 1996.

The Old Case Law

One early authority against the case for the validity and enforceability pre-nuptial contracts in fact concerns a post-nuptial deed. *Westmeath v. Westmeath*¹ was an appeal from the Court of Chancery in Ireland to the House of Lords. There, two deeds were signed by the parties after they were married but were for the purposes of anticipated separation. The parties actually continued to live together after the execution of first deed and did so intermittently after the second.

The first deed was held to be null and void as the parties lived together after the execution of it which was sufficient to impugn it and set it aside as invalid.

Subsequently, the Marchioness of

Westmeath set up a separate establishment and the second deed was signed and executed but the parties, although not cohabiting as husband and wife, appeared to the world as living together as husband and wife by their social life. Again it was held that the deed at law could not be sustained.

In *Brodie v Brodie*², the parties to a marriage made an agreement in writing before the marriage to live apart and immediately after the marriage made a further agreement, endorsed on the previous one, purporting to confirm it. It was held that the two agreements were one and the same, and therefore void, as against public policy in providing for a future separation. Even if the second agreement was treated as a separate agreement confirming the first, it could not ratify an act void at its inception.

In *Wilson v. Carney*³, this case involved a breach of promise to marry where the defendant's existing spouse was terminally ill and subsequently died, Kennedy, L.J. stated:

"while, no doubt, there are cases in which separation deeds have been, and continue to be, upheld, I think I am right in saying that no Court has ever yet held that a deed providing *in futuro* for the contingency of separation between husband and wife is in accordance with public policy."

The 1937 Constitution

The rule of public policy leaning against the validity and enforcement of such pre-nuptial contracts was no doubt reinforced by the State's pledge to "guard with special care the institution of mar-

riage" in Article 41 (3) (1) of the 1937 Constitution. However, section 113 of the Succession Act, 1965 provides that the legal right of a spouse may be renounced in an ante-nuptial contract made in writing between the parties to an intended marriage. This section, although never tested in our courts does of course benefit from the presumption of constitutionality.

The Effect of the Divorce Referendum

Following the passing of the Divorce Referendum the Family Law (Divorce) Act, 1996 was enacted on the 27th February, 1997 and sets out the legislative framework for the regulation of the law of divorce, although the provisions of the constitutional amendment are self-executing as seen in *R.C. v. C.C.*⁴

Given the changes in the law as regards marriage, in particular the recognition that it may not be lifelong and that remarriage is now possible, this poses the question as to whether parties should be able to regulate in advance for the consequences of a possible breakdown and what enforceable effect, if any, could such agreements have in the later context of judicial separation or divorce proceedings?

In the context of divorce, the Court has a Constitutional duty to ensure, *inter alia*, that:

"Such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law." (Article 41.3.2.iii)

The Courts seem unlikely to permit the ousting of their Constitutional duties by a pre-marriage contract concluded possibly many years prior to the breakdown of the marriage. The paramount duties of the Courts to children also could clearly be likely to override such agreements.

In the context of judicial separation, apart from the fact that the Courts may resist any attempted ouster of their jurisdiction, the wording of the Property Adjustment Section which existed under the Judicial Separation and Family Law Reform Act, 1989 and is repeated with slight change of wording in Section 9 (1)(c) of the Family Law Act, 1995, requires consideration. This states that the Court may make an order providing for:

“the variation for the benefit of either of the spouses and of any dependent member of the family or of any or all of those person of any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the spouses”.

This provision is also repeated in Section 13(1)(c) of the Family Law Divorce Act, 1996.

In *N v N*⁵ the old Section 15 (1) (c) of the 1989 Act was tested in relation to separation agreements. Judge McGuinness, sitting in the Circuit Court at that time relied on English case law to hold, in summary, that settlement meant agreement; that the section empowered the court to vary the separation agreement and that public policy does not require finality in family law matters

The decision was not appealed. However, it has to be looked at in the light of the Supreme Court's determination in *F. v F*⁶ where it was held that a spouse who concluded terms of agreement to separate by comprising divorce a mensa et thoro proceedings was estopped from bringing Judicial Separation proceedings under the 1989 Act. In *F. v F.*, the above case of *N v N* was cited but was neither quoted nor distinguished. Further, the court took a view, which could favour those approving of pre-marriage contracts, that the concepts of certainty and finality should apply to family law except where excluded by law or justice (per Denham J at p. 369).

Section 9 of the 1995 Act is similar to that in the English Matrimonial Causes Act where “settlement” has been given a wide interpretation as in a recent case of *Brooks v Brooks*⁷ where the House of Lords held that a private pension fund constituted a post-nuptial settlement which could be varied under the section for the benefit of the wife who was penniless. The judgment of Lord Nicholls at p. 263-264 gives a useful summary of this development.

Conclusions

Taking into account therefore, the Constitutional duties of our Courts and the wording of the relevant Acts, what use is a pre-nuptial contract?

One possible use is as a source of evidence of the parties intentions at the time of the agreement. The English case of *Edgar v Edgar* (1980)⁸, dealing with a separation deed gives a useful guide as to how our courts might deal with such contracts. This case concerned a wife who had signed a deed of settlement with her husband having been fully advised legally and indeed after being advised that she could obtain a more favourable financial outcome by way of ancillary relief after a Decree of Divorce.

Subsequently, she obtained a divorce and sought a lump sum. The Court of Appeal held when exercising its discretion under the ancillary reliefs provisions that it had to take into account the prior agreement by the wife not to take a lump sum. The Court did this by treating the agreement as “conduct” of the parties which was to be taken into account when making such ancillary orders.

In deciding the weight to be given to the prior agreement in order to achieve justice between the parties, the court had to take into account, inter alia, the parties' conduct leading up to the agreement, their subsequent conduct and the circumstances surrounding the making of the agreement such as undue pressure by one party on the another, exploitation by one party of a dominant position, the inadequate knowledge of one party and any unforeseen or overlooked change in the circumstances existing at the date of the agreement. The exploitation of bar-

gaining power, rather than the existence of it per se, was the crucial question. The judgment of LJ Omrod from p891-894 contains a useful summary of the applicable principles.

In light of the foregoing, I would submit that the following matters would be necessary elements in any assessment of the validity, enforcement and legal weight of a pre-nuptial agreement, proof of proper independent legal advice to both, absence of duress, equal bargaining power between the parties and the fairness of the agreement between the parties. However, the passage of time, the existence of children and other complicating factors requiring the modification of the agreement would affect the enforceability of such agreements.

In the end, the courts, apart from their specific and imperative powers, generally deal with the division of family assets in a flexible way. Therefore, while it might now be possible to advise on terms for a pre-nuptial contract, the adviser must also advise the client that the court may refuse to uphold these agreements as being contrary to public policy. It must also be pointed out that the Courts have Constitutional duties which may overturn such agreements, and that at best such agreement may be regarded as evidence of the intention of the parties at the time of the agreement but that the passage of time and changing circumstances are also likely to be taken into account by a Court.

A definitive resolution by the courts of the position of these agreements is clearly desirable and linked to some extent to how the Courts will deal with the finality or otherwise of separation agreements in the context of judicial separation and divorce proceedings. ●

- 1 1830 Dow & Clarke 519
- 2 1917 Vol. 33 T. L. R. 525
- 3 24 T.L.R. 277 (1908) 1 KB 729 C.A.
- 4 Unrep. H.C. Barron J. 17/1/97
- 5 1995 1 Fam L. J. 14
- 6 [1995] 2 I.R. 354
- 7 14 July [1995] 3 A.E.R. 256
- 8 [1980] 3 A.E.R. 887 C.A.

The Credit Union Bill, 1996

Anthony P. Quinn, Barrister



The purpose of the recently published Credit Union Bill, 1996 (the Bill), is to consolidate existing credit union legislation, and to provide an updated framework for the development and supervision of the successful credit union movement. The comprehensive new Bill contains 188 sections and five detailed schedules. With revised statutory ceilings for loans, shares and deposits, the expansion of additional services to members such as foreign exchange and ATM services, the elaboration of the regulatory and supervisory functions by the Registrar of Friendly Societies (the Registrar) and enhanced court powers, the Bill will introduce a new era in the credit union movement in Ireland. However, the basic co-operative concept of one member, one vote irrespective of shareholding is retained in the Bill, and the voluntary nature of the credit union movement is also re-affirmed by, for example, the prohibition on directors' fees. While it is not intended that credit unions should compete directly with banks and building societies, more competition in some financial services seems inevitable. Credit Unions are exempt from legislation on banks, building societies and consumer credit, including moneylending.

The Credit Union Act 1966 and Part III of the Industrial and Provident Societies (Amendment) Act 1978 are being repealed. The Industrial and Provident Societies Act 1893, as amended, will no longer apply to credit unions but remains in place as the Principal Act in an outmoded legal framework for many other societies,

including co-operatives. The Advisory Committee to the Minister for Enterprise and Employment is continued.

Registration

A minimum of 15 members required for registration replaces the old minimum of 7.

A society may be registered as a credit union if the Registrar is satisfied that it fulfils the conditions specified in s. 6, on objects, common bond and rules. If the Registrar refuses to register a credit union, his decision may be reviewed by the High Court under s. 8 (3). The Court may give such directions as it thinks appropriate, to the Registrar or otherwise, to resolve the matter. Previously, the Registrar's decision could be reviewed by the District Court in a less expensive procedure, under s. 2 (4) of the Credit Union Act 1966.

Membership

About 1.4 million people in the State are members of credit unions which have a combined worth of over £1.3 billion in savings and assets. The Bill provides for a right of appeal to the District Court in the district where the registered office is situated, by persons refused membership of a credit union. The court's decision will be final but questions of law may be referred to the High Court with an appeal to the Supreme Court. Persons expelled from a credit union may appeal to the District Court under S. 19, which may confirm or cancel the expulsion.

Rules

Credit union rules shall be in such form as the Registrar may determine. They must include matters about objects, membership, meetings, boards, shares, loans, audits, disputes and withdrawal of membership, specified in detail in the First Schedule. Using schedules to specify requirements on rules reflects a traditional concept in industrial and provident societies legislation. The Model Rules for credit unions drafted by the Irish League of Credit Unions ("the ILCU") will require amendment in light of the matters specified in the First Schedule and other implications of the Bill. A credit union may apply to the High Court under s.14 (5)(b) for a review of the Registrar's decision to refuse to register amendments of rules.

Specified objects of credit unions include promoting thrift by accumulating savings and creating credit for members' mutual benefit. Also now included by statute are wider co-operative principles such as training, education and involvement of members in community matters. A credit union shall not carry on any business or activity which is not appropriate or incidental to its objects. The High Court may, under s.26 (4), on an application by a member or the Registrar, restrain a credit union from doing any act which is ultra vires.

Management

Part iv, ss. 53-76 of the Bill provides extensive and enhanced control procedures for the management of credit unions.

Officers or voluntary assistants who have receipt or charge of credit union funds are required under s.74 to account for and pay over all such money and property under their control to such persons appointed by the credit union or its board of directors. Without prejudice to other rights, if any person fails to comply with a requirement to account under s.74, the Circuit Court may, on an application by a credit union, make an order requiring the person to comply with the requirement.

Removal from Office of Specified Officers

The Registrar, under s. 96, may suspend or remove all or any of the directors or Supervisory Committee members. The Fifth Schedule provides that such persons may appeal to the High Court. The Court also has power to declare that persons removed from such office shall not act in specified categories, e.g. as an officer or auditor of a credit union.

Disputes and Complaints

The traditional procedure under society law for disputes to be decided under relevant rules or by the Registrar is continued in an enhanced form under s.125. Applications for enforcement of decisions may be made to the Circuit Court and there are also extensive arbitration procedures under the Arbitration Acts 1954 and 1980.

Ceilings on Shares, Loans and Deposits

Under the Bill the maximum shareholding which a member may hold in an individual credit union is increased from £6,000 to £20,000. A similar limit applies to deposits which can only be accepted from members with at least £1,000 in shares, subject to prudential requirements on aggregate liabilities at the Registrar's discretion.

Under s. 35, loans to members, on security or otherwise, may be made for "provident or productive purposes", a Victorian term which is interpreted liberally. Loans may not exceed £20,000 under the present terms of the Bill but that limit may be increased during the parliamentary process or later by Ministerial regulation. The five-year time limit on loans is replaced by a more flexible system, allowing loans for periods exceeding five and ten years. Such flexibility is subject to prudential provisions in s.35 (2) which include ratios to protect credit union assets. The user-friendly system is confirmed by fair procedures on approval of loans with a right of appeal. Section 38 continues the maximum rate of interest at one per cent per month on the outstanding loan, to include all charges in accordance with a truth in lending policy. The ILCU are seeking for the proposed ceilings on loans, shares and deposits to be increased.

Additional Services to Members

Much interest will focus on the power in s 48 to provide additional services to members subject to the Registrar's approval under s.49. Section 48 does not specify the type of additional services intended but has been drafted widely: "a credit union may provide, as principal or agent, additional services of a description that appears to the Registrar to be of mutual benefit to its members." These have been described as including foreign exchange services and ATMs. The High Court may review the Registrar's decisions regarding such additional services, under s. 52 of the Bill.

Investments

The types of investment of surplus funds by credit unions are set out in s.43. Section 44 recognises the special community nature of the credit union movement and facilitates the operation of special funds for social, cultur-

al or charitable purposes.

Such wider use of credit union funds has raised fears about the safety of members' savings and safeguards provided include a requirement that directors be satisfied that adequate provision has been made for current and contingent liabilities and also for proper reserves. Annual payments into the special fund shall generally not exceed 0.25% of the value of a union's assets. Provisions on audits, reserves, savings protection schemes and insurance against fraud of officers in the Bill, will also help to protect members' savings.

Charges on assets - an important reform

Sections 33-34 facilitate credit unions in borrowing money on security or otherwise from sources approved by the Registrar, subject to specified conditions. Instruments of charges on assets will be exempt from the Bills of Sale (Ireland) Acts, 1879 and 1883, subject to complying with a new system on registering charges with the Registrar of Friendly Societies. It is considered that this important reform, which follows company law procedures, should be extended also to industrial and provident societies such as workers' co-ops and social enterprise co-ops.

Control and Supervision by Registrar

S. 84 provides that the Registrar shall administer the system of regulation and supervision of credit unions with a view to protecting members' funds and maintaining the financial well-being of credit unions generally. While these detailed provisions for supervision of management by the Registrar and specified penalties for offences should ensure the more efficient operation of credit unions, there is a fear that they could also inhibit voluntary effort.

The circumstances in which the

Registrar may give regulatory directions to a credit union are set-out in s. 87. Such directions which reflect the thrust but not the detail of banking legislation, (especially s.21, Central Bank 1971 as substituted by s.38 of the 1989 Act) may include prohibitions on raising funds, making payments or acquiring or disposing of assets or liabilities. A credit union which is the subject of such regulatory direction may not be wound up, put into receivership or have its property sequestered or distrained, unless the High Court so orders.

The Fourth Schedule to the Bill includes extensive supplementary provisions on regulatory directions. A credit union may appeal to the High Court against the making of a regulatory direction. Under 6 of the Fourth Schedule, where the Registrar forms the opinion that a credit union to which a regulatory direction was given is unable to meet its obligations to its members and creditors and the circumstances which gave rise to the direction are unlikely to be rectified, he shall forthwith apply to the High Court which may order the credit union to prepare, in consultation with the Registrar, a scheme for the orderly termination of its business and discharge of its liabilities to its members and creditors under the Registrar's supervision. The order may also require that the scheme be submitted to the Court within two months for approval. The Court may also make further orders including an order for winding-up of the credit union on just and equitable grounds. Winding-up under company law procedures, suitably adapted, may also be used in other circumstances.

Inspections and Investigations

The power of appointing an inspector to a credit union is vested in the Registrar and not in the courts. This is in accordance with existing legislation on societies and differs in some respects from comparable procedures under company law. Courts do have

specified functions with regard to such inspectors, where for example, inspectors may apply under s. 93 (5) of the Bill to the High Court for an order that a person be examined under oath.

The enhanced inspection provisions under the Bill are in accordance with fair procedures and with natural and constitutional justice. Matters arising out of such inspections can be referred to the DPP or may ground applications to wind up the credit union by the High Court.

Appointment of Administrators and Examiners to Credit Unions

The High Court, on the Registrar's application, may make an administration order in specified circumstances to enable a credit union business to be carried on as a going concern with a view to re-establishing the proper and orderly regulation and conduct of the credit union. These procedures, in ss. 137-141 of the Bill, follow the general scheme in the Insurance (No. 2) Act 1983 but are an innovative feature of credit union legislation.

The High Court may in the future appoint examiners to credit unions under ss. 142-170 of the Bill on the petition of the Registrar or, with his consent, on the petition of other specified persons including: a credit union, its directors or qualifying group of members, or creditors. Cases under a threshold of £250,000 in liabilities may be remitted to the Circuit Court. The general principles of examinership under the Companies (Amendment) Act 1990 (No. 27) are followed, however, following the recommendations of the First Report of the Company Law Review Group (December 1994), some innovations are introduced: for example, before appointing an examiner the Court must be satisfied that there is a reasonable prospect of the credit union surviving. The general period for examinership is reduced from three months to 70 days. An independent account-

ant's report must accompany the petition for appointment of an Examiner to the High Court. That accountant's report shall include his opinion as to whether the facts disclosed would warrant further inquiries with a view to proceedings under s. 297 or s. 297 A, Companies Act, 1963 as amended, concerning criminal and civil liability for persons convicted of fraudulent trading. These revised examinership procedures herald similar changes proposed in company law.

Conclusion

Aspects of the proposed legislation have been both welcomed and criticised by the Irish credit union movement. While the increase on the present limit on shares, is welcome, the ceiling of £20,000 on shares, loans and deposits in the new Bill are regarded by the ILCU as too low. Self-regulation, arising from the founding principle of mutual self-help and co-operation is highly valued within the Irish credit union movement and the extension of powers for the Registrar and courts are arguably over-intrusive in the credit union context. This greater degree of regulation can however, be explained as a worthwhile balancing of the concept of self regulation with the overriding principle of protection of members interests and is in the wider public interest.

It is likely that amendments will be made to the Bill during the legislative process. These changes and the full implications of the new legislation will be considered in the forthcoming revised edition of *Credit Unions in Ireland* (Oaktree Press) by this author.

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Eurowatch

The recent case of Broede v. Gerd Sandker¹ held that despite Article 59 of the EC Treaty² concerning the progressive abolition of restrictions on freedoms to provide services within the Community, member states are entitled to prohibit debt collection agencies in other Member States from securing judicial recovery of debts. The exercise of that function in a professional capacity may be reserved to the legal profession.

Marian Moylan, Barrister.



The Plaintiff, Broede, a travel agency established in Germany, obtained from the German courts³ an enforceable judgment against Mr. S. who resided in Germany. It engaged INC, a French company which provided debt collection and corporate consultancy service, to act on its behalf. INC in turn conferred a power of attorney on its managing director, Ms. R., who resided in Germany, authorising her to enforce the decision of the German Court on behalf of Broede and to take all related legal measures. Ms. R. applied, accordingly, to the German courts for the issue of an attachment order against Mr. S. However, that application was dismissed on the ground that Ms. R. lacked the requisite capacity to act, since, under German law⁴, debt collection undertakings are prohibited from representing their creditor clients in legal proceedings. Ms. R. appealed and the Landgericht Dortmund referred to the Court of Justice two questions which were designed to determine whether Article 59 precluded a national rule which prohibited an undertaking established in another Member State from securing judicial recovery of debts owed to others.

The Court of Justice noted that, in prohibiting debt-collection undertakings from carrying out judicial debt-collection work themselves without the involvement of a lawyer, the German provision constituted a restriction on freedom to provide services within the meaning of Article 59 of the Treaty. This was so even though it applied without distinction to national

providers of services and to those of other Member States, since it made it impossible to provide those services in Germany even where the activities of the provider of the services were of a purely occasional nature.

The Court added that if it was to fall outside the prohibition laid down by Article 59, the restriction must fulfil four conditions:

- it must be applied in a non discriminatory manner
- it must be justified by imperative requirements in the general interest
- it must be suitable for securing the attainment of the objective which it pursues
- it must not go beyond what is necessary in order to attain that objective.

As regards the first condition, the Court held that the rule prohibiting a debt-collection agency from itself undertaking, in the course of business, the judicial recovery of debts without representation by a lawyer was not discriminatory and applied without distinction to national providers of services and to those of other Member States. As to the second condition, the Court stressed that the German Government had maintained, without being contradicted, that the provision was intended to protect the recipients of the services in question against the harm which they could suffer as a result of legal advice given to them by persons who did not possess the necessary professional or personal qualifications and

to safeguard the proper administration of justice.

As regards the third and fourth conditions, the Commission, intervening in the case, had maintained that the rule prohibiting a debt-collection agency from itself undertaking the judicial recovery of debts went beyond what was necessary in order to attain the objectives pursued by the RBERG⁵. According to the Commission, the restrictions in issue were not concerned with the protection either of creditors or of officials responsible for the administration of justice, since under Paragraph 79 of the ZPO⁶, creditors could apply to court for an attachment order either personally or through the intermediary of non-professional advisers instructed by them and such appliances were not subject to the requirement that they be represented by a lawyer.

In answer to that argument, the Court noted, first, that the proceedings in question concerned the representation of litigants by third parties who were legal persons acting in the course of business. Secondly, according to the German Government, in allowing creditors engaged in legal proceedings to act in person or through the intermediary was afforded only to natural persons. The position was different, however, in the case of litigation services provided on a professional basis. That activity was reserved, according to the RBERG, to lawyers who were answerable personally to the courts.

According to the Court, the fact that

a creditor, or a non-professional adviser acting on his behalf, could lodge an application for an attachment order did not preclude legislative provisions such as those at issue in the main proceedings from being regarded as justified in the general interest on the ground that they protected creditors or safeguarded the sound administration of justice in relation to the provision of litigation services on a professional basis.

The Court concluded that; in the absence of specific Community rules in the matter, each Member State is free to regulate the exercise of the legal profession in its territory; the application of professional rules to lawyers ensures that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience and that as Community law presently stands, it is for the Member States to assess whether it is necessary to place restrictions on the professional recovery of debts by way of judicial proceedings.

The Position of Persons whose work is performed in more than one member state.

Article 5(1) of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters⁷ has continuously presented difficulties of application to employment contracts, particularly where the work was performed in more than one Contracting State. The San Sebastian Convention⁸ sought to address those difficulties. Nevertheless, the European Court of Justice has again been called upon to interpret the wording of the amended Article 5(1). The resultant judgment provides guidance towards identification of the place where the employment contract is performed.

Article 5(1) of the Brussels Convention, as amended by the San Sebastian convention, provides:

"A person domiciled in a

Contracting State may, in another Contracting State, be sued:

1. in matters relating to a contract, in the courts of the place of performance of the obligation in question, in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts for the place where the business which engaged the employee was or is now situated.

In *Rutten v. Cross Medical Ltd*⁹ the Court of Justice was asked, in a reference by the Netherlands courts, to rule on the interpretation of place where the employee habitually carries out his work within the meaning of Article 5(1) of the Convention, where a contract of employment is carried out in more than one Contracting State.

The reference arose from proceedings taken by a Netherlands national, Mr. Rutten, against his employer, a Dutch company, for payment of arrears of salary and interest following his dismissal. During his employment, Mr. Rutten had carried out his duties not only in the Netherlands, but also, for approximately one-third of his working hours in the United Kingdom, Belgium, Germany and the United States of America. He carried out his work from an office established in his home in the Netherlands to which he returned after each business trip.

In its judgment of the 9th January, 1997, the Court referred to its earlier caselaw¹⁰ according to which it had held that:

- in relation to contracts of employment, the place of performance of the relevant obligation, for the purposes of Article 5(1) refers to the place where the employee actually performs the work covered by the contract with his employer and that where the employee performs his work in more than one Contracting State, that place refers to the place where or from which the employee principally discharges his obligations towards his employer.

and,

- in relation to contracts of employment, the interpretation of Article 5(1) of the Brussels Convention had to take account of the concern to afford proper protection to the employee as the party to the contract who was the weaker from the social point of view and that such protection was best assured if disputes relating to a contract of employment fell within the jurisdiction of the courts of the place where the employee discharged his obligations towards his employer.

The ECJ stressed that those principles remained unaffected despite the amendments to the wording of Article 5(1) by the San Sebastian Convention. The Court had already interpreted the Convention as establishing the rule of special jurisdiction relating to contracts of employment, which the San Sebastian Convention inserted in Article 5(1). The new wording of that provision, following the entry into force of the San Sebastian Convention, was intended in fact to support the interpretation given by the court to that article in regard to contracts of employment.

The court concluded that Article 5(1) of the Brussels Convention, as amended by the San Sebastian Convention, must be interpreted as meaning that:

- where, in the performance of a contract of employment an employee carried out his work in several Contracting States, the place where he habitually carries out his work, within the meaning of that provision, is the place where he has established the effective centre of his working activities;
- when identifying that place, it is necessary to take into account the fact that the employee spends most of his working time in one of the Contracting States in which he has an office where he organises his work for his employer and to which he returns after each business trip abroad.

Directive 96/71/EC of the 16th December, 1996 addresses some problems concerning the posting of workers abroad and the legislation applicable to that employment relationship.

This Directive applies to undertakings established in a Member State which in the framework of the transnational provision of service, post workers, with whom they have an employment relationship, to the territory of another Member State. Members States are required to ensure that these undertakings guarantee such workers the terms and conditions of employment covering the following matters, which in the Member State where the work is carried out, are laid down by

law, regulation or administrative provision, and/or by collective agreements or arbitration awards:

- (a) maximum work periods and minimum rest periods,
- (b) minimum paid annual holidays,
- (c) the minimum rates of pay including overtime pay,
- (d) the conditions of hiring out workers, in particular the supply of workers by temporary employment undertakings,
- (e) health, safety and hygiene at work,
- (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people,
- (g) equality of treatment between men and women and other provisions on non discrimination.

This Directive must be implemented by all Member States by 16th December, 1999. ●

1. Case C-3/95; Judgement dated 12th December, 1996.
2. The first paragraph of Article 59 provides:
"...restrictions on freedom to provide services within the Community shall be progressively abolished...in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended."
3. Amtsgericht Hagen.
4. Article 1(1) of the German law of 17th December, 1935 - RBERG.
5. See footnote 4 above.
6. Zivilprozeßordnung (German Civil Code).
7. 27th September, 1968.
8. Convention on the Accession of the Kingdom of Spain and the Portuguese Republic, 26th May, 1968.
9. Case C-383/95; Judgement dated 9th January, 1997.
10. Case C-125/92 Mulox IBC v. Hendrick Geels (1993) ECR I-4075)

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The Future of Law

Richard Susskind, IT advisor to Lord Woolf during the latter's review of the Civil Justice system in England and Wales, has written a book entitled "The Future of Law" in which he boldly predicts the impact of information technology on the administration of the legal system and on the nature of legal practice.

Cian Ferriter, Special Projects Manager, Bar Council

 In his book, Susskind posits the emergence of a very different model of legal service than that which we today; in place of today's re-active, one-to-one, advisory-style legal service where a disputant walks in off the street to a lawyer for advice after a problem has occurred Susskind predicts a shift to a pro-active one-to-many, legal information service with an emphasis on dispute pre-emption and legal risk management. On this model, today's lawyers, if they stand still, will be overtaken by a new species of legal specialist and information engineers who will use IT to work out and page solutions to legal problems onto their own home computer without having to go to the stress and expense of consulting solicitors or barristers.

These information engineers might emerge from any number of sources: electronic legal publishers, the multinational computer giants, multi-disciplinary trans-national professional agglomerates. The catalyst for these millenarian changes, according to Mr. Susskind, will be various "enabling" technologies such as e-mail, hypertext, voice-recognition and information retrieval and the changes their application will precipitate in the structure of the market for legal services.

The thesis in this writer's view is not wholly substantiated and Susskind's approach suffers from the contemporary malaise of seeing in IT the solution for problems that really lie elsewhere. If we accept the likelihood that for the foreseeable future we will have a system of justice that involves humans proposing and debating laws, implementing them, advisers advising in dispute situations as to the likely effect of those laws and humans who adjudicate authoritatively

on the dispute if agreement cannot otherwise be reached, it is difficult to see how IT is going to so transform human nature that any one of these elements of the rule of law will become redundant. Susskind dances around this essential weakness in his argument by giving us "Harvard School of Business" style lectures on how we should be managing our human affairs more efficiently i.e. how we should intelligently pre-empt problems rather than retrospectively seek to address harm done. This is neither philosophically justified in the text nor grounded in the reality of human nature and undermines some otherwise interesting arguments.

In fairness to Susskind he does open the book with an exhortation that it is better regarded and read "as a broad-brush polemic"² than a value-free piece of high scholarship and he is reasonably strong in his account of present and mid-term developments in information technology and how these developments might have a practical application on the administration of our legal system and on the practice of law.

It is instructive to look at some of the developments that Susskind chronicles to see how they might impact on the administration and practice of law in his jurisdiction.

He sees a role for IT in helping the lawyer cope with the information deluge in his age of what he terms "hyper-regulation". This is undoubtedly true: the availability of legislation, case law and texts in electronic format will enable the use of intelligent search engines which will automatically filter through the mass of information, pull out material on your specialist area and present it in packages on your desktop

computer either in immediate response to a particular query or in a more information-gathering fashion every week or month. The imminent publication of electronic versions of the statutes and statutory instruments in force (by the Attorney General's office) and of the Irish reports (by the Incorporated Council of Law Reporting in Ireland) will soon make this electronic research and electronic legal awareness service a reality for Irish lawyers. Electronic information gathering coupled with cheap yet high-powered desktop publishing should facilitate the widespread production and circulation of legal information bulletins by specialist lawyers groupings. An enlightened government would make as much of this information as possible available freely to the public over the Internet to facilitate wider understanding of our laws and the legal system.³

It may well be as Susskind predicts that non-lawyers will step in and starting selling packaged legal information kits on disk e.g. of the legal forms to be filed and items to be considered when applying for a divorce along with an on-line commentary and "help" facility. This form of intelligent check-list can be extended into fuller form as an "expert system" where e.g. the environmental regulation code is organised into a logical database with legal commentary on its provisions and a question and answer walk-through of the problem in hand. This model of a "one-to-many" (i.e. all chemical factory owners who have bought this off-the-shelf package) "information" service is very different from a one-to-one "advisory" service where the owner visits his lawyer for a personal meeting. In the new scenario the owner of a chemicals factory where there has been a leak might sit down and

tap in the facts of his case into his computer and sit back while it comes up with the answer.

These are undoubtedly potential applications for IT in the legal field. Susskind perhaps underestimates the reasons why a disputant might have had recourse to a lawyer in the first place: because he hasn't the time to spend hours reading the law, because he wants the insurance of third party advice if something goes wrong and because the lawyer has knowledge of how the law applies in practice, a process of judgement and tactical nous that computers are a long way from being able to provide. The emergence of new markets in legal service will not axiomatically undermine the existence of present markets.

Other technological applications that Susskind considers lie in the field of practice management: the use of word processing to automate pleadings, general correspondence, etc., the use of e-mail for documentation involved in a case; the use of caseload management systems for diarying developments in cases, enabling efficient time-management etc. Other IT applications of benefit include video-conferencing for remote meetings, consultations, expert evidence, etc., precedent management systems for the indexing and retrieval of old work. There is nothing in here that is not being used or will not become standard over the next 5 years.

Susskind has a short section on the important of education and training in ensuring that the benefits of IT are optimised in the legal practice. To this writer's mind this is the most important aspect of the future of law: how, through the vocational education institutions and on-going professional education structures, we ensure that people are made aware of and taught to optimise their use of IT applications in legal practice. The vast majority of the country's present practitioners grew up in and were educated during the pre-IT age. If these practitioners are going to understand the impact of IT on legal practice and manage its potential, huge professional education programmes need to be launched. Ironically, IT itself is leading to improved methods of education: "computer-based training" involves interactive run-throughs of legal issues "on-line" using text, voice and graphics without the need for an instructor or trainer so that students can learn from

home/remote locations as happens currently in The School for Law and IT at the University of Warwick.⁴

In summary therefore, it would appear IT is going to have a big impact on legal research and awareness, practice management and legal training. However what changes will these developments precipitate in the structure of the legal marketplace itself?

Although his thesis posits that a re-organisation in the structure of the marketplace for legal services will be caused by these IT developments, Susskind provides no analysis of the present structure of that marketplace; and refers to no research data quantifying the main players in the legal market. He does not consider the reasons why disputants have recourse to lawyers and does not consider the rationale behind the divided legal professions. There is no comparative research of trends in other jurisdictions nor, most crucially, is there any explanation as to why a book purporting to assess the impact of IT on our legal system confines itself almost wholly to the ramifications of IT for solicitors in commercial private practices. There is no concession to the very different factors that might arise in considering the impact of IT on the criminal justice system or on matters of public as opposed to private law, nor is there any consideration of how European and domestic competition law and policy might impact on some of his speculations about the emerging legal marketplace.

We are thus left to our own rational and intuitive devices to assess if there will be any impact on the structure and operation of the Irish marketplace for legal services.

A few tentative predictions: it seems fair to predict that there will still very much be a need for lawyers; if anything it is likely that greater public awareness of the laws and the legal system will increase demand for legal advice. It is certainly foreseeable that more self-help may be available for representative groups, public service groups and interested citizens. It may well be that a mixture of players from the traditional legal market and from other markets such as the computer and publication markets will provide the new information kit and legal education services. It would be desirable to see the State through its executive playing a major role here.

In terms of the divided profession, there will still be a need for first-point-of-contact advice and end-of-dispute advocacy. It is hard to see that information technology on its own affects any of the current arguments for or against fusion of the professions or alternative distribution of work between both branches. However the interesting spin-off affect of any development that calls for change in current business practice or management is that it often causes a more fundamental re-examination of what that business is about and such a process may revive the fusion debate.

There may however be interesting developments within each branch of the profession as precipitated by IT. The removal of reliance on any one physical location which IT affords arguably is changing and within 5 years certainly will change the role of the Law Library as it presently operates.

Within the solicitor's branch, interesting research remains to be done on whether the economies of scale afforded by major IT investment will enable the large firms to grow in size and corner more of the market or whether the benefits of the cheap but powerful PC and single-user dial-up services will enable the smaller practices to reap similar benefits without much capital outlay. The experience of accountancy practices may be instructive here; they have found that the real cost of computer systems is not the hardware and software but rather lies in their management, technical support and change of existing practices.

In all Susskind's book raises interesting questions and should provoke timely debate. The jury will be out for some time yet on whether the more radical of his prognostications prove well-founded. ●

1. Susskind, "The Future of Law: Facing the Challenges of Information Technology", Clarendon Press, Oxford, 1996.
2. *ibid.*, p4.
3. As a contribution to the development of such a public access ethos, The Bar Council will launch a series of "Laypersons Guides to the Law" on the Internet accessible for free by the public, next term.
4. The World Wide Web site reference is <http://www.law.warwick.ac.uk>.

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Books and the Law

IRISH PENSIONS LAW AND PRACTICE by Kevin Finucane and Brian Buggy Oak Tree Press (1996), £49.95 (paperback) and £65.00 (hardback).



This book is the first in its area and is certain to become a standard reference book for solicitors, barristers, actuaries and all others advising on pensions.

Its layout is friendly and accessible. Helpfully, for instance, the Pensions Act, 1990 in a consolidated format reflecting amendments in the Social Welfare Act, 1993 and the Pensions (Amendment) Act, 1996 are included in appendix II to the book for easy reference.

As the title suggests, it is also a practical tome. Throughout it is generously peppered with nuggets of information gleaned from the authors' practical experience as pension lawyers. The chapter on the taxation of pension schemes contains a thorough analysis of Revenue practices as well as the legal provisions. For the uninitiated, there is nothing to fear. Basic terms are explained and the authors have the confidence to debunk even complicated actuarial terminology in the chapter on actuarial and funding matters.

The Family Law Act, 1995 introduced for the first time the concept of pension adjustment orders into the separation process. The Family Law (Divorce) Act, 1997, in force since 27th February, 1997, contains almost identical provisions for divorce situations. The pension of an earning spouse can often be a major component of total matrimonial property and for the lucid treatment of pensions and marital breakdown alone, I would

commend this book to every family law practitioner.

Since the landmark decision of the European Court in *Barber v. Guardian Royal Exchange Assurance Group* [1990] 2 CMLR 513 on equality requirements as regards pensions, there have been a number of other important European decisions, notably, *Ten Oever* [1995] and the *Moroni and Colloroll* cases, all at [1995] 2 CMLR 357. This important area is comprehensively examined in a chapter on European Equality Law and Pensions.

For the insolvency practitioner, for the first time there is now access to a book concentrating on the winding-up of pension schemes. The consequences of corporate acquisitions and reconstructions on company pensions schemes are fully discussed.

Public sector pensions, many of which are unfunded (euphemistically described as "pay as you go"), cover a very large percentage of the population and are analysed in Chapter Eight.

A lawyer coming to look at pensions will get information from this book not available elsewhere. For instance, when advising, perhaps in the context of an unfair dismissal, an "early leaver" from a pension scheme on his rights to have a transfer payment by his old employer's scheme to his new scheme, looking at the Pensions Act, 1990, he might be advised that he can only insist on transferring benefits accrued since 1 January, 1991 when that Act came into force. But Finucane and Buggy point out at page 400 that in practice the trustees cannot be selective because the Revenue will not sanction a partial transfer of a member's pension bene-

fits. They go on to point up an anomaly whereby the receiving scheme is not obliged to receive a transfer of pre-1991 benefits. Clearly legislative amendment would be desirable here to harmonise the law with Revenue practice and achieve the desirable objective of complete pension portability.

The chapter on investment neatly summarises the modes of investments; segregated, pooled and unit-linked, and topically analyses trustees' investment duties. Thanks to the work of the National Pensions Board, established in 1986 under the chairmanship of His Honour Mr. Justice Brian McCracken (who writes a generous foreword to this book) and its five reports leading to the Pensions Act, 1990, the Irish Industry is now well regulated. Hopefully, that means that we could not have an Irish Maxwell affair now. The Pensions (Amendment) Act, 1996, effected numerous technical amendments to the 1990 regulatory structure, notable introducing whistle blowing" rule for advisers. This book deals with the regulatory framework in detail.

As a suggestion for future editions, it strikes me that a short glossary of terms for continuous reference purposes might be an addition because as a relative neophyte in pensions law I occasionally suffer from "overload" of terminology, however clear the explanations are when the term is first mentioned. In short, for commercial, company, family and insolvency practitioners as well as those wishing to enquire about or specialise in pensions, this book will immediately become an invaluable addition to their library.

- Patrick Hunt, Barrister.

DIVORCE IN IRELAND by *Kieron Wood and Paul O'Shea*, O'Brien Press £8.99.

The authors of this book, a Barrister and a Solicitor, were perhaps faced with a dilemma in going to print prior to the coming into force of the divorce legislation; namely, whether to publish and be damned or, wait and see how the law develops and risk missing the boat in terms of publicity and sales.

Fortunately, this book does not suffer greatly from having been launched prior to the coming into effect of the Family Law (Divorce) Act, 1996 as it does not concentrate solely on the new legislation, but rather gives an overview of what may be loosely called "family law reliefs".

True to their calling the authors start with a disclaimer to the effect that the book is no replacement for advice from lawyers and that the book is intended only as a guide to the options available in the case of marital breakdown. It is in this light that the book ought to be viewed and judged.

Starting with a History of Divorce in Ireland, the book takes the reader on a whistlestop tour of the most likely topics that a potential litigant may be asked to address and understand in the course of marital breakdown. I was surprised however by the omission of a chapter on maintenance, which is a matter of concern to everybody embroiled in family law proceedings. The book deals with, amongst other topics, Nullity, Judicial Separation, Divorce, Barrering, Child Abduction, Pensions and Tax in accessible language which the casual reader will understand and easily assimilate.

Interspersed with the analysis of these broad and complex topics are details of religious and civil marriage requirements, and a chapter on Remarriage in the Church which contains extracts from the code of Canon Law. The inclusion of this range of

information perhaps explains the authors' expressions of thanks to five priests and ministers at the outset of the book.

The final third of the book is taken up with sample family law documents, a synopsis of the Family Law Divorce Act, 1996, a summary of relevant legislation, a glossary of terms and some useful addresses, (which are set out in no discernible order).

It is unfortunate in my view that the forms and precedents are not put in context for the reader but merely left to speak for themselves. Once again in choosing to publish the book before the coming into effect of the Family Law Divorce Act, 1996, the authors eschewed the opportunity to set out precedents which accord with the new Circuit Court Rules on the subject (SI 84 of 1997), which I think is a pity.

Most people who come into contact with the Family Law Courts, do so at the level of the District Court; the majority of lay litigants are to be found at that level also. I was surprised that there was no real analysis of the functions and powers of that (and other Courts) as I believe it would have been of great assistance to litigants to know how the Court operates in a nuts and bolts way.

The last ten years have witnessed an explosion in the scope of family law legislation and this book reflects the broad range of reliefs available to those people unfortunate enough to be caught up in a marriage breakdown. Mrs Justice Catherine McGuinness in her foreword echoes what the authors and indeed all people involved in the process are thinking and voicing; namely that these fine legislative advances will be rendered for nought unless the administrative back-up services, in terms of more trained staff better Courts, more Judges, and better consultation facilities are put in place immediately. This is particularly true for country venues.

Allowing that this publication is not a text book and that, in the main, it does not pretend to be, it is to the authors joint credit that they have produced a book which is going to be read and understood by many people who find themselves involved in the spirit sapping and emotionally draining situation of a marital breakdown.

- *Paul McCarthy, Barrister*

IRISH PLANNING LAW AND PROCEDURE by *Eamonn Galligan*, Published by Roundhall, Sweet & Maxwell, £65.00.

I have nothing but good to say of this book. The Table of Contents sets out with enviable clarity and detail the topics and sub-topics treated. Nothing is less worthy of a 450 page book packed with case reference, reference to authority and indeed intelligent and closely reasoned argument.

At the time of preparing this review I had a specific interest in the locus standi of applicants in judicial review of planning decisions and turned to read the short but well digested account of this topic commencing at page 271. I was pleasantly surprised.

The same can be said of the more difficult topic of material change of use treated at page 57. I was particularly taken by the intelligent comparison Eamonn Galligan makes between the approach of the judges in the U.K. and the judges in this jurisdiction. This ability to contrast Irish jurisprudence with that of other jurisdictions and not just the U.K. is a welcome dimension which will help heighten the awareness amongst Irish planning practitioners of the implications of any specific decision. For example, the reference (page 173) to U.S. case law in the context of the EIA derives from a United States Act of 1969.

Not only is the book laid out in a clear way, it covers comprehensively

the large range of topics associated with the physical planning and environment protection and each topic which I have read at close quarters is handled with an enviable sureness of touch.

This sureness of touch manifests itself in the excellent summaries of cases which appear plentifully in the textual discussions. It may be that this is the most valuable amongst several valuable features of this book. An acutely crafted case summary is invaluable to the practitioner and

Eamonn Galligan's case summaries are excellent: the point clearly identified, no wasted verbiage (so often employed to disguise an inability to identify the point); able contextualisation and in many cases stimulating and erudite commentary.

As a bonus, the book handles well: the spine does not break when you open the book and the paper is soft and pliable enough to bend gently as required. The author has included a Planning and Conveyancing Guideline for Practitioners by Patrick Sweetman,

Solicitor and a number of useful practice notes which will extend the appeal of the work.

The book is already a success and I have not doubt that like Oscar Wilde's audience the same will shortly be said of its subscribers.

- Philip O'Sullivan, Senior Counsel

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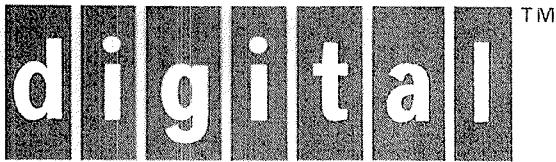
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